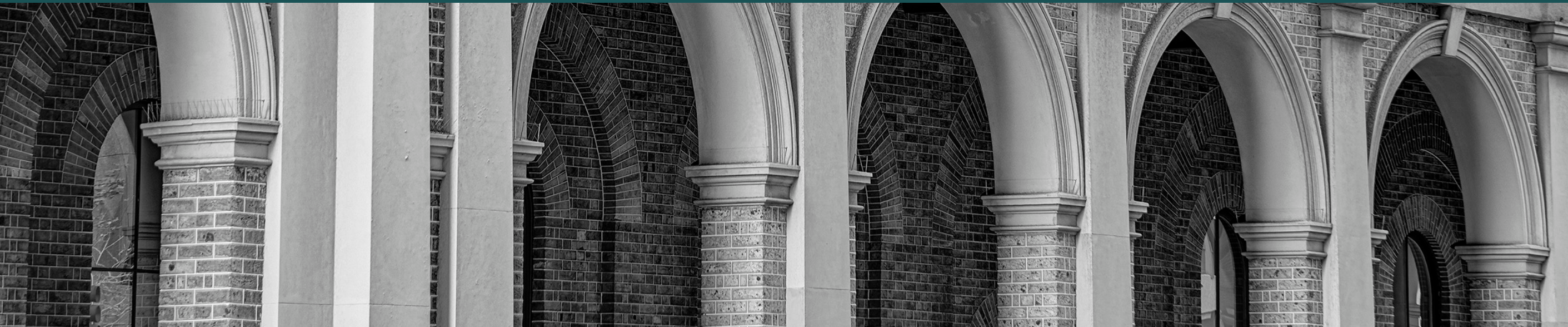




GREENWAY CHAMBERS

Litigation Essentials - Disclosure in the Equity Division

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The Origins of Practice Note SC EQ 11

SkyMesh Pty Ltd v Ipstar Australia Pty Ltd [2012]

NSWSC 696:

[9] “If a party is forced promptly to apply its mind not only what its real case is but how to prove it, this should have the benefit of not only exposing the strengths of the case but also its weaknesses. The unreliable or uncertain witness is earlier exposed as are documents which help or hinder the case on either side. This ought to cause practitioners to purposefully and immediately deal with core issues where if needs be case management can be more constructive. Hopefully this will also cause a timely appraisal of such critical notions as onus with a realistic assessment of prospects.”



The Origins of Practice Note SC EQ 11

Armstrong Strategic Management and Marketing Pty Ltd

v Expense Reduction Analysts Group Pty Ltd [2012]

NSWSC 393

[66] “The ambit of that disclosure is confined to the real issues between the parties as defined by not only the pleadings, but also the evidence. This process will require the proofing of witnesses at a very early stage of the litigation with the need for forensic judgments to be made as to the existence of admissible evidence in support of the respective claims. This will of course require the client and/or witnesses to provide the relevant documents to the lawyers in support of the particular claims in their evidence. However, it is envisaged that the process will engender a far more disciplined analysis of the need for disclosure by reference to those real issues, compared to the carte blanche gathering in of every document the respective clients have generated in their lengthy relationship for “review” by teams of lawyers and students in the absence of any knowledge of the proposed evidence.”



Key Elements of Practice Note SC EQ 11

1. The Court will not make an order for disclosure of documents until the parties to the proceedings have served their evidence, unless there are exceptional circumstances necessitating disclosure (para 4).
2. There will be no order for disclosure in any proceedings in the Equity Division unless it is necessary for the resolution of the real issues in dispute in the proceedings (para 5).
3. Any application for an order for disclosure, consensual or otherwise, must be supported by an affidavit setting out specified matters, including the reasons why disclosure is necessary for the resolution of the real issues in dispute in the proceedings (para 6).



Court's Definition of "Exceptional Circumstances"

*Stevenson J said in Owners Strata Plan SP 69567 v
Baseline Constructions Pty Ltd [2012] NSWSC 502:*

[30] "As a matter of language, something is exceptional if it is out of the ordinary or unusual. To my mind, the exceptional circumstances referred to in paragraph 4 of the Practice Note must be circumstances that are not normal, or usual; they must be something out of the ordinary; they need not be unique; but however one characterises them they are not "exceptional" at large but "exceptional" because they necessitate disclosure."



What could be an exceptional circumstance?

1. Information necessary for one party's case is solely within the knowledge of another party from which disclosure is sought (see: *Naiman Clarke Pty Ltd v Tuccia* [2012] NSWSC 314 at [26])
2. A party is unable to serve its evidence without certain documents (see: *Danihel v Manning* [2012] NSWSC 556 at [16])
3. Avoid having to serve tranches of evidence (see: *Skyscanner Limited v Hotels Combined Pty Ltd* [2016] NSWSC 183 at [76])



YOU'RE NOT DONE YET!



Is disclosure necessary?

Disclosure will be ordered only when it is "necessary"
for the resolution of the real issues in dispute



The Question to ask

Q: Is it reasonably necessary for disposing of the matter fairly or in the interests of a fair trial
[McDougall J in *Leighton International v Hodges* [2012] NSWSC 458 at [22]]



A more detailed Example - Exceptional Circumstance

Mempoll Pty Limited, Anakin Pty Ltd and Gold Kings

(Australia) Pty Limited [2012] NSWSC 1057

[19] “...I am comfortably satisfied that “exceptional circumstances” are established, and that the documents sought to be produced are necessary for the fair disposal of the matter and in the interests of a fair trial.”

