FEDERAL COURT OF AUSTRALIA

Alvoen on behalf of the Wakaman People #5 v State of Queensland (No 3)

[2021] FCA 785

File numbers: QUD 178 of 2018
QUD 143 of 2015
QUD 746 of 2015
QUD 350 of 2017
QUD 351 of 2017
QUD 728 of 2017

Judgment of: **COLLIER J**

Date of judgment: 12 July 2021

Catchwords: **PRACTICE AND PROCEDURE** – interlocutory application for order that lawyers of various respondents answer interrogatories – enjoinder application made following evidence emerging during cross-examination to restrain lawyers acting – whether inherent jurisdiction of Court to protect the due administration of justice engaged – whether Court should dispense with compliance with r 21.02 *Federal Court rules 2011* (Cth) – whether prospect of claim of legal professional privilege relevant – whether interrogatories available in respect of interlocutory application rather than substantive pleadings – detailed affidavit material filed in proceeding by applicant – where applicant for enjoinder application a stranger to retainer – whether fishing

Legislation: *Australian Solicitors Conduct Rules 2012* (Qld) r 37
Federal Court Rules 2011 (Cth) rr 1.34, 21.02
Legal Profession Act 2007 (Qld) s 7
Native Title Act 1993 (Cth)

Cases cited: *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd* [2012] FCA 290
Australian Securities & Investments Commission v Southcorp Limited [2003] FCA 804
Black v Taylor [1993] 3 NZLR 403
Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd (2014) 228 FCR 252; [2014] FCA 1065
Dowling v Fairfax Media Publications Pty Ltd (No. 2) [2010] FCAFC 28

Dr Michael Van Thanh Quach v MLC Life Limited (No 2) [2019] FCA 1322

Geelong School Supplies Pty Ltd v Dean (2006) 238 ALR 612; [2006] FCA 1404

Grimwade v Meagher [1995] 1 VR 446

Hancock v Rinehart (Privilege) [2016] NSWSC 12

Hanson-Young v Leyonhjelm (No 2) [2019] FCA 393

Martin v Norton Rose Fulbright Australia [2019] FCA 1101

Mitchell v Pattern Holdings Pty Ltd [2000] NSWSC 1015

Mumbin v Northern Territory of Australia (No 1) [2020] FCA 475

QGC Pty Limited v Bygrave (2010) 186 FCR 376; [2010] FCA 659

Tommy on behalf of the Yinhawangka Gobawarrah v State of Western Australia (No 2) [2019] FCA 1551

Western Australia v Ward (1997) 76 FCR 492

Williamson v Nilant [2002] WASC 225

Division:	General Division
Registry:	Queensland
National Practice Area:	Native Title
Number of paragraphs:	138
Date of hearing:	15 March 2021
Counsel for the Applicant:	Mr G Del Villar QC
Solicitor for the Applicant:	North Queensland Land Council
Counsel for the First Respondent:	Ms E Longbottom QC with Ms S Marsh
Solicitor for the First Respondent:	Crown Law
Counsel for Preston Law, Mr Kerr, Mr Kempton and Ms Cao-Kelly:	Mr M Jonsson QC
Solicitor for Preston Law, Mr Kerr, Mr Kempton and Ms Cao-Kelly:	Preston Law

ORDERS

QUD 178 of 2018
QUD 143 of 2015
QUD 746 of 2015
QUD 350 of 2017
QUD 351 of 2017
QUD 728 of 2017

BETWEEN:	**JOHN ALVOEN & ORS ON BEHALF OF THE WAKAMAN PEOPLE #5** Applicant
AND:	**STATE OF QUEENSLAND** Respondent

ORDER MADE BY: **COLLIER J**
DATE OF ORDER: **12 JULY 2021**

THE COURT ORDERS THAT:

1. The Court dispense with compliance with rule 21.02 of the *Federal Court Rules 2011* (Cth).

2. Within 21 days of these Orders, Andrew Macrae Kerr and David Kempton:

   (a) provide written answers to the Applicant's interrogatories set out in annexure "SW77" to the affidavit of Susan Gillian Mary Walsh affirmed 10 February 2021, subject to any objection referable to a claim of privilege in accordance to r 21.03(4)(c) of the *Federal Court Rules 2011* (Cth), and file affidavits verifying those answers in accordance with rule 21.03(1) of the *Federal Court Rules 2011* (Cth); and

   (b) serve the documents referred to in order 2 (a) on the Applicant, Petrina Cao-Kelly and the State of Queensland.

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

REASONS FOR JUDGMENT

COLLIER J:

1 Before the Court is an interlocutory application (**interrogatories application**) filed on 10 February 2021 in QUD 178 of 2018 *John Alvoen & Ors on behalf of the Wakaman People #5 and State of Queensland*. The interrogatories application was filed by the applicant in the substantive proceedings (**Wakaman Applicant**). It was addressed to the State of Queensland, law firm Preston Law, and lawyers David Kempton, Andrew Kerr and Petrina Cao-Kelly. In the interrogatories application the Wakaman Applicant sought the following orders:

> 1. The Court dispense with compliance with rule 21.02 of the *Federal Court Rules 2011* (Cth).
>
> 2. David Kempton and Andrew Macrae Kerr:
>
> (a) provide written answers to the Applicant's interrogatories and file affidavits verifying those answers in accordance with rule 21.03 (1) of the *Federal Court Rules 2011* (Cth); and
>
> (b) serve the documents referred to in order 2 (a) on the Applicants, Petrina Cao-Kelly and the State of Queensland.

2 Notwithstanding that the interrogatories application was filed only in QUD 178 of 2018, I note orders of Reeves J on 14 March 2019, including :

> 1. Any document filed, which relates to Wakaman People #3 (QUD746/2015), Wakaman People #4 (QUD728/2017), Wakaman People #5 (QUD178/2018), GAG Crystalbrook Station Pty Ltd (QUD143/2015), Lance Frank, Bradley Thomas and Emma Elizabeth O'Shea (QUD 350/2017) and that part of James William Malcolm and Janelle Lynette O'Shea (QUD351/2017) which is overlapped by QUD728/2017 (**the Wakaman proceedings**):
>
> (a) need only be filed in relation to QUD178/2018; and
>
> (b) shall bear the Court heading set out in QUD178/2018, and be endorsed with the file numbers of the Wakaman proceedings, which are: QUD 143/2015, QUD 746/2015, QUD 350/2017, QUD 351/2017, QUD 728/2017 and QUD178/2018.

3 The interrogatories application relates to an earlier application filed by the Wakaman Applicant on 24 December 2020. That earlier application (**enjoinder application**) was addressed to pastoral respondents to the substantive proceedings, in addition to Preston Law, Mr Kempton, Mr Kerr and Ms Cao-Kelly. In substance, the enjoinder application seeks orders restraining Preston Law, or alternatively Mr Kempton and Mr Kerr, from acting for the named pastoral respondents.

4 The matter is complicated by the facts that:

- Although the Wakaman Applicant seeks orders for interrogatories to be answered by Mr Kempton and Mr Kerr, neither they nor Preston Law nor Ms Cao-Kelly are parties to the substantive proceedings;
- The interrogatories application relates to admissions of fact sought by the Wakaman Applicant, of Mr Kempton and Mr Kerr, in respect of the enjoinder application, rather than the pleadings; and
- It is common ground that the Court would need to dispense with r 21.02 of the *Federal Court Rules 2011* (Cth) in order for the present interrogatories application to proceed.

5 At the hearing of the interrogatories application Mr Jonnson QC stated that he appeared for Preston Law, Mr Kerr, Mr Kempton and Ms Cao-Kelly. Insofar as I understand it, they were the active respondents to the interrogatories application.

6 Having considered the interrogatories application, for the following reasons I am satisfied that the Court should make the orders sought, including that there be dispensation with r 21.02 of the Federal Court Rules, and that Mr Kempton and Mr Kerr should both provide written answers to the interrogatories and file affidavits verifying those answers.

BACKGROUND

7 Relevant background facts are as follows.

8 Materially, pastoral respondents to the substantive proceedings are:

- Lance Frank O'Shea;
- Bradley Thomas O'Shea;
- Emma Elizabeth O'Shea;
- James William Malcolm O'Shea;
- Janelle Lynette O'Shea;
- Philip Henry Porter;
- Michael William Porter;
- Mark Edward Porter;

- Rex and Penny McClymont;
- White River Resources Pty Ltd;
- Robert O'Shea;
- John and Janelle Foote; and
- GAG Crystalbrook Station Pty Ltd.

9 Cairns law firm Preston Law acts for all of these respondents. The representing lawyers at the firm are variously Mr Kerr and Mr Kempton.

10 Lay evidence was given in the substantive proceedings at various locations in August, September and November 2020. On 25 November 2020 following evidence emerging in cross-examination of Indigenous respondents Mr Rodney Chong and Ms Carol Chong, Senior Counsel for the Wakaman Applicant raised concerns before the Court about a possible conflict of interest that would prevent law firm Preston Law acting for various pastoral respondents to the proceedings. During the hearing on 26 November 2020, Senior Counsel for the Wakaman Applicant reiterated those concerns, and sought, in summary, an order requiring Mr Kerr and Mr Kempton to file affidavits outlining their contacts, and those of law firm Preston Law, with Uwoykand Tribal Aboriginal Corporation (**UTAC**), Uwoykand Corporation Pty Ltd, Mr Rodney Chong and Ms Carol Chong.

11 The State of Queensland (**State**) supported the making of an order in such terms, and submitted that the conflict might affect the integrity of the Court's process.

12 The respondents represented by Preston Law opposed the making of such an order.

13 Subsequently, the parties agreed on orders requiring, *inter alia*, any application with respect to Preston Law to be filed on or before 24 December 2020.

14 On 26 November 2020, I ordered that leave be granted for Mr Rodney Chong, Ms Carol Chong, and UTAC to cease being respondents to the proceedings in QUD143/2015, QUD746/2015, QUD728/2017 and QUD178/2018.

ENJOINDER APPLICATION

15 The respondents named in the enjoinder application are:

- Lance Frank O'Shea;
- Bradley Thomas O'Shea;

- Emma Elizabeth O'Shea;
- James William Malcolm O'Shea;
- Janelle Lynette O'Shea;
- Philip Henry Porter;
- Michael William Porter;
- Mark Edward Porter;
- Rex and Penny McClymont;
- White River Resources Pty Ltd;
- Robert O'Shea;
- John and Janelle Foote;
- GAG Crystalbrook Station Pty Ltd;
- Preston Law;
- Andrew Macrae Kerr;
- Petrina Cao-Kelly; and
- David Kempton.

16 I understand that GAG Crystalbrook Station Pty Ltd (**GAG Crystalbrook**) acquired the lease over Crystalbrook Station (which is within the native title claim area) following transfer of the lease on 2 March 2017 from Port Bajool Pty Ltd (**Port Bajool**). On 18 August 2017 Reeves J ordered that GAG Crystalbrook be joined as the applicant to QUD143/2015, and Port Bajool be removed as a party. I make this observation because a number of the proposed interrogatories concern Port Bajool, which is no longer an active party in the substantive proceedings.

17 In the enjoinder application the Wakaman Applicant sought the following orders:

1. Preston Law be restrained from providing legal services or advice to the following parties in these proceedings:
    a. Lance Frank O'Shea;
    b. Bradley Thomas O'Shea;
    c. Emma Elizabeth O'Shea;
    d. James William Malcolm O'Shea;

e. Janelle Lynette O'Shea;

f. Philip Henry Porter;

g. Michael William Porter;

h. Mark Edward Porter;

1. Rex and Penny McClymont;

J. White River Resources Pty Ltd;

k. Robert O'Shea;

l. John and Janelle Foote; and

m. GAG Crystalbrook Station Pty Limited.

2. Alternatively:

a. David Kempton be restrained from providing legal services or advice to GAG Crystalbrook Station Pty Limited;

b. each of Andrew Macrae Kerr and Petrina Cao-Kelly be restrained from providing legal services or advice to all or any of the following parties in these proceedings:

i. Lance Frank O'Shea;

ii. Bradley Thomas O'Shea;

iii. Emma Elizabeth O'Shea;

iv. James William Malcolm O'Shea;

v. Janelle Lynette O'Shea;

vi. Philip Henry Porter;

vii. Michael William Porter;

viii. Mark Edward Porter;

ix. Rex and Penny McClymont;

x. White River Resources Pty Ltd;

xi. Robert O'Shea; and

xii. John and Janelle Foote.

c. Preston Law assign a different solicitor to act as lawyer for the parties identified in order 2(i) and (ii) above.

3. Further, or alternatively:

a. Andrew Macrae Kerr be restrained from providing legal services or advice to all or any of the following parties in these proceedings:

i. Lance Frank O'Shea;

ii. Bradley Thomas O'Shea;

iii. Emma Elizabeth O'Shea;

iv. James William Malcolm O'Shea;

v. Janelle Lynette O'Shea;

vi. Philip Henry Porter;

vii. Michael William Porter;

viii. Mark Edward Porter;

ix. Rex and Penny McClymont;

x. White River Resources Pty Ltd;

xi. Robert O'Shea; and

xii. John and Janelle Foote.

b. Preston Law assign a different solicitor to act as lawyer for the parties identified in order 3(i).

4. Preston Law or, alternatively, Andrew Macrae Kerr and David Kempton, pay:

a. the applicant's costs of and incidental to this application;

b. the costs of 25 November and 26 November 2020 that were reserved by order 2 of the consent orders made on 26 November 2020; and

5. Such other order as the Court thinks fit.

18 The enjoinder application was filed on the same date as a lengthy affidavit sworn by Ms Susan Walsh, a senior legal officer employed by North Queensland Land Council Native Title Representative Body Aboriginal Corporation (**NQLC**) with the day-to-day carriage of the Wakaman cluster of claims on behalf of the Wakaman Applicant. It is convenient to refer to that affidavit as the **Walsh affidavit**, because it is so designated in the proposed interrogatories.

