FEDERAL COURT OF AUSTRALIA

Registered Clubs Association of New South Wales v Stolz (No 4) [2022] FCA 994

File number:	NSD 405 of 2020
Judgment of:	**YATES J**
Date of judgment:	26 August 2022
Catchwords:	**PRACTICE AND PROCEDURE** — application for an order under s 37AF of the *Federal Court of Australia Act 1976* (Cth) (the **Federal Court Act**) prohibiting publication or other disclosure of an interlocutory application and other documents – whether the order is necessary to prevent prejudice to the proper administration of justice – whether the order is necessary to protect the safety of any person – application under s 37AF dismissed **PRACTICE AND PROCEDURE** —interim order made under s 37AI of the Federal Court Act prohibiting publication or other disclosure of an interlocutory application and other documents – where application for the interim order was made *ex parte* – whether the interim order should be revoked *nunc pro tunc* – consideration of Pt VAA of the Federal Court Act and the principles applicable to making an interim order under s 37AI – application for revocation dismissed
Legislation:	*Federal Court of Australia Act 1976* (Cth) ss 5(2), 22, 23, 37AA, 37AB, 37AE, 37AF, 37AF(1)(b)(iv), 37AG, 37AG(1), 37AG(1)(a) – (d), 37AG(2), 37AH, 37AH(2), 37AI, 37AI(1), 37AI(2), 37AJ, Pt VAA *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1) *Federal Court Rules 2011* (Cth) r 39.05
Cases cited:	*Australian Competition and Consumer Commission v Air New Zealand Ltd (No 12)* [2013] FCA 533 *Australian Competition and Consumer Commission v Hughes* [2001] FCA 38 *Australian Competition and Consumer Commission v Valve Corporation (No 5)* [2016] FCA 741 *Australian Rail, Tram and Bus Industry Union v Metro Trains Melbourne Pty Ltd* [2020] FCAFC 81; 276 FCR 172

	D1 v P1 [2021] NSWCA 314 *Drummond v Canberra Institute of Technology* [2021] FCA 376 *DSO18 v Minister for Home Affairs (No 3)* [2020] FCA 640 *Hogan v Australian Crime Commission* [2010] HCA 21; 240 CLR 651 *John Fairfax & Sons Ltd v Police Tribunal of New South Wale*s (1986) 5 NSWLR 465 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 *Registered Clubs Association of New South Wales v Stolz* (No 2) [2021] FCA 1418; 157 ACSR 465 *Rinehart v Welker* [2011] NSWCA 403; 93 NSWLR 311 *Roberts-Smith v Fairfax Media Publications Pty Limited* [2019] FCA 36 *Rush v Nationwide News Pty Ltd (No 6)* [2018] FCA 1851 *Russell v Russell* [1976] HCA 23; 134 CLR 495 *Scott v Scott* [1913] AC 417 *State of New South Wales v Kable* [2013] HCA 26; 252 CLR 118 *Welker v Rinehart* [2011] NSWSC 1094
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Number of paragraphs:	88
Date of last submissions:	7 August 2022
Date of hearing:	5 August 2022
Counsel for the Applicant:	Mr C Withers SC with Mr J Entwisle
Solicitor for the Applicant:	Thomson Geer
Counsel for the First and Second Respondents:	Mr G Watson SC with Mr D Helvadjian
Solicitor for the First and Second Respondents:	Xenophon Davis

ORDERS

NSD 405 of 2020

BETWEEN:	**THE REGISTERED CLUBS ASSOCIATION OF NEW SOUTH WALES (ABN 61 724 302 100)** Applicant
AND:	**TROY GRAHAM STOLZ** First Respondent
	DIANNE LESLEY STOLZ Second Respondent

ORDER MADE BY: **YATES J**

DATE OF ORDER: **26 AUGUST 2022**

THE COURT ORDERS THAT:

1. The applicant's application for an order under s 37AF of the *Federal Court of Australia Act 1976* (Cth), as sought in prayer 3 of the interlocutory application dated 28 July 2022, be dismissed.
2. The first respondent's application to discharge Order 1 made on 29 July 2022 be dismissed.
3. The applicant pay the first respondent's costs of and incidental to the applications referred to in Orders 1 and 2.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

YATES J:

INTRODUCTION

1 On 29 July 2022, I made a number of orders on the *ex parte* application of the applicant, The Registered Clubs Association of New South Wales (**ClubsNSW**). The orders included an interim order under s 37AI of the *Federal Court of Australia Act 1976* (Cth) (the **Act**) which prohibited the publication or other disclosure of a number of documents, including an interlocutory application dated 28 July 2022 (the **interlocutory application**). The **interim order** was in these terms:

> 1. Pursuant to s 37AI of the *Federal Court of Australia Act* 1976 (Cth), the publication or other disclosure of the following documents and the information contained in them, including the fact that the documents referred to in paragraphs (a) – (d) have been filed, is prohibited other than to the parties to the applicant's interlocutory application dated 28 July 2022 (the **interlocutory application**), including Jordan Shanks-Markovina, and their legal representatives, until the application pursuant to s 37AF in paragraph 3 of the interlocutory application is determined:
>
> (a) the interlocutory application;
>
> (b) the statements of charge directed to the First Respondent and Jordan Shanks-Markovina dated 28 July 2022; and
>
> (c) the affidavit of Sylvia Fernandez made 28 July 2022, including Exhibits SF-13 and Exhibit SF-14;
>
> (d) the Applicant's written submissions dated 29 July 2022; and
>
> (e) the transcript of the hearing of 29 July 2022.