Black J’s considerations:

1. there was a substantial inequality of information between the plaintiff and the defendants
2. the plaintiff was not given notice of directors or shareholders meetings of the relevant companies and the plaintiff did not attend such meetings
3. the plaintiff trusted his business partners and advisers
4. despite requests made of an accountant, a number of defendants deflected requests for financial information
5. the plaintiff had no reason to believe that the value of the shares in the companies was other than what he claimed was represented to him when he sold those shares in 2009



What won't cut it

1. Evidence does not satisfy the matters required in the Practice Note [*In the matter of Felan's Fisheries Pty Limited* [2017] NSWSC 1273]
2. Partial admission in the pleadings [*SkyMesh Pty Ltd v Ipstar Australia Pty Ltd* [2012] NSWSC 696]
3. Burdensome [*In the matter of Graziers Pastoral Pty Ltd* [2020] NSWSC 1818]
4. Nothing more than a 'chain of enquiry' [*Commonwealth Bank of Australia v Goater* [2016] NSWSC 710]
5. Document sought do not reflect the pleaded case [*In the matter of Pure Nature Sydney Pty Ltd* [2018] NSWSC 482]

Tips for preparing application

- Start with the basics
- PN SC EQ 11 [4]- necessary for the resolution of the real issues in dispute in the proceedings (*Leighton International v Hodges* [2012] NSWSC 458 at [21]-[23] per McDougall J)
- Consider risk of duplication of proceedings, Court's resources and costs



Application tips

- Start assessment of real issues in dispute with the pleadings, then the evidence to date
- Set out the classes and/or samples clearly in a schedule-reference for each issue in dispute
- Reasons the documents are only in the respondent's possession- eg oppression
- Address s 56 issues
- Avoid obvious arguments over privilege
- Realistic, considered estimate of costs- set out in a schedule and provide the experience of the solicitor (expert)

Application tips

- S 56- attempt to negotiate classes in open correspondence
- “Love letters to the Court”- considered, consistent, reasonable- ie classes you would otherwise include in application and be prepared to argue in Court
- Consider sending draft application
- Limit breadth to what is ‘necessary’- dates, entities, accounts, email addresses, file type etc
- Anticipate arguments re burden- how will the respondent locate the documents- electronic disclosure, use of forensic IT specialist
- Consistency of language/ defined terms across pleadings, evidence, application and submissions- be the point of reference

SC EQ 11 and engaging experts

- Initial, targeted guidance on what, if any, documents are required to form opinion or prove assumptions
- May not require disclosure
- Assistance drafting classes- technical language, jargon, types of documents, formats, programs used etc
- Affidavit from expert, or on information and belief (limits opportunity for cross-examination)- enhance your ability to demonstrate necessity, relevance and 'exceptional circumstances'



SC EQ 11 and engaging experts

- Consider engaging forensic IT expert-
- Affidavit re electronic discovery, likelihood of production of documents, method, time, cost
- See *Evidence Act* 'Dictionary', not just paper:

"document" means any record of information, and includes-- (a) anything on which there is writing, or (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or (d) a map, plan, drawing or photograph.

- Metadata and recovery of deleted documents



Subpoenas and notices to produce

- May be considered abuse of process- subversion of PN
- *Owners Strata Plan SP 69567 v Baseline Constructions Pty Ltd* [2012] NSWSC 502 at [23]-[24] per Stevenson J:

It would subvert the intended operation of the Practice Note if parties could avoid its operation by adopting the expedient of serving a notice to produce, rather than seeking an order for disclosure. Indeed, if a notice to produce was served with the object of avoiding the operation of the Practice Note, such service might well constitute an abuse of the Court's process.



Subpoenas and notices to produce

- *Rinehart v Rinehart* [2018] NSWSC 1102 at [53] per Ward CJ in Eq

More recently, it has been said that a subpoena will be an abuse of process where it is used as a means of obtaining disclosure of documents which, in accordance with para 4 of Practice Note SC Eq 11, could only be obtained before the service of evidence in exceptional circumstances necessitating disclosure (see *New Price Retail Services Pty Ltd v Hanna* [2012] NSWSC 422 at [19]; considered in *The Owners – Strata Plan No 76902 v Roads and Maritime Services* [2017] NSWSC 528 per Ball J).



Subpoenas and notices to produce

- Pick your battles, save your ammunition (& other appropriate metaphors)
- Establishing necessity and exceptional circumstances requires merit
- Save the time and expense of issuing subpoenas and notices to produce that may be the subject of criticism and NOM to set aside for abuse of process
- Avoid distraction and eroding merit of subsequent application
- Attempt negotiation of classes early before making application



Subpoenas and notices to produce

- What is permissible?
- Common sense approach
- *Re North Coast Transit Pty Ltd* [2013] NSWSC 1912 at [55] per Black J:

In my view, a subpoena issued to a third party requiring the production of four identified documents would not, in the ordinary course, be inconsistent with the objectives of Practice Note SC Eq 11, such that it could be characterised as subverting those objectives.

- Subpoenas are unlikely to be considered disclosure and fall within ambit of SC EQ 11 if issued to third parties and the request is not in the nature of discovery: *Westgate Finance v May* [2012] NSWSC 806 at [36] per McDougall J

Subpoenas and notices to produce

- R 21.10(1):
 - a) any document or thing that is referred to in any originating process, pleading, affidavit or witness statement filed or served by party B,
 - b) any other specific document or thing that is clearly identified in the notice and is relevant to a fact in issue.
- r 21.10(1)(a)- less likely to subvert PN
- See also r 34.1
- Similar considerations to subpoenas



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Questions?