19 The State filed two affidavits of Mr Tarquin Nesbitt-Foster dated 10 February 2021 and 11 February 2021.

THE WALSH AFFIDAVIT

20 The Walsh affidavit is detailed, containing seventy-five annexures. Evidence to which Ms Walsh deposes as being to her knowledge can be summarised as follows.

- Preston Law, Mr Kerr and Mr Kempton represented several parties in the Wakaman claims and related non-claimant applications [16]-[27]. Ms Cao-Kelly was a solicitor at Preston Law who Ms Walsh believed provided legal representation to UTAC.

- UTAC transitioned to a corporation governed by the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) [36].
- The UTAC land interests in the Wakaman #5 claim area arose as a result of UTAC formerly being the lessee of two pastoral holdings described as pastoral holding No 2323 (**Lyndside**) and pastoral holding No. 4808 (**Powis**), collectively known as Bulimba Station [29]. The Indigenous Land Corporation (**ILC**) granted the leasehold interests in Bulimba Station to UTAC in or around August 1999 [31]. Preston Law, Ms Cao-Kelly and Mr Kerr have provided legal representation to UTAC additional to representing UTAC in the Wakaman #5 claim [32].
- UTAC transferred its leasehold interests in Bulimba Station to Uwoykand Corporation Pty Ltd (**Uwoykand**) on 23 November 2018, the transfer being registered on 4 June 2019. Uwoykand holds Bulimba Station as Trustee [33]-[34]. The relevant trust includes as an object (in clause 4 (a)(vii) of the trust deed) to act as the prescribed body corporate for any native title bestowed upon any land within the boundary of Bulimba Station for the Kunjen Native Title Application [33].
- Mr Chong and Ms Chong gave evidence about Mr Kerr and Preston Law acting for UTAC in the transfer from UTAC to Uwoykand at the lay evidence hearing [37].
- Despite the transfer by UTAC to Uwoykand of UTAC's leasehold interests in Bulimba Station, Mr Kerr continued to provide legal representation to UTAC as a respondent with an interest that may be affected by a native title determination in the Wakaman #5 claim [38].
- On 27 October 2020, Mr Kempton emailed Ms Walsh advising that Preston Law would seek an order for its clients to have a more limited active respondent role in respect of the separate questions before the Court. Mr Kempton subsequently confirmed that this email was sent on behalf of GAG Crystalbrook only [40].
- At the case management hearing in these proceedings on 28 October 2020 Mr Andrew Preston appeared for the pastoral respondents represented by Preston Law, instructed by Mr Kerr and Mr Kempton [41].
- On 19 November 2020, Ms Walsh emailed Mr Kerr asking him to clarify whether his clients also included UTAC and White River Resources Pty Ltd [42]-[43].

- By email dated 20 November 2020 Mr Kerr informed Ms Walsh – for the first time – that steps were being taken in compliance with the Federal Court Rules as a precondition to Mr Kerr filing a notice of ceasing to act for UTAC [45]. Mr Kerr filed a notice of ceasing to act for UTAC on 24 November 2020 [46].
- On 26 November 2020 Mr Boulot informed the Court that he had assisted UTAC, via Ms Chong who was a director of UTAC, to prepare necessary documents to seek the leave of the Court to cease being a party. On 26 November 2020 Ms Chong on behalf of UTAC filed a notice of ceasing to be a party to the proceedings [47].
- On 26 November 2020 the Court granted leave to Mr Chong, Ms Chong and UTAC to cease being parties to the proceedings [48].
- Ms Walsh believed that Mr Chong was one of the founding members and directors of UTAC, based on documentation for UTAC when it was originally incorporated (which included Mr Chong's name as one of the original members of the committee of the association of UTAC committee members) and correspondence between Mr Chong and the ILC relating to the grant of Bulimba Station to an Aboriginal corporation [49]. Ms Walsh believed that Mr Chong was still a member and the contact officer of UTAC [50].
- Mr Chong was a director and shareholder of Uwoykand and a beneficiary listed in the Register of Beneficiaries of the Tatelyn Bulimba Station Trust [51].
- Ms Walsh believed that Ms Chong was performing the role of administration officer for UTAC from at least June 2017 [52].
- Mr Chong and Ms Chong signed a respondent party notice of their intention to be a party to the Crystalbrook non-claimant application dated 31 August 2015. In an affidavit filed 29 November 2016 Mr Kempton deposed that he received a notice from the National Native Title Tribunal on or about 9 September 2015 disclosing that Mr Chong and Ms Chong had elected to be respondents to that application [54].
- Mr Chong and Ms Chong signed a respondent party notice dated 12 February 2016 giving notice of their intention to be respondents to the Wakaman #3 claim [55]. They also signed a respondent party notice dated 15 August 2018 giving notice of their intention to become respondents to the Wakaman #4 claim [56]. Their status as respondents to Wakaman #3 and Wakaman #4 was confirmed in *Alvoen v State of*

Queensland [2019] FCA 1469. On 2 October 2019 the Court granted leave to Mr Chong to be joined as a respondent to the Wakaman #5 claim [57].

- Mr Chong and Ms Chong are members of the Wakaman People native title claim group for the Wakaman #3, #4 and #5 claims as descendants of a Wakaman apical ancestor [58]. They are also members of the native title claim group for two previous Wakaman People native title claims [60].
- Ms Walsh believed that Mr Chong was a member of the Applicant for the Wakaman #1 claim when it was first filed on 24 September 1997, was removed as a member for that claim on 1 November 1999, but was re-authorised for the claim in 2004 [61]. The Wakaman #1 and #2 claims were struck out in 2007.
- At the request of NQLC in relation to the Wakaman 1 and 2 claims, connection reports (**previous Wakaman connection reports**) were prepared by Dr Suzi Hutchings, Dundi Mitchell, Professor Bruce Rigsby and Dr James Weiner [72]. On 14 February 2020 NQLC filed an interlocutory application on behalf of the applicants in the present proceedings seeking orders to the effect that these reports were subject to legal professional privilege and not to be used in the proceedings. Materially, Ms Walsh understood that NQLC and Preston Law agreed that that interlocutory application would be adjourned *sine die* on the basis, *inter alia*, that Preston Law would obtain undertakings from expert Dr Brunton that the previous Wakaman connection reports would not be used for any purpose other than the experts' conference in the proceedings, reference purposes in relation to matters specifically referred to in Dr Brunton's reports, and that Dr Brunton himself would not further disseminate or use those reports in the absence of further agreement between the parties; and that any party could apply for leave to file the reports [73] and [109].
- At the oral hearing on 23 November 2020 Ms Chong gave evidence of her knowledge of the previous Wakaman connection reports, and of Mr Chong having access to them [74]-[75].
- At the oral hearing on 23 November 2020 Ms Chong gave evidence of providing copies of the previous Wakaman connection reports to Mr Kempton [76].

- At the oral hearing on 23 November 2020 Ms Chong gave evidence that she had prepared an anthropological report for Mr Kempton's client Port Bajool at the request of Mr Kempton [77]-[78].
- A copy of a report by Ms Chong dated December 2015 is referred to in material accompanying an application by Port Bajool of 29 November 2016 [82], and was provided to Dr Brunton [84].
- Ms Walsh believed that Ms Chong had used the previous Wakaman connection reports in opposing her removal as a respondent to the Wakaman #3 and #4 claims and as a respondent to those claims [79]-[84]. Ms Walsh also believed that Mr Chong had similarly used the previous Wakaman connection reports [85].
- Ms Walsh believed that Mr Kempton had used the previous Wakaman connection reports and Ms Chong's report in affidavits provided by him in Wakaman matters, and inferentially supplied those reports to expert Dr John Avery for use by him [86]-[93].
- Mr Kempton has otherwise in numerous instances of correspondence over the course of the Wakaman claims and the Crystalbrook non-claimant application referred to having copies of previous Wakaman connection reports [94].
- Mr Kempton on behalf of GAG Crystalbrook made numerous statements relating to the role of Mr Chong and Ms Chong in the application to remove Mr Chong and Ms Chong as respondents to the Wakaman #3 and #4 claims [95]-[99].
- Ms Chong gave evidence that she had spoken with Preston Law, including Mr Kempton and Mr Kerr, concerning the Wakaman claims [100].

AFFIDAVITS OF MR TARQUIN NESBITT-FOSTER

21 The State filed two affidavits of Mr Tarquin Nesbitt-Foster dated 10 February 2021 (**first Nesbitt-Foster affidavit**) and 11 February 2021 (**second Nesbitt-Foster affidavit**).

22 In the first Nesbitt-Foster affidavit, Mr Nesbitt-Foster deposed to matters apparent from files held by Crown Law, within his personal knowledge and belief, or on instructions from the Department, referable to the enjoinder application. In the second Nesbitt-Foster affidavit Mr Nesbitt-Foster corrected an error in the first affidavit.

23 Relevantly in the first Nesbitt-Foster affidavit, Mr Nesbitt-Foster deposed, in summary

- Mr Kerr was the solicitor on the record for various pastoral respondents including White River Resources Pty Ltd [6], and between 13 August 2018 and 24 November 2020 the solicitor on the record for UTAC [7].
- In correspondence to Ms Marita Stinton of Crown Law, Mr Kerr by email on 20 November 2020 stated that he continued to act for White River Resources Pty Ltd and UTAC, however steps were being taken "as a precondition to filing a notice of ceasing to act" for UTAC [9].
- At the hearing on 24 November 2020 during cross-examination Ms Chong gave evidence that she had received no communications from Mr Kerr in respect of his being or continuing to be solicitor on the record for UTAC [11]-[12].
- Although Mr Kempton was the solicitor on the record in the Wakaman proceedings for GAG Crystalbrook, at various states during the course of the Wakaman proceedings

  Mr Kempton has appeared, communicated or caused documents to be filed on behalf of parties represented by Mr Kerr including UTAC [15].
- "Preston Law Pastoral Respondents" referred to pastoral parties represented by both Mr Kerr and Mr Kempton, including GAG Crystalbrook and UTAC [16].
- At various stages during the course of the Wakaman proceedings Mr Kerr had appeared and communicated on behalf of GAG Crystalbrook [17].

PROPOSED INTERROGATORIES

24 The interrogatories the Wakaman Applicant proposes to deliver to Mr Kerr and Mr Kempton are annexed to a further affidavit of Ms Walsh filed on 10 February 2021 (**10 February 2021 affidavit**). They are as follows.

INTERROGATORIES DELIVERED BY THE APPLICANT TO ANDREW MACKRAE [sic] KERR

1. In these interrogatories

   "**non-claimant Applicants**" means the applicants in the three non-claimant applications described in paragraph 9 of the affidavit by Susan Walsh filed on behalf of the Applicant in support of the enjoinder application on 24 December 2020 (**Walsh affidavit**);

   "**Preston Law's other clients**" means the clients of Preston Law in connection with the Wakaman cluster of claims other than the non-claimant Applicants and Uwoykand Tribal Aboriginal Corporation (**UTAC**);

   "**previous Wakaman connection reports**" means the reports described m

paragraph 72 of the Walsh affidavit

"**Wakaman cluster of claims**" means the three Wakaman claimant applications described in paragraph 2 and the three non-claimant applications described in paragraph 9 of the Walsh affidavit.

2. On what date was the firm of Preston Law first retained to provide legal services to UTAC and who on behalf of UTAC retained Preston Law?

3. On what date was the firm of Preston Law retained to provide legal services to UTAC specifically in connection with the Wakarnan cluster of claims and who on behalf of UTAC retained Preston Law?

4. On what date or dates was the firm of Preston Law retained to provide legal services to the non-claimant Applicants and Preston Law's other clients?

5. Did you inform the directors of UTAC, Mr Rodney Chong or Ms Carol Chong that Preston Law acted for the non-claimant Applicants and Preston Law's other clients?

6. If the answer to interrogatory 5 is in the affirmative:

   a. on what date did you provide the information?

   b. to whom did you provide the information?

   c. did you provide the information orally or in writing?

   d. what was the substance of the information that you provided about the other parties?

7. Did you inform the directors of UTAC, Mr Rodney Chong or Ms Carol Chong that the non-claimant Applicants and Preston Law's other clients supported a negative determination of native title?

8. If the answer to interrogatory 7 is in the affirmative:

   a. on what date or dates did you provide the information?

   b. to whom did you provide the information?

   c. did you provide the information orally or in writing?

   d. did you explain to the person or persons referred to in interrogatory 8(b) that a consequence of there being a negative determination of native title over an area was that thereafter no claim group could obtain a determination recognising the existence of native title over that area?

9. After Preston Law was retained to provide legal services to UTAC in connection with the Wakaman cluster of claims, did you inform the non-claimant Applicants or Preston Law's other clients that the members of UT AC asserted the existence of native title rights and interests over the area of Bulimba Station within the boundaries of Wakaman #5?

10. If the answer to interrogatory 9 is in the affirmative:

    a. to whom did you provide the information?

    b. on what date or dates did you provide the information?

c. did you provide the information orally or in writing?

d. did you explain to the person or persons referred to in interrogatory 10 (a) that a consequence of there being a negative determination of native title over an area was that thereafter no claim group could obtain a determination recognising the existence of native title over that area?