2 This relief was claimed in the interlocutory application itself. The interlocutory application also sought an order under s 37AF of the Act, prohibiting the publication or other disclosure of the interlocutory application and other documents. The purpose for seeking the interim order was to preserve the confidentiality of the interlocutory application until such time as the application for the order under s 37AF of the Act could be determined.

3 I therefore made the interim order under s 37AI of the Act to preserve the subject matter of the application for the order under s 37AF of the Act. This reason was not expressed in the interim order itself.

4 Before proceeding further, it is necessary to set out the background to the filing of the interlocutory application.

5 On 30 November 2021, I made an order (the **November 2021 order**) restraining Mr Stolz from publishing or causing to be published to any person who was not a party, or a legal representative of a party, to the principal proceeding, statements about ClubsNSW's, or its legal representatives', conduct of the proceeding, which were calculated to intimidate, harass or otherwise bring improper pressure on ClubsNSW in respect of the conduct of the proceeding: see *Registered Clubs Association of New South Wales v Stolz* (No 2) [2021] FCA 1418; 157 ACSR 465.

6 ClubsNSW brought an application for such relief on the basis that Mr Stolz had engaged in a pattern of deliberate behaviour to impede ClubsNSW in its conduct of the proceedings it had brought against Mr Stolz and his wife to vindicate (what ClubsNSW claims to be) its rights to obtain relief in respect of Mr and Mrs Stolz's wrongful possession and improper use of its confidential information and intellectual property. ClubsNSW has now pleaded its case against Mr and Mrs Stolz in a statement of claim that it has recently filed.

7 In my reasons for judgment, I said (at [170] – [171]):

> 170 Viewed objectively and cumulatively, all this conduct suggests that Mr Stolz has embarked on a pattern of behaviour calculated to bring pressure to bear on the applicant in respect of its conduct of the proceeding, through media and public comment that condemns the applicant for bringing and maintaining its proceeding against the respondents. It suggests that the opportunity to condemn is exploited every time the applicant takes a significant step in the proceeding—whether to seek compliance by the respondents with orders to which they have consented, or to seek cooperation from the respondents in using the Court's processes to obtain documents from third parties, or to take steps to protect its position on costs, or to take steps to stop the respondents from misrepresenting the proceeding, including one of the Court's judgments. Dispute as to whether, as a litigant, the applicant is entitled to take these steps, is a matter which should be resolved by the Court, not outflanked by pressure brought to bear on the applicant by the court of public opinion.
>
> 171 On the evidence before me, it is clearly arguable that Mr Stolz's conduct has had, and if continued is likely to have, the real, clear, and definite tendency to interfere with the course of justice in this case.

8 ClubsNSW contends that Mr Stolz has breached the November 2021 order by giving an interview titled "The Legal way to take a life" for a YouTube programme known as "FriendlyJordies" (the **YouTube interview**). This programme is said to be operated by Jordan Shanks-Markovina. ClubsNSW says that Mr Shanks-Markovina knowingly assisted Mr Stolz to disobey and breach the November 2021 order and has, himself, published statements that scandalise the Court and have a tendency to interfere with the due administration of justice.

9 ClubsNSW also contends that Mr Stolz has breached the November 2021 order by publishing a number of posts on Twitter and LinkedIn.

10 Further, ClubsNSW contends that some of these posts breach undertakings given by Mr Stolz to the Court on 22 April 2020. These undertakings were to the effect that he would not use or disclose certain information referred to in another order of the Court made on that day in connection with a documentary disclosure regime to which Mr Stolz and Mrs Stolz had consented.

11 ClubsNSW's desire to obtain an order under s 37AF of the Act arises from the fact that the interlocutory application also seeks orders that Mr Stolz and Mr Shanks-Markovina be punished for contempt of court because of their conduct. ClubsNSW says that Mr Stolz's and Mr Shanks-Markovina's conduct suggests that they have been goading it into bringing contempt proceedings so as to provide a springboard for them to generate further waves of publicity and social media activities which attack ClubsNSW and its legal representatives in relation to the bringing, and conduct, of these proceedings. ClubsNSW is concerned that bringing contempt proceedings against Mr Stolz and Mr Shanks-Markovina will provide Mr Stolz and Mr Shanks-Markovina with the opportunity to escalate attacks against ClubsNSW and its legal representatives. This concern is shared by ClubsNSW's solicitors, who have also expressed concern for the safety and welfare of their employees.

12 ClubsNSW's rationale is that, by prohibiting the disclosure of the existence of the contempt proceedings, the opportunity to mount further attacks upon it and its legal representatives will be avoided, or at least minimised. In effect, ClubsNSW seeks an order under s 37AF of the Act in aid of the 30 November 2021 order, the purpose of which was to ensure that there be no unlawful interference with the course of justice through repetition of Mr Stolz's conduct which I had found to be a threatened contempt of court.

13 When the matter came before me on the return date of the interlocutory application (5 August 2022), Mr Stolz appeared. Mr Shanks-Markovina did not appear. ClubsNSW has been unable to serve Mr Shanks-Markovina personally with the interlocutory application, despite several attempts to do so. I have now made orders for substituted and deemed service.

14 On 5 August 2022, Mr Stolz applied to revoke the interim order *nunc pro tunc*. He also resisted the making of the following order that ClubsNSW was then seeking under 37AF of the Act:

> 1. Pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth), the

publication or other disclosure of the following documents and the information contained in them, including the fact that the documents referred to in paragraphs (a) – (d) and (h) have been filed, is prohibited other than to the parties to the applicant's interlocutory application dated 28 July 2022 (the **interlocutory application**), including Jordan Shanks-Markovina, and their legal representatives, until the applications for punishment of the First Respondent and Mr Shanks-Markovina for contempt is determined:

(a) the interlocutory application dated 28 July 2022;

(b) the statements of charge directed to the First Respondent and Jordan Shanks-Markovina dated 28 July 2022; and

(c) the affidavit of Sylvia Fernandez made 28 July 2022, including Exhibits SF-13 and Exhibit SF-14;

(d) the Applicant's written submissions dated 29 July 2022; and

(e) the transcript of the hearing of 29 July 2022;

(f) the affidavit of Sylvia Fernandez made 4 August 22, including Exhibit SF-15;

(g) the transcript of the hearing on 5 August 2022; and

(h) any amended statement of charge directed to the First Respondent filed and served in accordance with order 4 below.

2. Any person establishing sufficient interest may apply to the Court on 48 hours' notice, or such shorter notice as the Court might permit, to vary or discharge Order 1.

15 On 5 August 2022, I made a further interim order under s 37AI of the Act pending the giving of judgment on these questions.

THE LEGISLATION

16 In light of the issues raised by the parties and discussed in these reasons, it is necessary for me to set out ss 37AE to 37AI of the Act:

> **37AE Safeguarding public interest in open justice**
>
> In deciding whether to make a suppression order or non-publication order, the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.
>
> **37AF Power to make orders**
>
> (1) The Court may, by making a suppression order or non-publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:
>
> (a) information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Court or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Court; or

(b) information that relates to a proceeding before the Court and is:

(i) information that comprises evidence or information about evidence; or

(ii) information obtained by the process of discovery; or

(iii) information produced under a subpoena; or

(iv) information lodged with or filed in the Court.

(2) The Court may make such orders as it thinks appropriate to give effect to an order under subsection (1).

37AG Grounds for making an order

(1) The Court may make a suppression order or non-publication order on one or more of the following grounds:

(a) the order is necessary to prevent prejudice to the proper administration of justice;

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;

(c) the order is necessary to protect the safety of any person;

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).

(2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

37AH Procedure for making an order

(1) The Court may make a suppression order or non-publication order on its own initiative or on the application of:

(a) a party to the proceeding concerned; or

(b) any other person considered by the Court to have a sufficient interest in the making of the order.

(2) Each of the following persons is entitled to appear and be heard by the Court on an application for a suppression order or non-publication order:

(a) the applicant for the order;

(b) a party to the proceeding concerned;

(c) the Government (or an agency of the Government) of the Commonwealth or a State or Territory;

(d) a news publisher;

(e) any other person who, in the Court's opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should be made.

(3) A suppression order or non-publication order may be made at any time during a proceeding or after a proceeding has concluded.

(4) A suppression order or non-publication order may be made subject to such exceptions and conditions as the Court thinks fit and specifies in the order.

(5) A suppression order or non-publication order must specify the information to which the order applies with sufficient particularity to ensure that the court order is limited to achieving the purpose for which the order is made.

37AI Interim orders

(1) If an application is made to the Court for a suppression order or non-publication order, the Court may, without determining the merits of the application, make the order as an interim order to have effect, subject to revocation by the Court, until the application is determined.

(2) If an order is made as an interim order, the Court must determine the application as a matter of urgency.

THE EVIDENCE

17 ClubsNSW sought the interim order on the basis of the facts deposed to in an affidavit made by its solicitor, Ms Fernandez, on 28 July 2022. ClubsNSW also tendered certain documents, including copies of posts made by Mr Stolz on Twitter between 27 and 29 July 2022.

18 ClubsNSW relied on this evidence, and a further affidavit made by Ms Fernandez on 4 August 2022, when seeking the order under s 37AF of the Act on 5 August 2022.

19 These affidavits also form part of the evidence that ClubsNSW intends to rely on at the hearing of its application that Mr Stolz and Mr Shanks-Markovina be punished for contempt. For that reason, I will not discuss the evidence given through these affidavits in any detail, save to note the following.

20 On the evening of 11 July 2022, ClubsNSW became aware of the YouTube interview. In introducing the interview, which was conducted by Kristo Langker (who is described as Mr Shanks-Markovina's producer), Mr Shanks-Markovina referred to the proceedings commenced by ClubsNSW against Mr and Mrs Stolz, and said:

> One of the more bizarre aspects of this case is that ClubsNSW effectively got the Courts to chuck in a gag order on Troy meaning he couldn't talk about this ordeal so, for months, Troy has been forced into silence as ClubsNSW has exhausted as many legal avenues as possible to grind him down yet, today, due to an extraordinarily tragic set of circumstances, Troy is breaking his gag order and has agreed to speak to us.

21 The "gag order" to which Mr Shanks-Markovina referred appears to be the November 2021 order. There are a number of references in the interview to Mr Stolz being "gagged". The "extraordinarily tragic set of circumstances" to which Mr Shanks-Markovina referred is to the

disclosure, made in the interview, that Mr Stolz was diagnosed, relatively recently, with a serious illness.