11. Did you obtain instructions from UTAC to pursue a negative native title determination in Wakaman #5?

12. If the answer to interrogatory 11 is in the affirmative:

a. who provided the instructions on behalf of UT AC to pursue the negative determination of native title?

b. on what date or dates were the instructions provided?

c. were the instructions provided orally or in writing?

d. before the instructions were provided, had you explained to the person or persons referred to in interrogatory 12(a) that a consequence of a negative determination of native title in Wakaman #5 was that the Kunjen People could not obtain a determination recognising the existence of native title over that part of Bulimba station pastoral lease areas within the boundaries of Wakaman#5?

13. When you retained Dr Brunton to be an expert witness for various clients in the Wakaman cluster of claims, did you inform him that UTAC was established to represent Kunjen people native title claimants in relation to the Bulimba station pastoral lease areas, including that which was within the boundaries of Wakaman #5?

14. If the answer to interrogatory 13 is in the affirmative:

a. on what date or dates did you provide that information to Dr Brunton?

b. was the information provided orally or in writing?

15. In relation to the opening submissions filed on behalf of Preston Law's clients in the Wakaman cluster of claims on 29 October 2020, did you obtain instructions from UTAC to file those submissions on behalf of UT AC?

16. If the answer to interrogatory 15 is in the affirmative:

a. who provided the instructions on behalf of UTAC?

b. on what date or dates did you seek the instructions?

c. on what date or dates did you obtain the instructions?

d. what was the substance of the instructions provided?

17. In relation to the notice of ceasing to act for UTAC in Wakaman #5 that you filed on 20 November 2020, did UTAC terminate the retainer between it and Preston Law?

18. If the answer to interrogatory 17 is in the affirmative:

a. who terminated the retainer on behalf of UTAC?

b. on what date did UTAC terminate the retainer?

c. what explanation, if any, was given to you for terminating the retainer?

d. was the termination effected orally or in writing?

19. If the answer to interrogatory 17 is in the negative:

a. who at Preston Law was responsible for terminating the retainer?

b. on what date was the retainer terminated?

c. on what basis, if any, was the retainer terminated?

d. did you inform any director or member of UTAC or Mr Rodney Chong or Ms Carol Chong about the basis for terminating the retainer before it was terminated?

e. if the answer to interrogatory 19(d) is in the affirmative:

(i) to whom did you provide the information?

(ii) what was the substance of the information that you provided?

(iii) when did you provide the information?

(iv) did you provide the information orally or in writing?

f. was a notice of intention of ceasing to act in accordance with Form 7 of the *Federal Court Rules 2011* (Cth) served on UTAC?

g. if the answer to interrogatory 19(f) is in the affirmative:

i. on what date was the notice of intention of ceasing to act served on UTAC?

ii. who was the notice of intention of ceasing to act served on and at what address?

20. On what date did you first discuss with the directors of UTAC it:

a. transitioning from an entity governed by the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act entity**) to a corporation governed by the *Corporations Act 2001* (Cth) (**Corporations Act entity**); and

b. transferring its interests in the Bulimba station pastoral leases to a Corporations Act entity?

21. Did you explain to the directors of UTAC that as a consequence of transferring its interests in the Bulimba station pastoral leases to a Corporations Act entity, UTAC would no longer have an interest in the Wakaman #5 claim area for the purposes of s. 84 of the *Native Title Act 1993* (Cth)?

22. if the answer to interrogatory 21 is in the affirmative:

a. to whom did you provide the explanation?

b. on what date or dates did you provide the explanation?

c. did you provide the explanation orally or in writing?

d. what was the substance of the explanation that you provided?

23. Did Mr Kempton at any stage act for UTAC in relation to the Wakaman cluster of claims or in relation to the matters described in interrogatory 20(a) or (b)?

24. If the answer to interrogatory 23 is in the affirmative:

a. for what period or periods did Mr Kempton act for UTAC?

b. on what basis did Mr Kempton act for UTAC?

25. If the answer to interrogatory 23 is in the negative:

a. did Mr Kempton attend meetings with any of the directors or members of UTAC, Preston Law, Mr Rodney Chong, Ms Carol Chong, the non-claimant Applicants or Preston Law's other clients in relation to the Wakaman cluster of claims or in relation to the matters described in interrogatory 20(a) or (b)?

b. if the answer to interrogatory 25(a) is in the affirmative:

i. on what date or dates did the meetings take place?

ii. who was present at the meetings or meetings?

iii. what was the substance of the discussions with Mr Kempton at those meetings?

26. Did Mr Kempton at any stage act for Mr Rodney Chong or Ms Carol Chong in relation to the Wakaman cluster of claims or in relation to the matters described in interrogatories 20(a) or (b)?

27. If the answer to interrogatory 26 is in the affirmative:

a. for what period or periods did Mr Kempton act for Mr Rodney Chong or Ms Carol Chong?

b. on what basis did Mr Kempton act for Mr Rodney Chong or Ms Carol Chong?

28. If the answer to interrogatory 26 is in the negative:

a. did Mr Kempton attend meetings with Mr Rodney Chong or Ms Carol Chong, Preston Law, UTAC, the non-claimant Applicants or Preston Law's other clients in relation to the Wakaman cluster of claims or in relation to the matters described in interrogatory 20(a) or (b)?

b. if the answer to interrogatory 28(a) is in the affirmative:

i. on what date or dates did the meetings take place?

ii. who was present at the meeting or meetings?

iii. what was the substance of the discussions with Mr Kempton at those meetings?

29. Did you provide copies of any of the previous Wakaman connection reports to Dr Ron Brunton for the purpose of his preparing expert reports for UTAC, the non-claimant Applicants or for Preston Law's other clients?

30. If the answer to interrogatory 29 is in the affirmative:

a. which reports did you provide copies ofto Dr Brunton?

b. on what date or dates did you provide copies of the respective reports?

31. If the answer to interrogatory 29 is negative, who at Preston Law provided copies of the reports to Dr Brunton?

32. Before the provision of the previous Wakaman connection reports to Dr Brunton, did you make inquiries of Mr Rodney Chong or Ms Carol Chong to satisfy yourself that the reports were not subject to an obligation of confidence, legal professional privilege or the implied undertaking described in *Hearne v Street* (2008) 235 CLR 125?

33. If the answer to interrogatory 32 is in the affirmative

a. what inquiries did you make?

b. on what date or dates did you make those inquiries?

34. Did you inform the directors of UTAC, Mr Rodney Chong or Ms Carol Chong that the previous Wakaman connection reports would be used to further the cases sought to be advanced by the non-claimant Applicants or Preston Law's other clients?

35. If the answer to interrogatory 34 is in the affirmative:

a. to whom did you provide the information?

b. on what date or dates did you provide the information?

c. what was the substance of the information you provided?

d. did you provide the information orally or in writing?

INTERROGATORIES DELIVERED BY THE APPLICANT TO DAVID KEMPTON

1. In these interrogatories

"**non-claimant Applicants**" means the applicants in the three non-claimant applications described in paragraph 9 of the affidavit by Susan Walsh filed on behalf of the Applicant in support of the enjoinder application on 24 December 2020 (**Walsh affidavit**);

"**Preston Law's other clients**" means the clients of Preston Law in connection with the Wakaman cluster of claims other than the non-claimant Applicants and Uwoykand Tribal Aboriginal Corporation (**UTAC**);

"**previous Wakaman connection reports**" means the reports described m

paragraph 72 of the Walsh affidavit

"**Wakaman cluster of claims**" means the three Wakaman claimant applications described in paragraph 2 and the three non-claimant applications described in paragraph 9 of the Walsh affidavit.

2. Did you at any stage act for UTAC or for Mr Rodney Chong or Ms Carol Chong?

3. If the answer to interrogatory 2 is in the affirmative:

   a. for what period or periods did you act for UTAC, Mr Chong or Ms Chong?

   b. on what basis did you act for UTAC, Mr Chong or Ms Chong?

4. If the answer to interrogatory 2 is in the negative, did you attend meetings with any of the directors or members of UTAC, Mr Chong, Ms Chong, Preston Law, the nonclaimant Applicants or Preston Law' other clients in relation to the Wakaman cluster of claims or in relation to the following matters:

   a. UTAC transitioning from an entity governed by the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act entity**) to a corporation governed by the *Corporations Act 2001* (Cth) (**Corporations Act entity**); and

   b. UTAC transferring its interests in the Bulimba station pastoral leases to a Corporations Act entity?

5. If the answer to interrogatory 4 is in the affirmative:

   a. on what date or dates did the meetings take place?

   b. who was present at the meetings or meetings?

   c. what was the substance of the discussions with you at those meetings?

6. Did you obtain copies of any of the previous Wakaman connection reports from Mr Rodney Chong or Ms Carol Chong?

7. If the answer to interrogatory 6 is in the affirmative:

   a. on what date or dates were you provided with the copy or copies?

   b. who provided you with the copy or copies?

   c. which reports were you provided copies of?

8. Did you provide copies of any of the previous Wakaman connection reports to Dr John Avery for the purpose of his preparing an expert report to assist Port Bajool Pty Ltd (**Port Bajool**) or GAG Crystalbrook Station Pty Ltd (**GAG Crystalbrook**) in connection with their non-claimant application?

9. If the answer to interrogatory 8 is affirmative:

   a. which reports did you provide copies of?

   b. on what date or dates did you provide copies of the respective reports?

10. If the answer to interrogatory 8 is negative, which solicitor at Preston Law provided copies of the reports to Dr Avery?

11. Before the provision of the previous Wakaman connection reports to Dr Avery, did you inform Mr Rodney Chong or Ms Carol Chong that Port Bajool or GAG Crystalbrook was seeking a negative determination of native title?

12. If the answer to interrogatory 11 is in the affirmative:

    a. to whom did you provide the information?

    b. on what date or dates did you provide the information?

    c. did you provide the information orally or in writing?

    d. did you explain to the person or persons referred to in interrogatory l 2(a) that a consequence of there being a negative determination of native title over an area was that thereafter no claim group could obtain a determination recognising the existence of native title over that area?

13. Before the provision of the previous Wakaman connection reports to Dr Avery, did you make inquiries of Mr Rodney Chong or Ms Carol Chong to satisfy yourself that the reports were not subject to an obligation of confidence, legal professional privilege or the implied undertaking described in *Hearne v Street* (2008) 235 CLR 125?

14. If the answer to interrogatory 13 is in the affirmative:

    a. what inquiries did you make?

    b. on what date or dates did you make the inquiries?

15. Did you provide copies of any of the previous Wakaman connection reports to Dr Ron Brunton so he could prepare expert reports for Port Bajool, GAG Crystalbrook, the nonclaimant Applicants or Preston Law's other clients in the Wakaman cluster of claims?

16. If the answer to interrogatory 15 is affirmative:

    a. which reports did you supply copies of?

    b. on what date or dates did you provide copies of the respective reports?

17. If the answer to interrogatory 15 is negative, which solicitor at Preston Law provided copies of the reports to Dr Brunton?

18. Before the provision of the previous Wakaman connection reports to Dr Brunton, did you make inquiries of Mr Rodney Chong or Ms Carol Chong to satisfy yourself that the reports were not subject to an obligation of confidence, legal professional privilege or the implied undertaking described in *Hearne v Street* (2008) 235 CLR 125?

19. If the answer to interrogatory 18 is in the affirmative:

    a. what inquiries did you make?

    b. on what date or dates did you make the inquiries?

20. Before the previous Wakaman connection reports were provided to Dr Avery and Dr Brunton, did you inform Mr Rodney Chong, Ms Carol Chong or UTAC that the reports would be used for the preparation of expert reports by Dr A very and Dr Brunton in one or more of the Wakaman cluster of claims?

21. If the answer to interrogatory 20 is in the affirmative:

    a. to whom did you provide the information?

    b. on what date or dates did you provide the information?

    c. did you explain to the person or persons referred to in interrogatory 21 (a) that the Port Bajool, GAG Crystalbrook, the other non-claimant Applicants or Preston Law's other clients in the Wakaman cluster of claims might seek a negative determination of native title?

    d. did you explain to the person or persons referred to in interrogatory 21 (a) that a consequence of there being a negative determination of native title over an area was that thereafter no claim group could obtain a determination recognising the existence of native title over that area?

22. On what basis did you decide to engage Ms Carol Chong to provide a consultancy report for Port Bajool?

23. Before engaging Ms Carol Chong, did you inform Mr Rodney Chong or Ms Carol Chong that Ms Chang's report would assist Port Bajool to establish that the Wakaman People had no native title over the Wakaman #3 claim area?

24. If the answer to interrogatory 23 is affirmative:

    a. to whom did you provide the information?

    b. on what date or dates did you provide the information?

    c. did you explain that Port Bajool might use the information in the consultancy report to support a negative determination of native title over the Wakaman #3 claim area?

    d. did you explain that a consequence of there being a negative determination of native title over an area was that thereafter no claim group could obtain a determination recognising the existence of native title over that area?

25 In support of the present application the Wakaman Applicant relied on the following material:

(1) The affidavits of Ms Walsh to which I have referred;

(2) The affidavits of Mr Tarquin Nesbitt-Foster to which I have referred;

(3) Expert anthropological report of Dr Ron Brunton at [26], [104] and in footnote 45 at [244] filed 19 December 2019;

(4) Affidavit of Carol Chong filed 22 July 2020 and amended 17 November 2020 tendered as Exhibit 63 during the law evidence hearing;

(5) Letter from Michael Neal of P & E Law to Chriss Harriss of NQLC dated 16 July 2015, tendered as Exhibit 68 during the lay evidence hearing;

(6) Affidavit of Rodney Chong filed 22 July 2020 amended 17 November 2020 filed 19 November 2020 tendered as Exhibit 61 during the law evidence hearing;

(7) Map prepared by Warren Chase (in two parts) with interpretation of Rodney Chong's hand-drawn boundary dated 5 April 2000 tendered as Exhibit 81 during the law evidence hearing;

(8) Affidavit of Warren Chase, cartographer, who prepared Exhibit 81 map dated 20 January 2021 and filed 21 January 2021; and

(9) The following transcripts from the lay evidence hearing:

(a) 19 November 2020 pp 1541-1544;

(b) 23 November 2020 pp 1835-1836;

(c) 24 November 2020 pp 1942-1945;

(d) 24 November 2020 p 2006; and

(e) 24 November 2020 p 2008.