22 In the course of the interview, Mr Stolz said:

> They've gagged me and they're aware I've got the incriminating information on my laptop and I'm officially breaking my gag order today and happy to go on record with you …

23 The existence of the YouTube interview has been published on social media numerous times, with links to the video.

24 On 15 July 2022, ClubsNSW's solicitors sent a letter to Mr Stolz's solicitors, stating ClubsNSW's view that, by making a number of statements in the interview, and through other related conduct, Mr Stolz has deliberately breached the November 2021 order and is in contempt of court. The letter requested that the video of the YouTube interview be taken off-line and that Mr Stolz provide a response identifying the steps he proposed to take to purge his contempt.

25 On 19 July 2022, Mr Stolz's solicitors responded in terms that did not engage with the request that had been made. Their response included the following statement:

> Mr Stolz has instructed us that, given his health, he wishes to make peace with the world.

26 On 19 July 2022, ClubsNSW sent a letter to Mr Shanks-Markovina making clear ClubsNSW's view that the publication of the video of the YouTube interview was a breach of the November 2021 order and a contempt of court. The letter requested Mr Shanks-Markovina to cease publishing the video immediately.

27 On 25 July 2022, *The Guardian* newspaper published an article under the headline "ClubsNSW warned Friendlyjordies that whistleblower interview was in contempt of court". The article referred to correspondence from ClubsNSW's solicitors with Mr Shanks-Markovina and included quotations taken from the letter addressed to him on 19 July 2022. The article also included quotations from a statement said to have been issued by ClubsNSW and from remarks attributed to a "spokesperson" for ClubsNSW. The substance of the quotations is that the giving of the YouTube interview was a breach of the Court's orders and that ClubsNSW was under a duty to notify the Court of these breaches.

28 On 25 July 2022, a number of posts promoting *The Guardian* article were made on the FriendlyJordies Twitter account. Since 25 July 2022, Mr Stolz has also made a number of posts on Twitter referring to the article.

29 The video of the YouTube interview (which has since been removed), and *The Guardian* article, have generated a large number of social media comments. Some of these comments include caustic remarks about ClubsNSW and its solicitors. ClubsNSW has received a number of communications directly from members of the public, which it considers to be abusive. It is concerned about the impact that such messages have on the well-being of its staff.

30 ClubsNSW is also concerned about the conduct of a collective known as "Kickin' the Punt", which has associated itself with Mr Stolz's cause. Approximately two years ago, certain individuals (said to be associated with the collective) attempted to gain access to ClubsNSW's premises. This caused ClubsNSW to take steps to increase security at the premises.

31 On 21 July 2022, the convenor of the collective published a video on the collective's Facebook page. The post included the title of the YouTube interview ("The legal way to take a life"), and stated:

> ClubsNSW is an insidious organisation. They need to be held accountable for what they do.

32 The Facebook page includes a lengthy comment by Mr Stolz, which names members of ClubsNSW's staff.

33 ClubsNSW is concerned by what it perceives to be the menacing language used on the collective's Facebook page. It says that the staff members named by Mr Stolz feel unduly threatened. ClubsNSW has expressed its concern for the safety and well-being of these staff members. It wishes to avoid its employees being exposed to undue attention and harassment.

34 On 29 July 2022, Mr Stolz published extracts from the ClubsNSW staff telephone directory for September 2016 on his Twitter account, with the following post:

> Anyone wanting to express your concern with the Grubs at clubsNSW [sic], please feel free to contact them.

35 On 1 August 2022, ClubsNSW's solicitors wrote to Mr Stolz's solicitors complaining that Mr Stolz had made a number of posts on Twitter that reproduced correspondence that was internal to ClubsNSW, in apparent breach of the orders previously made by the Court. The solicitors said that the posts contained statements that had the effect of intimidating, harassing

or otherwise bringing improper pressure to bear on ClubsNSW's staff and legal representatives in respect of the conduct of the litigation. I observe that a number of these posts refer to ClubsNSW's solicitors by their firm name as "ClubsNSW's Grubby Lawyers". Some posts refer to Ms Fernandez—ClubsNSW's solicitor on the record—directly. One post in particular makes a personal attack on her.

36 On 1 August 2022, ClubsNSW instructed its solicitors to lodge four complaints with Twitter in respect of 18 posts made by Mr Stolz in the period 29 July to 1 August 2022. As at 4 August 2022, two complaints had been dealt with; two complaints had not been dealt with. Of the two complaints that had been dealt with, the posts the subject of one complaint were found to be in violation of Twitter's rules against abusive behaviour.

37 On 4 August 2022, ClubsNSW instructed its solicitors to lodge further complaints in respect of further posts on Twitter made by Mr Stolz in the period 30 July to 4 August 2022.

SHOULD THE INTERIM ORDER BE REVOKED NUNC PRO TUNC?

Mr Stolz's submissions

38 Mr Stolz contended that this Court has the power to revoke its own orders retrospectively: *Australian Rail, Tram and Bus Industry Union v Metro Trains Melbourne Pty Ltd* [2020] FCAFC 81; 276 FCR 172 at [9] – [11]; [55] – [56]; [83]. He also contended that, as the interim order was an interlocutory order, r 39.05 of the *Federal Court Rules 2011* (Cth) provides an express grant of power to vary it or to set it aside.

39 Mr Stolz submitted that the interim order should be revoked *nunc pro tunc* for the following reasons.

40 First, the sole source of the Court's power to make a suppression or non-publication order is s 37AF of the Act. In the present case, the only relevant source of power in s 37AF is the power in para (1)(b)(iv)—namely, to make a suppression order or a non-publication order in respect of information that relates to a proceeding before the Court and is information lodged with or filed in the Court.