26 None of the active respondents to the interrogatories application filed any evidence in respect of the interrogatories application.

SUBMISSIONS OF THE PARTIES

27 In summary, the Wakaman Applicant submitted that the orders currently sought ought be made because:

- At the hearing in November, evidence emerged during the cross-examination of Mr Chong and Ms Chong which raised concerns about a conflict of interest that would prevent Preston Law from acting for various pastoral respondents.
- The Court's inherent jurisdiction over its officers and to control its process in aid of the administration of justice was a central issue in respect of this application. The test was whether a fair-minded, reasonably informed member of the public might conclude that the proper administration of justice requires that a practitioner should be prevented from acting in the interests of the integrity of the judicial process and the appearance of justice (*Mumbin v Northern Territory of Australia (No 1)* [2020] FCA

475, *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* [2014] FCA 1065).

- The cross-examination of Mr Chong by Senior Counsel for the State during the hearing painfully demonstrated that Mr Chong was not aware, and had not been told by his lawyers, of the consequences of a negative determination of native title. Similarly

  Ms Chong was not aware that a negative determination would preclude the Kunjen People from obtaining native title in the future in respect of that area.
- The proposed interrogatories sought to elicit answers that related to the matters in issue in the enjoinder application, and did not involve fishing.
- The proposed interrogatories did not involve fishing because the present circumstances did not constitute a case where the Wakaman Applicant sought to find out something of which he knew nothing now, which might enable it to make a case of which it had no knowledge at present.
- The proposed interrogatories were not oppressive.
- The question whether interrogatories should be ordered could not be separated from the enjoinder application and the evidence adduced in relation to it.
- The evidence before the Court supported an inference that Preston Law had a conflict of interest in acting on behalf of UTAC and other respondents that sought a negative determination of native title in relation to all of the Wakaman applications.
- The Court's inherent jurisdiction to protect the due administration of justice was engaged.
- The orders sought would accord with the overarching purpose set out in s 37M of the *Federal Court of Australia Act 1976* (Cth), as they would enable the Wakaman Applicant to obtain answers on matters in issue without the need to prepare and seek leave to file a statement of claim.

28 In support of the interrogatories application the State submitted (in summary) that:

- The proposed interrogatories were directed to eliciting answers relating to matters in issue in the enjoinder application, which would have a benefit of narrowing issues the Court might ultimately have to determine on the enjoinder application.
- The Court had the power to order interrogatories in the present case.

- The Court should be guided by the overarching purpose of civil practice and procedure.
- The interrogatories were proper interrogatories as they related to a matter in question, as informed by the evidence that was filed in support of the enjoinder application which established a presently existing case as to whether or not the enjoinder respondents ought to be restrained on the administration of justice ground having regard particularly to the fiduciary obligations owed to UTAC and the circumstances of the termination of the retainer by Mr Kerr with that entity.
- The interrogatories were not objectionable. To the extent there was any issue about privilege attaching to answers the subject of the questions in proposed interrogatories, that was a matter that could be resolved at the time the interrogatories were to be responded to, and was not a basis to refuse to order the interrogatories.

29 Mr Kempton and Mr Kerr opposed the present interlocutory application. In summary, they submitted:

- Part 21 of the Federal Court Rules presupposed there would be pleadings in place to guide the exercise of the discretion. There were no pleadings as between the Wakaman Applicant and Messrs Kempton and Kerr to define relevance in terms of the complaint against them, and to inform the exercise of the Court's discretion pursuant to Part 21 of the Federal Court Rules.
- Departure from the usual position as contemplated by the Federal Court Rules must be shown to be appropriate in the interests of justice.
- Interrogation was rarely utile.
- Insofar as the Wakaman Applicant sought an order for interrogatories in the interests of justice, the proposed interrogatories were not directed to any question of fact or issue in the substantive litigation. Rather, they were merely sought in aid of an ancillary question concerning the legal representative of a number of respondents. To that extent the proposed interrogatories would not shorten the trial or reduce costs – rather they would more likely have the opposite effect.
- Leave to interrogate would impinge adversely on the rights and interests of strangers to the immediate application, namely the pastoralists for whom Preston Law continued to act.

- There was no suggestion that the Wakaman Applicant or any of them were themselves former clients of Mr Kempton or Mr Kerr.
- Many of the proposed interrogatories were directed towards a subject matter protected by privilege, and were thus objectionable.
- The interrogatories application must be considered with appropriate caution and with due regard to the interests of persons presently and formerly represented by Preston Law.
- The native title claim group in this case was riven by differences of a most fundamental kind. The evidence before the Court was that Ms Chong was not comfortable seeking advice or information from the Wakaman Applicant's lawyers.
- The Wakaman Applicant had no standing to rely on either UTAC's Rule Book or the Charitable Trust Deed of UTAC in support of its complaint against Mr Kempton and Mr Kerr.
- The diversity of interest within the Wakaman Applicant claim group was also material to any complaint of apprehended misuse of confidential information.
- There was no basis upon which the Wakaman Applicant might claim to be owed a duty of loyalty by either Mr Kempton or Mr Kerr.
- The proper order was to entirely refuse leave to interrogate. Alternatively the Court should refuse leave to interrogate Mr Kempton and Mr Kerr in respect of matters protected by legal professional privilege, however on that basis all proposed interrogatories would be objectionable.

CONSIDERATION: GENERAL OBSERVATIONS

30 The interrogatories proposed to be served on Mr Kerr could be broadly described as eliciting answers to the question whether there existed a conflict of interest in his acting for UTAC and the affected parties in circumstances in which the retainer with UTAC was terminated, including:

- Details of Preston Law being retained to provide legal services to UTAC: proposed interrogatories 2 and 3.
- Details of Preston Law being retained to provide legal services to non-claimant applicants and other clients, and advising Mr Chong and Ms Chong of this (including

that those other clients supported a negative determination of native title): proposed interrogatories 4, 5, 6, 7 and 8.

- Whether he informed the non-claimant Applicants or other clients that UTAC asserted native title rights over Bulimba Station: proposed interrogatories 9 and10.
- Whether he obtained instructions from UTAC to pursue a negative native title determination in Wakaman #5, and more broadly relevant instructions to Preston Law from UTAC and the termination of the lawyer/client relationship: proposed interrogatories 11, 12, 15, 16, 17, 18, 19, 20, 21 and 22.
- Details of interaction with Dr Brunton, in relation to interests of UTAC and provision of copies of previous Wakaman connection reports: proposed interrogatories 13, 14, 29, 30 and 31.
- Whether and the extent to which Mr Kempton acted for UTAC or Mr Chong or Ms Chong: proposed interrogatories 23, 24, 25, 26, 27and 28.
- Inquiries of Mr Chong and Ms Chong concerning the status of the previous Wakaman connection reports: proposed interrogatories 32, 33, 34 and 35.

31 The interrogatories proposed to be served on Mr Kempton can be broadly described as eliciting answers to the question whether there existed a conflict of interest in his acting for Mr and Ms Chong, including:

- Whether Mr Kempton acted for UTAC, Mr Chong or Ms Chong, and details thereof: interrogatories 2 and 3.
- In the absence of a client relationship, whether Mr Kempton attended meetings with named parties in relation to the Wakaman claims or UTAC's corporate status: interrogatories 4 and 5.
- Material concerning previous Wakaman connection reports obtained from Mr Chong or Ms Chong, and Mr Kempton's use of such reports including provision to Dr John Avery or Dr Ron Brunton: interrogatories 6, 7, 8, 9, 10, 15, 16 and 17.
- Whether Mr Kempton informed Mr Chong or Ms Chong that Port Bajool or GAG Crystalbrook was seeking a negative determination of native title: interrogatories 11 and 12.
- Inquiries of Mr Chong and Ms Chong concerning the status of the previous Wakaman connection reports: interrogatories 13, 14, 18, 19, 20 and 21.

- The engagement of Ms Chong to provide a consultancy report for Port Bajool, and information provided to Mr Chong and Ms Chong in respect of the prospective use of that report: interrogatories 22, 23 and 24.

32 A starting point for consideration of the present application is that:

- Orders for service of interrogatories are exceptional.
- The enjoinder application and the interrogatories application were not the subject of a statement of claim or other formal pleadings in the present proceedings referable to rule 21.02 of the Federal Court Rules. Rather, the Wakaman Applicant relied on evidence adduced by it, in particular pursuant to the Walsh affidavit, and by the State, in particular the Nesbitt-Foster affidavits, as establishing a *prima facie* case in respect of the enjoinder application.
- Insofar as concerned Mr Kerr and Mr Kempton, the Wakaman Applicant's case was limited. Mr Kerr, Mr Kempton and Preston Law were not parties to the native title proceedings, rather they were parties to the enjoinder application and the interrogatories application.
- The proposed interrogatories related to the interactions between Mr Kerr, Mr Kempton and Preston Law on the one hand, and UTAC, Mr Chong and Ms Chong on the other, not substantive issues in dispute between the parties.
- The Wakaman Applicant which sought leave to serve the interrogatories was a stranger to the retainer in respect of which Preston Law was engaged by Mr Chong, Ms Chong and UTAC. The Wakaman Applicant framed its case in terms of the inherent jurisdiction of the Court to protect the due administration of justice.
- Leave to interrogate was strongly opposed by Mr Kempton and Mr Kerr for a variety of reasons, including that all information sought by the Wakaman Applicant in the interrogatories would be subject to legal professional privilege.
- The Court has an overall discretion to allow or disallow the administering of interrogatories, but will not do so if the interrogatories are "fishing", or vexatious or oppressive.

33 Accordingly, in determining the present application it is appropriate to examine the following issues:

(1) In determining whether the Court should dispense with the requirements in r 21.02:

(a) Whether the enjoinder application (and the supporting Walsh Affidavit) currently engaged the inherent jurisdiction of the Court to protect the due administration of justice;

(b) Whether an interlocutory application supported an order for interrogatories under Part 21 of the Federal Court Rules;

(c) Whether it was relevant that the Wakaman Applicant, being the applicant in respect of both the enjoinder application and the present application, was a stranger to the retainer of Preston Law, and that the respondents to the present application were not otherwise parties to the principal proceedings; and

(2) Whether the interrogatories were relevant to the enjoinder application, or constitute "fishing", and whether they gave rise to a breach of legal professional privilege principles such that the Court should refuse leave.

1. SHOULD THE COURT DISPENSE WITH COMPLIANCE WITH R 21.02 OF THE FEDERAL COURT RULES?

(a) Whether the enjoinder application (and the supporting Walsh Affidavit) currently engaged the inherent jurisdiction of the Court to protect the due administration of justice

34 The enjoinder application has been filed, but it is not presently before the Court for determination. As I have already noted, it constitutes a claim by the Wakaman Applicant to restrain Preston Law from acting in the proceedings for all its pastoral clients including GAG Crystalbrook, or (in the alternative) specific orders restraining Mr Kerr, Mr Kempton and Ms Cao-Kelly from acting for specific respondent clients. The Walsh affidavit particularised the alleged facts which the Wakaman Applicant asserted in support of the interrogatories application.

Relevant authorities

35 To the extent that the Wakaman Applicant claimed that the enjoinder application engaged the inherent jurisdiction of the Court to ensure the due administration of justice, the Wakaman Applicant relied in particular on the decisions of this Court in *Mumbin v Northern Territory of Australia (No 1)* [2020] FCA 475 and *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* [2014] FCA 1065.

36 In *Mumbin* there were two competing and overlapping native title determination applications in respect of land and waters in and around the town of Katherine in the Northern Territory. The applicant in respect of claim A sought to restrain the applicant in respect of claim B from engaging a particular Counsel to act, in circumstances where, for a number of years, the Counsel had worked as a lawyer with the Northern Land Council and had had some involvement in the prosecution of those claims.

37 The Court there noted that the prospect of misuse of confidential information was in issue, however Griffiths J also identified relevant principles guiding the exercise of the Court's separate discretion as including the inherent jurisdiction of the Court to ensure the due administration of justice. His Honour made the restraining orders sought. In particular his Honour observed at [39]:

> (a) The Court has an inherent jurisdiction to ensure the due administration of justice, to protect the integrity of the judicial process and to restrain legal practitioners from acting in a particular case as part of its supervisory jurisdiction (see, for example, *Grimwade v Meagher* [1995] VicRp 28; [1995] 1 VR 446 at 452 per Mandie J and *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* [2014] FCA 1065; 228 FCR 252 at [37] per Beach J).
>
> (b) The test to be applied is whether a fair-minded, reasonably informed member of the public might conclude that the proper administration of justice requires that a solicitor be prevented from acting in the interests of the protection of the integrity of the judicial process and the appearance of justice (I prefer this formulation of the principle, as opposed to the use of the term "would": see *Timbercorp* at [62] per Anderson J and the cases cited therein, as opposed to the different formulation adopted by Beach J in *Dealer Support Services* at [94], upon which the Jawoyn Claim applicant relied, but I would regard even that higher standard to have been met in the circumstances here).
>
> (c) Due weight must be given to the public interest in a client not being deprived of the legal practitioner of its choice, however, this important value can be over-ridden in an appropriate case (*Dealer Support Services* at [95] per Beach J).
>
> (d) This basis for disqualification is not discharged by it simply being demonstrated that there is no risk of the misuse of confidential information (*Dealer Support Services* at [96] per Beach J).
>
> (e) This basis for disqualification is an "exceptional one" and is "to be exercised with appropriate caution" (*Geelong School Supplies Pty Ltd v Dean* [2006] FCA 1404; 237 ALR 612 at [35] per Young J).
>
> (f) A legal practitioner may be restrained from acting in a matter not only where the practitioner has a conflict of interest viz a viz a former client, but also viz a viz a person who is "as good as" a client (*Macquarie Bank Ltd v Myer* [1994] VicRp 22; [1994] VR 350 at 359 per J D Phillips J).

38 Importantly for present purposes, Griffiths J also noted the *sui generis* nature of native title litigation, including by reference to the observation of Reeves J in *QGC Pty Limited v Bygrave* [2010] FCA 659; 186 FCR 376 at [57] that:

> All these observations underscore the fact that the role of the solicitor on the record is critical to the Court's ability to ensure that the cases before it are managed efficiently, promptly and inexpensively. This is particularly so in native title litigation where the costs sanction against the parties has been significantly reduced by the provisions of s 85A of the Act requiring costs orders to be the exception in such litigation. ***This necessarily means that the Court has to rely even more heavily upon the diligence and integrity of the solicitor on the record, among others, in the case management of native title litigation***…
>
> (emphasis added)

39 Second, in *Dealer Support Services* Beach J examined the question whether, in that case, a fair- minded reasonably-informed member of the public would conclude that the proper administration of justice required that the lawyers should be prevented from acting, in order to protect the integrity of the judicial process and the due administration of justice, including the appearance of justice. In that case the plaintiff sued the defendant, challenging the ownership of a trademark. The plaintiff was represented by a law firm, an earlier incarnation of which had acted for the defendant. The defendant brought an injunction to restrain the plaintiff from continuing to retain the law firm in the proceeding, relying (*inter alia*) on the inherent jurisdiction of the Court to ensure the due administration of justice.

40 Justice Beach was not satisfied that the circumstances warranted the disqualification of the law firm from acting, and dismissed the application. At [37] his Honour observed:

> 37. The third potential basis for disqualification arises from the Court's inherent jurisdiction to ensure the due administration of justice, to protect the integrity of the judicial process and to restrain solicitors from acting in a particular case as part of its supervisory jurisdiction (*Grimwade v Meagher* [1995] VicRp 28; [1995] 1 VR 446 at 452 per Mandie J and fortified by Brooking JA in *Spincode* at [32]-[44], [48] and [60]). In this context, the test to be applied is "whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice required that [the solicitors] be so prevented from acting, at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of [solicitors] without good cause" (at 452 per Mandie J). I accept this potential basis for disqualification and both Mandie J's and Brooking JA's exposition of principle. The real question in the present case is the application of that principle.

41 Subsequently his Honour stated:

> 93. I accept this third basis in principle as expounded by Mandie J in *Grimwade* at 452, Brooking JA in *Spincode* at [40]-[41] and [60] and Young J in

Geelong School Supplies at [29], [33] and [35].

94. First, the test to be applied is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a solicitor be prevented from acting in the interests of the protection of the integrity of the judicial process and the appearance of justice.

95. Second, due weight should be given to the public interest in a client not being deprived of the solicitor of its choice. That public interest is an important value, although it can be over-ridden with due cause (*WA v Ward* at 498 per Hill, Branson and Sundberg JJ).

96. Third, this third basis is not discharged by it being demonstrated that the first basis does not apply (cf *Photocure* at [56] and [60] per Goldberg J). It has independent scope. The third basis deals not just with private fiduciary relationships and *inter-partes* fiduciary obligations, but rather the administration of justice, the public interest and the appearance of propriety of officers of the court. The third basis is not only justified, but its justification explains its additional scope.

97. Fourth, nevertheless this jurisdiction is an "exceptional one" and is "to be exercised with appropriate caution" (Young J in *Geelong School Supplies* at [35] and Brereton J in *Kallinicos* at [76]).

98. The principles are clear enough. Their application is another question.

42 His Honour found there were powerful reasons against disqualification, including that different individual solicitors were acting for the plaintiff with no prior association with the defendant, the earlier firm had ceased relevant work for the defendant almost a decade beforehand, there was no actual conflict of duty and duty or duty and interest associated with the firm acting, and the fact that restraining the firm from acting would cause unnecessary cost and inconvenience.

43 It is self-evident that the most likely scenario in which an application for restraint against a law firm acting is made where the applicant is a former client of the firm. This was the position in *Dealer Support Services*. However, relevant principles are not confined to such circumstances. As Young J observed in *Geelong School Supplies Pty Ltd v Dean* (2006) 238 ALR 612 at 619 [33], there is unambiguous authority that the Federal Court has the inherent power to restrain solicitors or counsel acting in a particular matter for a particular client where such a course is required by the interests of justice. In *Western Australia v Ward* (1997) 76 FCR 492 Hill and Sundberg JJ said at 498:

> A court exercising Federal jurisdiction, like any other court, must, if it be necessary to ensure that justice be done and be seen to be done, and thus that the integrity of the judicial process be protected, have power to prevent a particular counsel or solicitor appearing for a party…

…

> Enough has been said to show that the requirements of natural justice do not involve an absolute right to the legal adviser of a party's choice. The instances in which courts have prevented chosen counsel or solicitors from acting have involved misconduct, potential use of confidential information, and a real risk of lack of objectivity and of conflict of interest and duty: *Grimwade v Meagher*. The present case is only another example of situations in which the' 'integrity of the judicial process", the "interests of justice", and the "need to preserve confidence in the judicial system", to use some of the notions that lie behind the inherent jurisdiction to exclude counsel or solicitors, may override the public interest that a litigant be able to be represented by the lawyer of its choice. That public interest is "an important value": *Black v Taylor* at 408. It is a serious matter to prevent a party from retaining its chosen lawyer: *Grimwade v Meagher*. But as those cases illustrate, particular circumstances may require some modification of the public interest in the ability of a litigant to have a lawyer of its choice.

44 In *Black v Taylor* [1993] 3 NZLR 403 to which the Hill and Sundberg JJ referred, the Court of Appeal of New Zealand considered a case where, for decades, a solicitor had acted for several members of a family, including the plaintiff and his late uncle. The plaintiff made claims against the estate of the uncle for breach of an alleged reciprocal contract to leave him certain shares in his will, and sought an injunction to restrain the solicitor from acting for the estate. At first instance the High Court of New Zealand made a declaration in those terms, and the solicitor appealed.

45 The Court of Appeal of New Zealand unanimously found that the appeal should be dismissed. In particular I note the following observations of Richardson J at 408-409:

> The High Court has an inherent jurisdiction to control its own processes except as limited by statute. As an incident of that inherent jurisdiction it determines which persons should be permitted to appear before it as advocates. In determining what categories of person may appear it does so in accordance with established usage and with what is required in the public interest for the efficient and effective administration of justice (3(1) *Halsbury's Laws of England* (4th ed) para 396).
>
> Another aspect of the inherent jurisdiction is the control of a particular proceeding in the Court. There the Court's concern is with the administration of justice in a particular case and in the generality of cases and with the associated basic need to preserve confidence in the judicial system. The right to a fair hearing in the Courts is an elementary but fundamental principle of British justice. It reflects the historical insistence of the common law that disputes be settled in a fair, open and even-handed way. It has been a mainspring of the development of administrative law over the past 40 years. Its fundamental importance has been emphasised in a number of recent decisions of this Court, including *Minister of Foreign Affairs v Benipal* [1984] 1 NZLR 758; *EH Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146 and R v Hall [1987] 1 NZLR 616.
>
> An associated consideration is the fundamental concern that justice should not only be done but should manifestly and undoubtedly be seen to be done (*R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, 259 per Lord Hewart CJ; see also *R v Racz* [1961] NZLR 227 and R v Burney [1989] 1 NZLR 732).

> The integrity of our system of justice depends on its meeting those standards. The assessment of the appearance of justice turns on how the conduct in question - here Mr Gazley's wish to be able to act as a counsel for the defendants against MA Taylor - would appear to those reasonable members of the community knowing of that background.
>
> In making that assessment the Court will also give due weight to the public interest that a litigant should not be deprived of his or her choice of counsel without good cause. The right to the choice of one's counsel is an important value. But it is not an absolute. That is recognised in criminal legal aid where the assignment of counsel is made by the Registrar and is not a matter of client choice (*Legal Services Act 1991*, s 17). And as a matter of practice the Court limits client choice in various respects. By way of illustration it does so by restricting the number of counsel it will hear; by expecting that counsel who have made an affidavit or a report before an appeal Court on factual matters of some significance will not appear to argue the case (*R v Lui* [1989] 1 NZLR 496); and by indicating that a practitioner should not appear as counsel for a party when his partner's conduct is a fact relative to an issue before the Court (*Barrott v Barrott* [1964] NZLR 988).

46 In *Grimwade v Meagher* [1995] 1 VR 446, the plaintiff had been the subject of earlier criminal prosecutions involving alleged commercial dishonesty. A number of other parties (**other original defendants**) were also prosecuted. The first defendant in *Grimwade v Meagher* had been retained as senior counsel instructed by the Crown in respect of the earlier criminal prosecutions. The plaintiff had been convicted in the Supreme Court of Victoria, however an appeal against conviction (in which the first defendant had appeared for the prosecution) was allowed by the Court of Criminal Appeal. Subsequently related civil proceedings were brought against the plaintiff by the other original defendants. The other original defendants instructed the first defendant to act for them in the civil proceedings against the plaintiff. The plaintiff sought an order restraining the first defendant from appearing for the other original defendants in those civil proceedings.

47 Justice Mandie allowed the plaintiff's application and made orders restraining the first defendant from acting. After examining a number of authorities in which the inherent jurisdiction of the Court to ensure the due administration of justice and protect the integrity of the judicial process were discussed, his Honour concluded at 454:

> …that there is a real and sensible risk of a lack of objectivity by the first defendant which not only gives rise to an undue risk of unfairness or disadvantage to the plaintiff but gives rise to a substantial concern that a fair trial would not be had and hence gives rise to a concern for the integrity of the judicial process and the due administration of justice.

48 While at 455 his Honour noted as important the right of a litigant to retain counsel of its choice, and that it was a serious matter to prevent a party from retaining such counsel, "particularly on the application not of a former client of that counsel but of an opposite or

adverse party", his Honour was satisfied that a restraining order should be made. As his Honour observed:

> I consider that a fair-minded reasonably informed member of the public would conclude that the proper administration of justice required that the first defendant be prevented from appearing in the said action because of the real risks of lack of objectivity and of conflict of interest and duty to which I have earlier referred.

49 Similarly, in *Williamson v Nilant* [2002] WASC 225 a firm of lawyers was retained to act both for a liquidator of a company, and Mr Rama, the shareholder who had applied for the winding up of the company. The company had been placed in liquidation following disputes between Mr Rama and other shareholders Messrs Williamson and Yogan in respect of the conduct of their conduct in the company, and the fate of a large sum representing the sale price of corporate assets. Messrs Williamson and Yogan applied to the Court for the removal of the firm of lawyers who acted for the liquidator. As McKechnie J observed, it was clear that the three people chiefly concerned in respect of the company were divided into two camps, being Mr Rama in one camp and Messrs Williamson and Yogan in another. His Honour observed:

> 16 Before 13 November 2001, I do not consider there was any conflict of interest by Metaxas & Vernon. Up until that date, Mr Metaxas had appeared on the examinations on instructions from the liquidator. There is no evidence that his firm had been retained by Rama. Even if, as appears to be the case, Rama funded the examinations, no conflict arose. Interested parties will often fund actions by a liquidator. Provided the legal practitioner's loyalty between clients is not compromised, there can be no objection to this course.
>
> 17 Since 13 November 2001 however, it seems to me that Metaxas & Vernon have been caught in a hopeless conflict. They owe a duty of loyalty to Rama. They also owe a duty of loyalty to the liquidator, together with a duty to advise the liquidator in circumstances where the liquidator is obliged to act objectively and impartially. Any advice tendered by the solicitors or actions recommended by them must be seen against a background where there is a liquidation on the basis of oppression and an insoluble conflict between the two camps directly interested in the liquidation, one of whom is also the client of the same solicitors.
>
> 18 Of course, lawyers are not judges and the same degree of independence and impartiality is not required, nor expected. Lawyers are expected to advance their clients' cases with vigour. However, in the present case there is a clear perception that, fulfilling their role to provide impartial and sound advice to the liquidator, it would be difficult, if not impossible, for the solicitors to put to one side, their role in representing Rama.

50 His Honour continued:

> 22 Cases will differ. In not every case where a solicitor acts for a liquidator and a party interested in the liquidation will there be a conflict. However, in the

> present case it seems to me there is sufficient reason to cause Metaxas & Vernon to be removed as solicitors for the liquidator. A liquidator's duty was long ago stated to be:
>
> > "... it is of the utmost importance that the liquidator should ... maintain an even and impartial hand between all the individuals whose interests are involved in the winding-up. He should have no leaning for or against any individual whatever." (*Contract Corporation, In re Gooch's Case* (1871) LR 7 Ch App 207 at 211).
>
> 23 This is not a case where the solicitor has come into possession of confidential information while acting for one client and there is a risk that confidential information may be disclosed when acting for another client; *Newman v Phillips Fox* (1999) 21 WAR 309. Nor is it a case where the solicitor has some form of stake in the outcome such as to raise a query as to the independence of the solicitor from the cause of action: *Afkos Industries Pty Ltd v Pullinger Stewart (A Firm)* [2001] WASCA 372,
>
> 24 Rather, this is a case which falls within the inherent jurisdiction of the Court and particularly in the necessity for the Court to control its processes and those of its officers, including liquidators.