41 Secondly, and relatedly, s 37AF(1)(b)(iv) does not empower the Court to suppress the existence of a proceeding, in particular a proceeding for contempt of court.

42 Thirdly, the Court should never have been asked to make, and should not have made, the interim order *ex parte*. This is because s 37AH(2) provides that certain persons are entitled to

appear and be heard on the application for a suppression order or a non-publication order. Mr Stolz submitted that one appropriate course in the present case was for the Court to be asked to appoint a case management hearing at which the making of a suppression order or non-publication order could have been argued.

43 Fourthly, the interim order that was made is not valid because it does not state, in terms, one or more of the grounds in s 37AG(1) on which a suppression order or non-publication order can be made: see s 37AG(2).

44 Fifthly, with respect to s 37AG(1)(a), the order that ClubsNSW seeks under s 37AF of the Act could never be necessary to prevent prejudice to the proper administration of justice. The fact that, for example, Mr Stolz has been charged with contempt is information that should be known. If anything, it is information that could only enhance the administration of justice. Certainly, if known, that information could not have a deleterious effect on the administration of justice.

45 Sixthly, with respect to s 37AG(1)(c), the evidence before the Court does not justify the conclusion that the order which ClubsNSW seeks under s 37AF is necessary to protect the safety of any person.

46 It will be appreciated that the last two submissions are directed, more appropriately, to whether the order, which ClubsNSW now seeks under s 37AF of the Act, should be made.

Conclusion

47 I accept that the Court has power to revoke the interim order *nunc pro tunc*. Apart from the principles referred to by Mr Stolz, s 37AI(1) itself makes clear that an interim order has effect subject to revocation by the Court. However, I am not persuaded that, in the present case, the interim order should be revoked.

48 I do not accept that the sole source of power to make, in an appropriate case, an order in the nature of a suppression order or a non-publication order is s 37AF of the Act or, more generally, Pt VAA thereof. Sections 22 and 23 of the Act provide a plenary grant of power to grant relief that is appropriate to the exercise of the Court's jurisdiction, including the power to make interlocutory orders as the Court thinks appropriate in the circumstances of the case. Such orders include orders that regulate the conduct of proceedings before the Court. The exceptional nature of the power to make orders of this kind is recognised in a number of cases: see, for example, *Scott v Scott* [1913] AC 417 at 437 – 438; *Russell v Russell* [1976] HCA 23;

134 CLR 495 at 520, 532 – 533; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 52 – 55; *John Fairfax & Sons Ltd v Police Tribunal of New South Wale*s (1986) 5 NSWLR 465 at 476 – 477; and *Rinehart v Welker* [2011] NSWCA 403; 93 NSWLR 311 (***Rinehart***) at [32] – [40]. Section 37AB of the Act expressly recognises that Pt VAA does not limit or otherwise affect any powers that the Court has to regulate its proceedings. That said, I accept that, in the present case, the interim order was expressed to be made, and was intended to be made, under s 37AI of the Act.

49 Section 37AF sets out the Court's power to make a suppression order or non-publication order *under that provision*. As s 37AF(1)(b)(iv) provides, such an order can be made in respect of information that relates to a proceeding before the Court and is information lodged with or filed in the Court. The word "information" includes any document: s 37AA.

50 Section 37AG provides the grounds on which such an order can be made. Those grounds include that the order is necessary to prevent prejudice to the proper administration of justice (s 37AG(1)(a)) and that the order is necessary to protect the safety of any person (s 37AG(1)(c))—the two grounds on which ClubsNSW relies in the present case. The word "necessary", which is deployed in each of the grounds specified in s 37AG(1), imposes a high threshold: *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 12)* [2013] FCA 533 at [7]; *Australian Competition and Consumer Commission v Valve Corporation (No 5)* [2016] FCA 741 at [8] – [9]; see also *Hogan v Australian Crime Commission* [2010] HCA 21; 240 CLR 651 (***Hogan***) at [30] – [33]. Section 37AG(2) also states that the suppression order or non-publication order must specify the ground or grounds on which the order is made.

51 Given these requirements, it seems to me to be axiomatic that, before the Court makes an order under s 37AF of the Act, it must be satisfied on the evidence or other material before it that one or more of the grounds in s 37AG(1) are established. Once one or more of those grounds are established, the decision to make a suppression order or a non-publication order is not a matter of discretion: *Hogan* at [33]; see also *Rinehart* at [48], dealing with the comparable provisions of the *Court Suppression and Non-publication Orders Act 2010* (NSW) (the **CSNO Act**). This requires the Court to determine the merits of the application for the s 37AF order that is before it, based on one or more of those grounds.

52 However, s 37AI recognises that this might not be possible. This might not be possible for a number of reasons, including the exigencies of the case. Another reason might be that the

Court does not believe that it has before it the parties that are either necessary or appropriate to enable the application under s 37AF to be determined on its merits.

53 Section 37AI recognises, therefore, that, where an application for a suppression order or non-publication order under s 37AF is before it, the Court can make an interim order "without the Court determining the merits of the application"—meaning the merits of the application made under s 37AF. In *DSO18 v Minister for Home Affairs (No 3)* [2020] FCA 640 at [4] – [5], Derrington J referred to s 37AI as a "sensible and pragmatic provision" which is designed to preserve an applicant's claim for relief by ensuring that any subsequent suppression or non-publication order is not rendered inutile. However, when an interim order is made, s 37AI(2) commands the Court to determine the application under s 37AF as a matter of urgency. It follows that, when the Court makes an interim order under s 37AI, it will *not* have determined the merits of the application under s 37AF. This has two immediate and related consequences.