51 His Honour made the restraining order sought.

52 In contrast, in *Mitchell v Pattern Holdings Pty Ltd* [2000] NSWSC 1015 the main proceedings involved a dispute in which the plaintiff sought an order that a contract of sale of a residential unit be specifically performed. The defendant was the registered owner of a building which it proposed to develop into four strata title units. The contract was entered prior to the completion of the development. The defendant had reached a confidential settlement with other parties, who had brought separate proceedings against the defendant in respect of a similar unit. A law firm had acted for those other parties, and at the time of these proceedings acted for the plaintiff. The defendant objected to the law firm acting for the plaintiff, on the basis that its previous litigation with the other parties had been resolved on a confidential basis, that the law firm was required to maintain that confidentiality on behalf of the other parties for whom it had acted, and that an available inference was that the law firm was involved in a breach of the contractual relationship between the defendant and those other parties in relation to confidentiality. The law firm rejected these contentions and declined to cease acting for the plaintiff.

53 Neither the plaintiff nor the other parties made any application to restrain the law firm from acting. The defendant sought an order to that effect on the basis of the inherent jurisdiction of the Court.

54 Justice Bergin refused to make the order sought. At [34] her Honour noted that, as an incident of its inherent jurisdiction, this Court may decide upon the propriety of a legal practitioner

representing a party in a particular case to ensure justice and the appearance of justice, although such jurisdiction should be exercised with circumspection. Her Honour found however that the case before the Court was distinguishable from such cases as *Grimwade v Meagher*, in that the retainer of the law firm by the plaintiff and the other parties was in the nature of a multiple retainer against a single defendant. Her Honour held that the onus was on the defendant to establish a real and sensible possibility of the misuse of confidential information possessed by the lawyers, in that there was no suggestion there would be conscious disclosure. Her Honour observed however that the defendant had not adduced evidence which would allow the Court to assess the real and sensible possibility of misuse of confidential information.

This case

55 Returning to the case now before me, as Griffiths J observed in *Mumbin* at [66] while each case necessarily turns on its own particular facts and circumstances, it is also appropriate to factor in the unique nature of native title litigation.

56 There is no statement of claim in respect of this application. Rather, as the Wakaman Applicant submitted, relying in particular on the Walsh affidavit and the affidavits of Mr Nesbitt-Foster, its case in summary was that Preston Law (in particular, and relevantly, Mr Kerr and Mr Kempton) ought be restrained from acting for the pastoral respondents.

57 In short, by reference to the authorities to which I have already referred, I am satisfied that there is at present at least a *prima facie* case that the Court's inherent jurisdiction is engaged by the facts as presented, and such evidence as is before the Court. From the evidence of Ms Walsh and Mr Nesbitt-Foster to which I have referred, the Court can at least potentially infer that:

- Mr Chong and Ms Chong were at relevant times directors and/or senior executive officers of UTAC and Uwoykand.
- Preston Law (and more specifically Mr Kerr and Mr Kempton) were acting for UTAC, and potentially Mr and Ms Chong, at the same time as acting for pastoral respondents including GAG Crystalbrook.
- Notwithstanding that UTAC, Mr Chong and Ms Chong did not support the Wakaman Applicant in its applications for native title, the objectives of both UTAC and

Uwoykand included the pursuit of native title, including in respect of land the subject of the Wakaman claims, whereas pastoral respondents such as GAG Crystalbrook did not have similar objectives.

- It is unclear whether Preston Law advised Mr Chong and Ms Chong of the implications of opposing the Wakaman Applicant's applications, including that a negative determination of native title in respect of the land the subject of the Wakaman claims could bar any subsequent native title determinations they might seek to press in respect of the land on behalf of another native title applicant (in particular, the Kunjen People).
- Notwithstanding the submissions of Mr Jonnson QC that UTAC had the freedom to subordinate and forgo any native title rights they might have asserted to the more conventional rights UTAC held under the pastoral leases, and that the interests of Mr Chong were antithetical to those asserted by the Wakaman Applicant, the interests of such pastoral respondents as GAG Crystalbrook, and the interests of Indigenous respondents such as UTAC/Uwoykand and Mr and Ms Chong, were potentially significantly divergent.
- There were unresolved questions concerning the apparent lack of notice by Preston Law to UTAC and/or Mr Chong and Ms Chong, in ceasing to act for them.
- Notwithstanding the submission of Mr Jonnson QC questioning whether the necessity for the due administration of justice meant that the continuing pastoral respondents should be effectively denied their representation of choice, there was no evidence before the Court that other lawyers in the employment of Preston Law (other than Mr Kerr and Mr Kempton, and/or Ms Cao-Kelly) could not act for those continuing pastoral respondents.
- Notwithstanding the submission of Mr Jonnson QC in respect of the appearance of Mr Boulot during the hearing, Mr Bolout did not act for UTAC, only for Mr and Ms Chong until they were granted leave to withdraw as respondents.

(b) Whether an interlocutory application supported an order for interrogatories under Part 21 of the *Federal Court Rules*?

58 Although I am satisfied that, based on the evidence to which I have referred, and for the purposes of the interrogatories application, the inherent jurisdiction of the Court is engaged, the next question is whether interrogatories ***can*** be issued in respect of an interlocutory

application such as the enjoinder application, and whether the Court ought dispense with the requirements of rule 21.02 of the Federal Court Rules.

59 As I have already explained, the substantive proceedings concerned applications for determination of native title under the Native Title Act. The enjoinder application raised issues related to the substantive proceedings, referable to representation in those proceedings.

60 I have been unable to identify an analogous decision where an application for leave to interrogate was made, or granted, in respect of a related interlocutory application, being adjunct to substantive proceedings. This lack of success may be attributable to the relative rarity of applications for the issue of interrogatories in modern times, and the fact that such cases as have seen leave granted have involved applications for the issue of interrogatories referable to matters in the pleadings in the substantive proceedings. However, this does not mean that the Wakaman Applicant is precluded from either seeking leave for the issue of interrogatories relating to the enjoinder application, or dispensation with rule 21.02. I so observe in circumstances where it appeared to be common ground among the parties appearing in the present proceedings that the power of the Court to protect the integrity of Court processes is in itself an important aspect of the Court's jurisdiction, in respect of which the parties can properly make application and submissions.

61 I am not satisfied that the Court lacks jurisdiction to grant leave simply because the interrogatories relate to the enjoinder application, and there are no pleadings in respect of that application. Rather, I am satisfied that, in the exercise of the Court's discretion, the necessity of compliance with rule 21.02 can be dispensed with in the present circumstances.

(c) Whether it is relevant that the Wakaman Applicant, being the applicant in respect of both the enjoinder application and the present application, is a stranger to the retainer of Preston Law, and that the respondents to the present application are not otherwise parties to the principal proceedings

62 The Wakaman Applicant is a stranger to the retainer of Preston Law, not being a present (or former) client of the firm. As the cases to which I have referred demonstrate, however, this does not in itself mean that the Wakaman Applicant is not a proper applicant to the enjoinder application. For the same reasons, there is no reason that the Wakaman Applicant cannot be a proper applicant to the application presently before the Court, or that Preston Law, Mr Kerr, Mr Kempton and Ms Cao-Kelly cannot be respondents.

Conclusion

63 Rule 21.02 of the Federal Court Rules provides:

> **21.02 When application may be made**
>
> A party must not make an application under rule 21.01 until 14 days after the pleadings have closed and, if an order has been made under Division 20.2, the parties have served any lists of documents.

64 However, r 1.34 of the Federal Court Rules provides:

> **1.34 Dispensing with compliance with Rules**
>
> The Court may dispense with compliance with any of these Rules, either before or after the occasion for compliance arises.

65 As the Full Court explained in *Dowling v Fairfax Media Publications Pty Ltd (No. 2)* [2010] FCAFC 28 in respect of an earlier version of r 1.34:

> 61. This rule, it has been said, "confers a very wide discretion on the court": cf *Lazar v Taito (Australia) Pty Ltd* [1985] FCA 35; (1985) 5 FCR 395 at 414 per Neaves J. The power "may be exercised ... where there is no apparent injustice and the alleged error can only be one of procedure": at 403 to 404 per McGregor J. "There is no general test to be applied in exercising the discretion given under O 1 r 8, save that the Court ought to do what justice appears to require": *Rishmawi v Minister for Immigration and Multicultural Affairs* [1999] FCA 611 at [7] per Kiefel J. Albeit in a different factual context, it has further been said that the "essential concern of the Court must be to adopt a process for communication which allows for an exchange between the Court and the litigants, and between the litigants themselves": *SAAK v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 86 at [49], 121 FCR 185 at 194 per North, Goldberg and Hely JJ. By way of example, the rule has been invoked where a notice of appeal was filed within time but service had not been effected within 21 days: *Moore v Tooheys Ltd* [1981] FCA 172; (1981) 56 FLR 345 at 349 per Bowen CJ, Northrop and Morling JJ.

66 In this case, because interrogatories are sought to be served in respect of issues the subject of an interlocutory application, there is no scope for there to be pleadings in the terms envisaged by r 21.02 of the Federal Court Rules. Nonetheless, the case of the Wakaman Applicant can be ascertained from the material in the Walsh affidavit. The material in that affidavit raises questions which engage the inherent jurisdiction of the Court, and, as I have already explained, I am satisfied that leave can be sought to issue interrogatories in respect of an interlocutory application of this nature.

67 It is appropriate for the Court to dispense compliance with r 21.02 of the Federal Court Rules in this case.

2. SHOULD THE COURT GRANT LEAVE TO ISSUE THE INTERROGATORIES SOUGHT?

General principles

68 The principles underlying the power of the Court to order a party to provide written answers to interrogatories were comprehensively described by Mansfield J in *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd* [2012] FCA 290 in the following terms:

> 24 The relevant Rule under the *Federal Court Rules 2011* as to the administration of interrogatories is Rule 21. I do not consider that the earlier Federal Court Rules, if applied, would result in a difference in the principles to be applied or in the outcome of this application, so I will deal with this application under Rule 21 of the 2011 Rules. There is a difference between granting leave to administer interrogatories, and ordering a party to provide written answers to interrogatories. It would make no difference to the outcome. The relevant step in the proceeding for the purposes of Rule 1.04(2) will be the ordering of the respondents to answer certain interrogatories.
>
> 25 ***The ultimate aim of the process of discovery of information by interrogatories is to shorten the trial and save costs. They are to enable a party to litigation to obtain discovery of material facts in order either to support or establish proof of his or her own case, or to find out what case (but not the evidence) the party has to meet; or to destroy or damage the case brought by his or her opposition***: *Adams v Dickeson* [1974] VR 77, as cited with approval in *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* [2010] FCA 230 (ACCC v ANZ) (at [95]).
>
> 26 The three step approach articulated by Greenwood J in *ACCC v ANZ* provides a useful starting point for the proper assessment of whether to administer interrogatories and as to their form. His Honour stated at [91]:
>
> > First, is the interrogatory directed to a matter pleaded in the statement of claim but not admitted in the defence? ... Secondly, if the interrogatory is not directed to that question, is each interrogatory otherwise directed to a denial or non-admission which is said to be unclear? If so, on either basis, the third question is whether the interrogatory is vexatious or oppressive in the sense that those terms are understood in the authorities.
>
> 27 However, underlying that approach is ***the overall discretion of the Court to allow or disallow the administering of interrogatories***. In recent times, orders giving leave to interrogatories or now, more accurately, under Rule 21.01 ordering a party to answer particular interrogatories are rare. They are often seen as expensive and unnecessary to secure a proper disclosure of information. There are other avenues to secure the proper disclosure of information. Modern case management has explored more efficient and effective avenues to achieve that end.
>
> 28 Quasar and Heathgate dispute that any of the interrogatories relate to a matter in question, as informed by a close scrutiny of the pleadings (including particulars contained in those pleadings). In *Ring-Grip (Australasia) Pty Ltd v H.P.M Industries Pty Ltd* [1971] 1 NSWLR 798 at 800, the New South Wales Court of Appeal observed that it is impermissible to interrogate as to

matters that go beyond the issues as disclosed by the pleadings and the particulars. The expression "relating to any matter in question" in the past has been taken to mean that the interrogatories are not confined to facts directly in issue but extend to any fact the existence or non-existence of which is relevant to the existence or non-existence of facts directly in issue: *Potter's Sulphide Ore Treatment Ltd v Sulphide Corporation Ltd* (1911) 13 CLR 101 (at 109-111); *Sharpe v Smail* (1975) 5 ALR 377 (at 381); *Seidler v John Fairfax & Sons Ltd* [1983] 2 NSWLR 390 (at 392); ACCC v ANZ at [14], [17], [97].

29 Alliance submits that it is a legitimate objective of interrogatories to seek to ascertain admissions as to material facts which, where is necessarily relevant to parts of their claim, such as the question of "fully informed consent", are beyond the knowledge of Alliance but well known to Quasar and Heathgate. The following statements of Woodward J in *Aspar Autobarn Co-operative Society v Dovala Pty Ltd* (1987) 16 FCR 284 (at 284-285) (*Aspar Autobarn*) largely reflect the contention of Alliance on this application:

> There can be no doubt that, in certain types of case, interrogatories administered with care and discretion and answered responsibly can play a very useful part in preparing a case for trial. It makes for a fairer and more efficient hearing if the parties know the outlines of each other's cases before they come to court. The statement of claim goes some way towards stating the applicant's case, but will often range wider, and be expressed in more general terms, than the basic allegations of the applicant require. The defence often discloses nothing of the respondent's real case and, in my view, serves little purpose in most litigation in this Court. Except where it is necessary to identify the issues with particular precision (as, for example, where statutes of limitation may be involved), there is much to be said for cases going to trial on the basis of affidavits rather than pleadings. If the affidavits are carefully and responsibly prepared there should be no need for interrogation. But where pleadings are used, they will often need to be supplemented by interrogatories in order to identify and narrow the areas of factual dispute or, as in the present case, to enable applicants to establish facts which are beyond their knowledge but well known to the respondents. (Emphasis added)

30 Quasar and Heathgate contend that the interrogatories are simply "fishing". In the Full Court decision of *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175 (*WA Pines*) Lockhart J said at 190-191:

> There are four objects of interrogatories: 1. To obtain admissions as to facts which will support the case of the interrogating party. 2. To obtain admissions which will destroy or damage the case of the party interrogated. 3. Interrogatories which are in the nature of a request for further and better particulars. 4. Interrogatories which seek to obtain accounts from a party occupying a fiduciary position.
>
> However, among the well-established limitations upon the power to interrogate and to discovery of documents is the rule that this power cannot be used for the purpose of "fishing".
>
> In *Hennessy v. Wright (No. 2)* (1888) 24 Q.B.D. 445 (reported as a note to *Parnell v. Walter* (1890) 24 Q.B.D. 441) Lord Esher M.R.

said:

> "In other words, the plaintiff wishes to maintain his questions, and to insist upon answers to them, in order that he may find out something ***of which he knows nothing now***, which might enable him to make a case of which he has no knowledge at present. If that is the effect of the interrogatories, it seems to me that they come within the description of 'fishing' interrogatories, and on that ground cannot be allowed.
>
> The moment it appears that questions are asked and answers insisted upon in order to enable the party to see if he can find a case, either of complaint or defence, of which at present he knows nothing, and which will be a different case from that which he now makes, the rule against 'fishing' interrogatories applies".

…

In *Associated Dominions Assurance Society Pty. Ltd. v. John Fairfax & Sons Pty. Ltd.* (1952) 72 W.N. (N.S.W.) 2, Owen J. said: "A 'fishing expedition', in the sense in which the phrase has been used in the law, means, as I understand it, that a person who has no evidence that fish of a particular kind are in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any there or not". See also *Bray on Discovery* (1885), pp. 13, 16, 98 and 461.

…

I have no doubt that the appellant is seeking to use the weapons of discovery and interrogatories to find out if it has a case of which it presently knows nothing. It is a fishing expedition to which this Court will not lend its aid. I respectfully agree with the following passage from the reasons for judgment of Smithers J. in *Melbourne Home of Ford Pty. Ltd. v. Trade Practices Commission and Bannerman*:

> "Accordingly in a proceeding pursuant to s. 163A(1), certainly in the absence of satisfactory evidence that the Chairman did not have the relevant reason to believe, the applicants are faced with the *prima facie* validity of the notice. ***In the absence of such evidence the proceeding is essentially speculative in nature***. In such circumstances, for the court to assist the applicants by making available to them the processes of interrogatories and discovery would be to assist them in an essentially fishing exercise and from this the court on established principle should refrain".

31 Thus, in circumstances where a party makes allegations in a pleading based on suspicion, they should not be entitled to interrogate on those suspicions, for to do so is an example of fishing by making a case where none presently exists: *WA Pines* at 173-174 per Toohey J; 181-182 per Brennan J; and 190-191 per Lockhart J, and more recently see *Minister for Immigration & Multicultural & Indigenous Affairs v Wong* [2002] FCAFC 327 at [32].

32 A more recent elaboration of principles informing legitimate objections to interrogatories and the relationship between processes of discovery and interrogatories is given by McKerracher J in *Austal Ships Pty Ltd v Incat Australia Pty Ltd (No 3)* (2010) 272 ALR 177 (*Austal Ships No 3*) at [6]-[8]:

> As will be apparent from r 6, an interrogatory may be objected to by a party when it is too wide, fishing or immaterial: *Aspar Autobarn Co-operative Society v Dovala Pty Ltd* (1987) 16 FCR 284. It may be objected to as being vexatious when it is fishing *Aspar* at 287. It can be objected to on grounds of being oppressive if it is unfair or unreasonable in the sense that the burden of answering it far outweighs the likely benefit which may be adduced from the answer.
>
> The administering and answering of interrogatories is a form of discovery. Just as this Court has now substantially limited the scope for wide ranging discovery, the circumstances on which leave to administer interrogatories will be granted is increasingly rare. That is not to say that interrogatories and discovery of documents are mutually exclusive. It is clear that they may overlap on occasions. In this Court it will be unlikely that interrogatories will be permitted as a substitute for discovery of documents.
>
> Interrogatories which are directed towards ascertaining the contents of documents may be an exercise in fishing and are not generally permissible: *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175 at 181-182 per Brennan J, and at 191-191 per Lockhart J….

33 The apparent infrequency with which interrogatories are utilised in modern litigation as a means of discovery should not prevent a careful consideration of the merits of a particular application.

34 As to the content or form of particular interrogatories, McKerracher J in *Austal Ships No 3* identified four categories of well-grounded objections to interrogatories at [9]:

> The first category is where the question calls for the expression of a legal opinion from a layperson. The second category is on the grounds that the interrogatory is fishing in that it seeks discovery of documents or other information in order to attempt to convert a speculative claim into something else. The third category is where the question is embarrassing or too wide in that it is not capable of being answered or otherwise requires the deponent to embark on an inquiry or inquiries that would outweigh any benefit to be gained from providing an answer having regard to the issues in dispute and would place an undue burden on the deponent. The fourth and final category is where the question does not relate to any matter in issue between the parties; is otherwise too wide; or is an exercise in fishing…

35 Reference may also be made to the observations of Woodward J in *Aspar v Autobarn* at 287-288.

36 In ascertaining whether interrogatories taken as a whole are oppressive, one must consider the number sought to be administered, the extent to which providing an answer imposes an unreasonable and onerous burden on the interrogated party, whether the interrogatory requires the interrogated party to form opinions, to exercise judgment or to draw conclusions, and whether

> the questions are repetitive: *ACCC v ANZ* (at [101]). If the energy, effort, time and cost required to address the interrogatories is not reasonably proportionate to the end sought to be achieved, then the interrogatories should not be administered. In making a decision, a balancing exercise must be undertaken: the benefits of narrowing and clarification of issues against the costs and the burden placed over the respondents inherent in the task of answering the written questions fully and accurately.

(emphasis added)

69 More recently in *Hanson-Young v Leyonhjelm (No 2)* [2019] FCA 393 White J observed:

> [14] In general, the Court will order a party to provide written answers to interrogatories only when it is necessary for the fair disposition of the proceeding or to save costs. The ultimate aim of the process of discovery of information by interrogatories is to shorten the trial and save costs: *Alliance Craton* at [25]. Interrogatories enable a party to litigation to obtain discovery of material facts in order to support or establish proof of his or her own case, to find out the case (but not the evidence) the party has to meet, or to destroy or damage the case brought by his or her opponent: ibid. In *Alliance Craton* at [36], Mansfield J noted that, if the energy, effort, time and cost required to address the interrogatories is not reasonably proportionate to the end sought to be achieved, then the interrogatories should not be allowed.
>
> [15] One of the reasons why the Court seldom orders a party to answer interrogatories is that the process is often an expensive and unnecessary means of securing the proper disclosure of information: *Alliance Craton* at [27]. However, the relative infrequency with which orders are made for the answering of interrogatories does not mean that such orders will not be appropriate in a given case. Ultimately, an evaluation has to be made having regard to the particular circumstances of each case.

Legal professional privilege

70 The key issue for the Court in this case is whether the proposed interrogatories are relevant to, and go to narrowing, the factual dispute posed by the enjoinder application. However, the respondents to the present application submit that an obstacle to the orders sought being made is that answering the interrogatories proposed may give rise to a breach of legal professional privilege principles such that the Court should pre-emptively refuse leave to administer them.

71 For a number of reasons I consider that this issue does not pose an obstacle to the Court granting the leave sought by the Wakaman Applicant.

72 First, whether legal professional privilege would preclude Mr Kerr or Mr Kempton answering the interrogatories is not an issue which has been properly argued to date. In this respect I note the following observation of Brereton J in *Hancock v Rinehart (Privilege)* [2016] NSWSC 12:

> To sustain a claim of privilege, the claimant must not merely assert it; but must prove

> the facts that establish that it is properly made. Thus a mere sworn assertion that the documents are privileged does not suffice, because it is an inadmissible assertion of law; the claimant must set out the facts from which the court can see that the assertion is rightly made, or in other words "expose ... facts from which the [court] would have been able to make an informed decision as to whether the claim was supportable". The evidence must reveal the relevant characteristics of each document in respect of which privilege is claimed, and must do so by admissible direct evidence, not hearsay.
>
> (Footnotes omitted.)

(see also Mortimer J in *Tommy on behalf of the Yinhawangka Gobawarrah v State of Western Australia (No 2)* [2019] FCA 1551 at [29]-[30], Griffiths J in *Dr Michael Van Thanh Quach v MLC Life Limited (No 2)* [2019] FCA 1322 at [8], and White J in *Martin v Norton Rose Fulbright Australia* [2019] FCA 1101 at [54].)

73 It follows that, notwithstanding that the issue of legal professional privilege has been raised as relevant, in the absence of proper argument any view taken by the Court at this point about a claim of legal professional privilege (by anyone) can be no more than speculative.

74 Second, as Mortimer J further pointed out in *Tommy* at [33], the first step in addressing objections based on asserted legal professional privilege is to consider the question of **who** holds the asserted privilege, which in turn presents some challenges in the context of the Native Title Act. Related issues including identifying the solicitor on the record for a party, and who is the "client", raise further questions. Before me Mr Jonnson QC submitted that the hands of Mr Kerr and Mr Kempton were, effectively, tied, because of their apprehension of a continuing obligation of confidence and an entitlement of legal professional privilege on the part of UTAC/Uwoykand. However in the absence of clarity of the nature of the relationship between Mr Kerr, Mr Kempton and Preston Law, and UTAC/Uwoykand, and whether communications in respect of interrogatories sought to be administered would breach that relationship, again it is not possible for me to do other than speculate that the answers sought by the Wakaman Applicant could place the present respondents in a situation where they would breach legal professional privilege.

75 Third, and as submitted by the Wakaman Applicant and the State, even if legal professional privilege applied, the holder of the privilege may waive it. It is not possible for Court to form a view at this point about whether that is likely or even possible.

76 Fourth, although the active respondents to the interrogatories application referred to affidavits of pastoral respondents Messers O'Shea and Patmore, which they submitted set out those

parties' attitude to the interrogatories application, Mr Jonnson QC accepted that the affidavits were expressed at a very high level of generality. In my view, little weight can be given to that evidence in the present circumstances.

77 I now turn to the interrogatories specifically.

Kerr interrogatories

Proposed Interrogatories 2 and 3

78 These proposed interrogatories seek admissions of fact concerning the representation of UTAC by Preston Law in connection with the Wakaman cluster of claims. They go to narrowing the factual dispute posed by the enjoinder application. They do not constitute fishing (or at this stage a breach of legal professional privilege) because there is already evidence before the Court that Preston Law acted for UTAC in respect of these claims, for example:

- The Notice of Intention to become a party to an application Form 5 in Wakaman #5 filed by UTAC on 13 August 2018, nominating "Preston Law – Andrew Kerr" as the legal representative of UTAC, and signed by "Andrew Kerr Solicitor".
- A Notice of Ceasing to Act filed by Mr Kerr on 24 November 2020 in QUD 178/2018, QUD 746/2015, QUD 728/2017, QUD 143/2015, QUD 350/2017 and QUD 351/2017, stating "Mr Andrew Kerr, Preston Law has ceased to act as lawyer for Uwoykand Tribal Aboriginal Corporation, a Respondent in the proceeding".

79 It is appropriate for the Court to order Mr Kerr provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed Interrogatories 4-10

80 These proposed interrogatories seek admissions of fact concerning whether Preston Law acted for non-claimant applicants in relation to the Wakaman cluster, whether Mr Kerr informed Mr and Ms Chong that Preston Law acted for non-claimant applicants and Preston Law's other clients, and whether Mr Kerr told Mr Chong and Ms Chong that those other clients supported a negative determination of native title (and similarly told those other clients of the interests of Mr Chong and Ms Chong).