54 First, at the time an interim order is made under s 37AI, the Court cannot be satisfied that any one or more of the grounds under s 37AG do exist—for example, that the order is necessary to prevent prejudice to the proper administration of justice or that the order is necessary to protect the safety of a person, despite any provisional views the Court might have in that regard.

55 Secondly, absent that satisfaction, it cannot be the case that, when making an interim order under s 37AI, Pt VAA of the Act requires the Court to specify the false position, contrary to the basis on which s 37AI proceeds, that the Court has made a determination on the merits that one or more of the grounds in s 37AG(1) have been established.

56 In order for the provisions of Pt VAA to be given a harmonious interpretation, s 37AG must be read as qualifying the exercise of power under s 37AF, not the exercise of power under s 37AI.

57 I do not accept, therefore, Mr Stolz's submission that the interim order made on 29 July 2022 is not valid because it does not state, in terms, one of the grounds in s 37AG(1) as the basis for making that order. In fact, the interim order does state the basis on which it was made—namely, s 37AI.

58 Even if, contrary to my view, s 37AG does qualify the exercise of power under s 37AI, the breach of a provision regulating the exercise of a statutory power does not mean that the exercise is necessarily invalid and of no effect. Whether that is so depends on whether a legislative purpose can be discerned to invalidate the exercise of the power because of that

failure: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [91]. Subsection 37AG(2) does not provide an essential preliminary to the exercise of the power under s 37AF or, if it be so, s 37AI. Paragraphs (a) – (d) of s 37AG(1) express the requirements for making an order. At most, s 37AG(2) directs the manner in which the power to make a suppression order or a non-publication order is to be exercised as a matter of form only. I do not discern any legislative intention that a failure to comply with s 37AG(2) results in an invalid exercise of power to make a suppression order or a non-publication order under Pt VAA.

59 Perhaps more importantly, and as Mr Stolz recognised in a supplementary written submission made with leave after the hearing on 5 August 2022, an order made by a superior court of record is valid and binding until it is set aside, even in the case of an order that is made without jurisdiction: *State of New South Wales v Kable* [2013] HCA 26; 252 CLR 118 at [32]. This Court is a superior court of record: s 5(2) of the Act. There is, of course, no question here that the Court has the authority to make a suppression order or non-publication order. The only question here is the form in which the interim order was made.

60 None of what I have said should be taken as suggesting that an order under s 37AI can be, or should be, made simply for the asking. The making of an order under s 37AI involves a discretion that must be exercised judicially. Nothing in s 37AI, or in any other provision of Pt VAA of the Act, compels the making of an interim order: *Drummond v Canberra Institute of Technology* [2021] FCA 376 at [12]. Section 37AI proceeds on the basis that an application for a suppression order or non-publication order is before the Court. It is in those circumstances that the Court must determine whether it is appropriate to make an interim order. In the present case, I was satisfied that the Court had before it a bona fide application for a suppression order or non-publication order under s 37AF, based on genuine grounds. As I have said, I was satisfied that it was appropriate to make the interim order to protect the subject matter of the s 37AF application until that application could be heard and determined on an appropriate basis.

61 As to the question of protection, I do not accept that an interim order under s 37AI of the Act cannot be made, and should not have been made in the present case, *ex parte*. Contrary to Mr Stolz's submission, s 37AH—and, in particular, s 37AH(2)—does not impose any such limitation on s 37AI, either as a matter of jurisdiction or of power.

62 Further, I do not accept Mr Stolz's submission that the appropriate procedure in the present case would have been to list the interlocutory application for a case management hearing at

which the making of a suppression order or non-publication order could have been argued. Had that step been taken by ClubsNSW then, self-evidently, the whole purpose of its s 37AF application would have been defeated in one stroke by the filing and service of the interlocutory application without the protection of an interim order under s 37AI. This very question was addressed in ClubsNSW's written submissions dated 29 July 2022. Based on the evidence that was then before the Court, ClubsNSW submitted that once the interlocutory application was filed and served, it would be immediately published online and be the subject of further adverse commentary. In making the interim order, I accepted that there was a real likelihood of that occurring and rendering inutile ClubNSW's application for the order it was seeking under s 37AF.

63 Finally, I do not accept that Part VAA does not empower the Court to suppress the existence of a proceeding itself. Whilst I accept that the making of such an order would be exceptional, it would nevertheless be an order within the broad scope of s 37AF(1)(b)(iv). To take Mr Stolz's example of proceedings for contempt of court, the interlocutory application is the process filed in the Court by which the present proceeding for contempt has been commenced. The word "information" is of wide import. Section 37AA defines "information" as including a document. The interlocutory application is, plainly, a document ("information") that relates to a proceeding before the Court and is a document filed in the Court.

SHOULD AN ORDER UNDER S 37AF BE MADE?

ClubsNSW's submissions

64 Relying on the principles summarised in *Rush v Nationwide News Pty Ltd (No 6)* [2018] FCA 1851 at [132] – [138], ClubsNSW accepted that a suppression order or non-publication order should only be made in exceptional circumstances, as indicated by the use of the word "necessary" in the grounds expressed in s 37AG(1) and by the need to take into account, when making an order under s 37AF, the primary objective of safeguarding the public interest in open justice, as expressed in s 37AE of the Act. ClubsNSW recognised that embarrassment is not itself a ground for making an order under s 37AG and that, generally speaking, parties must accept that embarrassment and damage to reputation can be inherent in any litigation.

65 ClubsNSW nevertheless submitted that open justice is not an absolute end in itself. It submitted that the principle will yield in circumstances where open justice might defeat the attainment of justice. This submission reflects an observation made by Brereton J in *Welker v Rinehart* [2011] NSWSC 1094 at [14] when discussing the application of s 8(1) of the CSNO Act:

> While there is, as the legislation emphasises, a powerful public interest in open justice, there is an even greater public interest in the attainment of justice. And so the ends of the attainment of justice prevail, where they must, over open justice. If open justice would practically defeat the purpose for which proceedings are brought, or result in the practical circumvention of the relief being sought, the public interest in upholding the rights of litigants will usually prevail over the public interest in open justice.

66 As I have noted, ClubsNSW based its application on the grounds provided by ss 37AG(1)(a) and (c).

67 First, ClubsNSW submitted that it has a strong case that Mr Stolz and Mr Shanks-Markovina have deliberately disobeyed the Court's orders, meaning in particular, but in the case of Mr Stolz not only, the November 2021 order. ClubsNSW submitted that breach of the November 2021 order was used to promote the YouTube interview. It submitted that this conduct, and the subsequent social media publications by Mr Stolz and Mr Shanks-Markovina, were effectively inviting it to bring contempt proceedings to feed a misleading narrative about its conduct and to further intimidate it, its staff, and its legal representatives. ClubsNSW submitted that, absent an appropriate order, the conduct, about which it has adduced evidence, will be less restrained and undoubtedly publicised in the media, "gratifying [Mr Stolz's and Mr Shanks-Markovina's] wish to inflict the greatest possible harm on [ClubsNSW]". ClubsNSW submitted that the Court should infer that Mr Stolz's opposition to the making of an order under s 37AF is to allow him to continue to engage in a deliberate breach of the Court's orders.

68 Secondly, ClubsNSW submitted that it seeks to bring the contempt charges to ensure Mr Stolz's compliance with the Court's orders and to maintain the dignity of the Court. ClubsNSW submitted that the order it seeks under s 37AF will ensure that it can prosecute the contempt proceedings without continual harassment by Mr Stolz, Mr Shanks-Markovina, and their followers. ClubsNSW submitted that the commentary to date has not only been personal, but threatening. It submitted that no private litigant should be subjected to this form of harassment.

69 Thirdly, ClubsNSW submitted that allowing publication of the contempt proceedings and the subject matter of the charges would effectively destroy, or at least frustrate or undermine, the purpose of those proceedings. It submitted that if the contempt proceedings are allowed to continue in the public eye, the very matters it is trying to keep confidential, which it says were published in breach of the Court's orders, will be reproduced and gain greater currency through media reports.

70 Fourthly, ClubsNSW submitted that the order it seeks under s 37AF is "not of unlimited duration": see s 37AJ. It submitted that once the contempt proceedings have been heard and determined, the order it seeks will no longer be in force, at which time "there can be commentary on the application with the benefit of a judgment from the Court explaining its reasons for holding that [Mr Stolz and Mr Shanks-Markovina] did or did not commit the contempts alleged".

71 Fifthly, ClubsNSW submitted that the order it seeks under s 37AF contains a carve-out for any person establishing a sufficient interest to apply to the Court to vary or discharge the order.

Conclusion

72 Having considered the evidence before me, I am not persuaded that the order that ClubsNSW seeks under s 37AF of the Act should be made.

73 In expressing that conclusion, I do not wish to be taken as condoning, in any way, the publication by Mr Stolz and Mr Shanks-Markovina of the material about which ClubsNSW complains. Similarly, I do not wish to be taken as condoning the remarks that have been made by others on social media as a consequence of Mr Stolz's or of Mr Shanks-Markovina's conduct. The personal remarks that Mr Stolz made concerning Ms Fernandez in her professional capacity are particularly unfortunate. Whether these remarks, and the other publications about which ClubsNSW complains, are a breach of the Court's orders, or are otherwise in contempt of court, are matters that will be determined in the fullness of time. I express no view on those questions at the present time.

74 Bearing in mind the stringency of the requirements for obtaining an order under s 37AF, I am not satisfied that an order is necessary to protect the safety of any person: s 37AG(1)(c). The evidence falls far short of establishing that ground.

75 In *Roberts-Smith v Fairfax Media Publications Pty Limited* [2019] FCA 36, Besanko J (at [16] – [17]) rejected a construction of s 37AG(1)(c) that required, as a precondition the operation of that ground, a finding that, as a matter of probability, a person would suffer harm if an order were not made. His Honour adopted the alternative construction canvassed in *D1 v P1* [2021] NSWCA 314 at [51] (in relation to the corresponding ground in the CSNO Act) that the necessity for such an order will be informed by the nature, imminence, and degree of the likelihood of harm occurring to the relevant person. For example, if the prospective harm is

very severe, it may more readily be concluded that an order is necessary, even if the risk of that harm is but a possibility.

76 As to this construction, Besanko J said (at [17]):

> 17 … It enables the Court to apply the criteria in a way which will achieve its purpose and is consistent with the law's general approach to risk of considering not only the possibility or probability of an event occurring, but also the likely extent of the consequences if it does. It would seem incongruous to have a test which founds an order where it is probable an assault will occur, but not in a case where there is a 49% risk of a death occurring.

77 I adopt that construction. However, I do not read the particular publication on which ClubsNSW appears to base its application on this ground (comments and a video on the "Kickin' the Punt" Facebook page) as containing a threat to any individual's personal safety. I do not think that ClubsNSW's reliance on this publication is materially strengthened by its reliance also on an event that occurred approximately two years ago, on which I have scant evidence, apparently involving persons associated with the collective. I have also referred to the personal remarks that Mr Stolz made with respect to Ms Fernandez. Unpleasant though those remarks were, I do not read them as posing a risk to Ms Fernandez's personal safety.

78 The question is whether, in light of this material, the safety of ClubsNSW's staff and its legal representatives will be at risk if the fact that ClubsNSW has commenced contempt proceedings against Mr Stolz and Mr Shanks-Markovina is not suppressed. I am not satisfied on the evidence before me that there is a material risk. Therefore, I am not satisfied that the order that ClubsNSW seeks under s 37AF of the Act is necessary to protect the safety of any person.

79 Similarly, I am not persuaded that an order under s 37AF of the Act is necessary to prevent prejudice to the proper administration of justice.

80 I understand ClubsNSW's concern that knowledge that it has commenced contempt proceedings, particularly against Mr Stolz, might well provide a catalyst for more unwanted, inflammatory remarks about, and criticism of, ClubsNSW and its legal representatives. Some of these remarks might well be ill-informed. Even so, I am not persuaded that the interests of justice will be served by keeping the commencement of the contempt proceedings a secret when it is already in the public domain, and now well-publicised, that ClubsNSW is of the view that Mr Stolz has deliberately breached the Court's orders, in particular the November 2021 order, and is in contempt of court.

81 In this regard, the article in *The Guardian* made ClubsNSW's position perfectly clear, as well as its view, apparently expressed in a public statement, and through a spokesperson, that it considered itself to be under a duty to bring such matters to the Court's attention. It has now done so by the commencement of the contempt proceedings. No doubt ClubsNSW took that step in the belief that it was necessary to do so to prevent prejudice to the proper administration of justice. It has certainly made submissions to that effect, with reference to the following comments by Tamberlin J in *Australian Competition and Consumer Commission v Hughes* [2001] FCA 38 at [15]:

> 15 Ultimately, in the case of mandatory or prohibitory orders made by it, the sanction which the Court has in order to enforce its decisions is the power to punish for contempt. This is the way in which the Court preserves respect for its role and the rule of law. Without the enforcement of court orders the whole process of adjudication becomes a hollow exercise. If a losing party can defy the orders of the Court then such disobedience renders futile, in the perception of the community, the remedy secured by the successful party. Orders are not made simply to suggest or advise persons that they ought to keep to the law as proclaimed but to ensure that the law is carried out as determined by the decision pursuant to which the order is made. Defiance of court orders diminishes the authority of courts and removes the incentive of parties, if such conduct is left unpunished, to comply with the requirements of the courts.

82 Given that the bringing of contempt proceedings serves the administration of justice in this way, it is difficult to see how it can be said that suppressing the fact that contempt proceedings have been commenced is, itself, necessary to prevent prejudice to the proper administration of justice, simply because a section of the community might strongly disapprove of that step being taken and publicly voice their disapproval, even by intemperate and, perhaps, unjustified remarks.

83 Further in this regard, I do not accept ClubsNSW's submission that disclosure of the commencement of the contempt proceedings, or of the subject matter of the charges against Mr Stolz and Mr Shanks-Markovina, would effectively destroy, or at least frustrate or undermine, the purpose of those proceedings. Since the publication of the YouTube interview, Mr Stolz has chosen to make public comments about ClubsNSW, its staff, and its external legal advisers. He has also chosen to publish internal documents of ClubsNSW in his possession. He has done so, knowing that he has given certain undertakings to the Court, and knowing that the Court has made orders against him. He has expressed his understanding that he is breaking his "gag order". He has chosen this path, even with the benefit of access to legal advice. He has also done so with the benefit of the Court's reasons for making the November 2021 order. It does

not seem to me that suppressing the fact that ClubsNSW has now commenced contempt proceedings against Mr Stolz will, of itself, assist in curtailing that conduct.

84 Further, if, as ClubsNSW contends, Mr Stolz has chosen this path as part of a strategy to use the existence of the contempt proceedings to intimidate and thus bring pressure to bear on ClubsNSW and its legal advisers in respect of the conduct of the principal proceeding, then he has seriously miscalculated the risk to which he has exposed himself. Ill-health—not even serious ill-health—justifies or excuses a contempt of court, if established, or lessens the consequences that attend it.

85 In light of these considerations, I am of the view that the interests of open justice are paramount in this case and that the order that ClubsNSW seeks under s 37AF of the Act is not necessary to prevent prejudice to the proper administration of justice.

86 For these reasons, I decline to make the order that ClubsNSW seeks.

DISPOSITION

87 Having reached this conclusion, I will dismiss the application for the s 37AF order. The interim order, and the further interim order I made on 5 August 2022, will cease to have effect, according to their terms.

88 Although Mr Stolz has been unsuccessful in his attempt to revoke the interim order, he has been successful in opposing ClubsNSW's application for the s 37AF order. The making of the interim order was integral to the application for the s 37AF order and, in large measure, the submissions made on the question of revocation were also relevant to the question of whether the s 37AF order should be made. As ClubsNSW has been unsuccessful in obtaining that order, it is appropriate that it should pay Mr Stolz's costs of and incidental to both applications.

I certify that the preceding eighty-eight (88) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Yates.

Associate:

Dated: 26 August 2022