81 These matters go to narrowing the factual dispute posed by the enjoinder application. They do not constitute fishing, or at this stage appear to raise issues of legal professional privilege in respect of possible answers, because evidence has already been filed to the effect that:

- Preston Law was retained to provide legal services for UTAC in connection with the Wakaman cluster of claims.
- Preston Law acted for non-claimant applicants in connection with the Wakaman cluster of claims. I note for example that a Notice of Intention to become a Party to an Application in Wakaman #3 was filed by Port Bajool Pty Ltd on or about 29 February 2016, nominating "David Kempton" as the legal representative of Port Bajool, and signed "David Kempton". An affidavit of Mr Kempton sworn 6 June 2017 and filed in Wakaman #3 in which he deposed that he was the solicitor for Port Bajool, had carriage of that proceeding and application QUD 143/2015 on its behalf, and that he and Preston Law had carriage of the non-claimant application henceforth conducted by GAG Crystalbrook following the transfer of Port Bajool's interest in Crystalbrook station to GAG Crystalbrook.
- Each of Lance Frank, Bradley Thomas & Emma Elizabeth O'Shea and James William Malcolm and Janelle Lynette O'Shea were respondents to the Wakaman #4 claim. The relevant respondent party notices to the Wakaman #4 claim were filed by Mr Kerr on their behalf on 18 May 2018.
- In the Federal Court party list for the Wakaman #5 claim QUD178/2018 on or about the time of the hearing of lay evidence, Mr Kerr and Preston Law were recorded as acting for pastoral respondents Ms Janelle Foote, Mr John Foote, Ms Penny McClymont, Mr Rex McClymont, Mr Robert O'Shea, Mr Mark Porter, Mr Michael Porter, Mr Philip Porter and White River Resources Pty Ltd.
- In submissions filed on 29 October 2020 in QUD 178/2018 by Mr Kerr and Preston Law, being the "Opening of Lance Frank O'Shea, Bradley Thomas O'Shea, Emma Elizabeth O'Shea, James William Malcolm O'Shea, Janelle Lynette O'Shea, Philip Henry Porter, Michael William Porter, Mark Edward Porter, Rex and Penny McClymont, White River Resources Pty Ltd, Robert O'Shea, John and Janelle Foote and Uwoykand Tribal Aboriginal Corporation (Pastoral Respondents)", Mr Kerr submitted (*inter alia*):

> 13. The Pastoral Respondents, positions are that the evidence does not support the making of a positive determination in Wakaman #3

> because, with due deference to the claimants' perception or understanding of itself as a society , or community, as that expression is commonly understood, the Wakaman People do not constitute a society of the particular kind identified in *Yorta Yorta*.
>
> …
>
> 26. In the event that question (a) of the separate questions is answered in the negative, the Pastoral Respondents will submit in their respective capacities as respondents to the Wakaman claims and as applicants in their non-claimant applications, that it is appropriate that the Court make a negative determination in relation to the area the subject of Wakaman #4 and Wakaman #5 and those non-claimant application overlapped by those claims.

- Mr Chong gave evidence during cross-examination that he had not been informed of the implications of a negative determination of native title. I note for example the following evidence of Mr Chong during cross-examination:

> MS LONGBOTTOM: And have you been told that a Determination can either be a positive Determination in that it's a finding that Native [sic] exists over the area; have you been told about that?
>
> RODNEY CHONG: No.
>
> MS LONGBOTTOM: Or it can be a negative Determination which is an order that means that Native Title doesn't exist over the area; have you been told about that?
>
> RODNEY CHONG: No.
>
> MS LONGBOTTOM: And that would mean that there couldn't be another claim for Native Title over the area; have you been told about that?
>
> RODNEY CHONG: No.
>
> (transcript 19 November 2020 pp 1543-1544)

- Similarly, Ms Chong gave evidence during cross-examination that she had not been informed of the implications of a negative determination of native title:

> MR O'GORMAN: Yes. You realise that, if the corporation of which you're a director gets the negative Native Title determination it seeks in its submissions of less than a month ago – that that will get red [sic] of the interest that the Kunjen People have over that part of Bulimba.
>
> Do you agree? Are you aware of that?
>
> CAROL CHONG: Say – can you say the question again, please?
>
> MR O'GORMAN: If the negative determination of Native Title that your company of which you're a director seeks – if that is made, do you realise that that part of Bulimba that is in the present Wakaman Native Title claim is lost to Kunjen?
>
> CAROL CHONG: No.

MR O'GORMAN: It is.

CAROL CHONG: It – it – it could be.

MR O'GORMAN: It could be?

CAROL CHONG: Mm.

MR O'GORMAN: And, again, are you, as a director, of that corporation, happy to see it blown up for the Kunjen People, as well?

CAROL CHONG: As in terms of for their interest in the land of the – of Kunjen?

MR O'GORMAN: That their interest - - -

CAROL CHONG: Or - - -

MR O'GORMAN: - - - any interest they have - - -

CAROL CHONG: Mm.

MR O'GORMAN: - - - if any, but let's assume they do – that that interest be obliterated as far as Native Title rights and interests go in that part of Bulimba that's the subject of the Wakaman proceedings. Do you realise that?

CAROL CHONG: Well, I don't know what – what Kunjen People want, they want to seek in terms of if they want to lay a Native Title claim in areas that they consider. I don't know.

(transcript 24 November 2020 p 2008)

82 It is appropriate for the Court to order Mr Kerr provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed Interrogatories 11, 12, 15 and 16

83 These proposed interrogatories pose questions concerning whether Mr Kerr obtained instructions from UTAC to pursue a negative native title determination in the Wakaman cluster of claims, and if so details of those instructions (including the consequences of a negative determination). They go to narrowing the factual dispute posed by the enjoinder application. In light of my observations concerning proposed interrogatories 2-10, I am satisfied that they do not constitute fishing (or at this stage a breach of legal professional privilege) because there is already evidence before the Court that:

- Preston Law acted for UTAC in respect of these claims.
- The position of Preston Law clients, including UTAC (as reflected in the opening statement filed on 29 October 2020 in QUD 178/2018 by Mr Kerr and Preston Law) was that a negative determination of native title was appropriate.

- Both Mr Chong and Ms Chong stated they had not been informed of the consequences of a negative determination.

84 It is appropriate for the Court to order Mr Kerr provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed Interrogatories 13 and 14

85 These proposed interrogatories seek admissions of fact concerning whether Mr Kerr provided information to expert witness Dr Brunton, specifically in respect of UTAC and the Kunjen People native title claimants.

86 I have already noted evidence before the Court that Preston Law had engaged Dr Brunton to act as an expert. Dr Brunton noted in the report that he had received a brief from Mr Kempton on 21 June 2019, acting for GAG Crystalbrook, engaging him as an expert anthropologist to provide confidential written and oral advice to enable the preparation of a response to the Wakaman cluster of claims

87 In his expert report "*Wakaman #3, #4, #5 Native Title Applications QUD 746 of 2015, QUD 728 of 2017, QUD 143 of 2015 QUD 350 of 2017, QUD 351 of 2017, QUD 178 of 2018 Expert Anthropological Report*", Dr Brunton refers to the discontinued Kunjen People's application QUD 33/2008, and notes at [104] that:

> … And it is not actually true to say that no other Aboriginal group has filed a claim over what Mr Leo thinks is Wakaman country, as Kunjen people filed an application over a southwestern section of this country in 2008. While this was later discontinued (QUD33/2008), it also took in a substantial part of what is now the Wakaman #5 claim (see my Map 3). The applicants included Rodney Chong – who is a respondent to the present Wakaman claims – Bishop Arthur Malcolm, Josephine Bertha Koolatah, Arthur Luke, Colin Lawrence and Alma Wason.

88 The proposed interrogatories are relevant to, and go to narrowing, the factual dispute posed by the enjoinder application. They do not constitute fishing because evidence has already been filed to the effect that Preston Law had engaged Dr Brunton. It is unclear whether any issues of legal professional privilege are relevant. It is appropriate for the Court to order Mr Kerr to provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed Interrogatories 17-19

89 These proposed interrogatories seek admissions of fact concerning whether UTAC terminated the retainer between it and Preston Law. They are relevant to, and go to narrowing, the

factual dispute posed by the enjoinder application. They do not constitute fishing, or at this stage appear to raise issues of legal professional privilege in respect of possible answers, because evidence has already been filed (in, for example, the Walsh Affidavit para 42) that, following email correspondence between Mr Kerr and Ms Walsh on 19 November 2020, on 20 November 2020 Mr Kerr emailed Ms Walsh and stated (*inter alia*) as follows:

> In relation to Uwoykand Tribal Aboriginal Corporation steps are being taken in compliance with the Federal Court Rules as a precondition to filing a notice of ceasing to act. The required documents are expected to be filed in the near future and will be served shortly thereafter.

90 Mr Kerr filed a notice of ceasing to act for UTAC in QUD 178/2018, QUD 746/2015, QUD 728/2017, QUD 143/2015, QUD 250/2017 and QUD 351/2017 at 10.27 am on 24 November 2020.

91 Further, Ms Chong gave the following evidence during cross-examination:

> MR O'GORMAN: Were you aware that Mr Preston – sorry, Mr Andrew Kerr of Preston Law ---
>
> CAROL CHONG: Mm hm.
>
> MR O'GORMAN: --- was the solicitor on the record for UTAC in these proceedings.
>
> CAROL CHONG: That's correct.
>
> MR O'GORMAN: And does he remain so?
>
> CAROL CHONG: I believe so.
>
> MR O'GORMAN: You haven't had any communications with him in the last week or so indicating that he's no longer ---
>
> CAROL CHONG: No, due to the proceedings, so – we're attending to give evidence providing on our Wakaman.
>
> MR O'GORMAN: Sorry?
>
> CAROL CHONG: We're attending ourselves as a respondent party to this proceeding as for Wakaman.
>
> MR O'GORMAN: Yes.
>
> CAROL CHONG: Yes.
>
> MR O'GORMAN: But are you aware or do you understand that Mr Kerr continues to act for UTAC in these proceedings, is that your belief?
>
> CAROL CHONG: Yes.
>
> MR O'GORMAN: Okay. Have you had any discussions with him in the last week or so about whether not he would continue to act for UTAC in these proceedings?
>
> CAROL CHONG: No. We haven't had communications with him, no.

(transcript 24 November 2020 p 1943)

92 I also note that on 26 November 2020 Ms Chong as a director of UTAC filed a *Notice by party other than the applicant* that the UTAC wished to cease being a party in QUD 178/2018. In a supporting affidavit filed on 26 November 2020, Ms Chong relevantly deposed:

> 3. On 24 November 2020 Preston Law filed a Notice of ceasing to act on behalf of Uwoykand Tribal Aboriginal Corporation.
>
> 4. As a result of the Corporation no longer being legally represented the directors of Uwoykand Tribal Aboriginal Corporation do not wish to continue as a self represented party in the proceeding nor do they wish to instruct new lawyers to represent Uwoykand Tribal Aboriginal Corporation in this proceeding.

93 It is open on the evidence of Ms Chong to infer that Ms Chong did not terminate the retainer of Mr Kerr. Similar evidence was given by Mr Chong during cross-examination (transcript 20 November 2020, p 1724).

94 It is appropriate for the Court to order Mr Kerr provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed Interrogatories 20-22

95 These proposed interrogatories seek admissions of fact concerning whether Mr Kerr discussed with the directors of UTAC the transition of UTAC to incorporation under the *Corporations Act 2001* (Cth), transferring its interests in the Bulimba station pastoral leases to a successor incorporated under that legislation, and the implications of such transition.

96 The proposed interrogatories are relevant to, and go to narrowing, the factual dispute posed by the enjoinder application. There may be issues of legal professional privilege which arise, however they do not constitute fishing because I note that there was cross-examination of Ms Carol Chong during the hearing concerning the motivations of directors of UTAC, and that Ms Chong gave evidence in respect of this topic. It is appropriate for the Court to order Mr Kerr to provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed Interrogatories 23-28

97 These proposed interrogatories seek admissions of fact by Mr Kerr concerning whether Mr Kempton acted for UTAC in relation to the Wakaman cluster of claims or in relation to the transition of UTAC to a Corporations Act entity.

98 There is apparent overlap between a number of these proposed interrogatories of Mr Kerr, and interrogatories proposed to be asked directly of Mr Kempton, in particular

- Proposed Kerr interrogatories 23, 24, 25 and 28 appear to overlap Kempton interrogatories 4 and 5, and
- Proposed Kerr interrogatories 26 and 27 appear to overlap Kempton interrogatories 2 and 3.

99 Further, a question arises how Mr Kerr would be in a position to answer such questions as those posed in interrogatories 25 (b)(iii) and 28 (b)(iii) (unless he was at the relevant meetings himself).

100 However, I do not understand there to be any dispute that, at material times, Mr Kerr was a partner of Preston Law, and was accordingly in a position to comment on the conduct of the firm, the clients of the firm, and which employees of the firm including Mr Kempton represented or met with those clients (see for example Rule 37 of the *Australian Solicitors Conduct Rules 2012* (Qld) and s 7 (4)(b) of the *Legal Profession Act 2007* (Qld) defining "principal" of a law practice). If Mr Kerr is unable to answer questions, he no doubt would say so.

101 The proposed interrogatories are relevant to, and go to narrowing, the factual dispute posed by the enjoinder application. There may be issues of legal professional privilege which arise, however as previously noted I am unable to make any observations about this issue at the moment. The fact that there is overlap between these proposed interrogatories and a number of those proposed to be asked directly of Mr Kempton is no reason in my view to disallow them. It is appropriate for the Court to order Mr Kerr to provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed Interrogatories 29-31

102 These proposed interrogatories seek admissions of fact concerning the provision of material by Mr Kerr or other Preston Law staff to expert anthropologist Dr Brunton.

103 Annexed to Dr Brunton's report *Wakaman Native Title Applications – Anthropological Report Volume 1, Ron Brunton* is a letter of engagement dated 9 August 2019 signed by Mr Kerr, confirming that Preston Law acted for a number of pastoral lessees (including GAG Crystalbrook Pty Ltd) in the Wakaman People #4 and #5 Native Title Determination

Applications, and stating that Preston Law would like to engage Dr Brunton as an expert in the matter.

104 In his Expert Anthropological Report dated December 2019 Dr Brunton stated:

> 45. …Furthermore, whatever might be required for connection reports prepared for mediation in Queensland, Mr Leo's report has now been filed as an expert report in the Federal Court. Consequently, as it is my strong opinion that at least five of the earlier reports are particularly relevant to the Wakaman claim – those by Suzi Hutchings, Dundi Mitchell, David Wilkins, James Weiner, and Bruce Rigsby – I think it was essential for them to have been reviewed and referred to by Mr Leo, for reasons that will become obvious in later sections of this report. Of course, this does not mean that it would have been incumbent on him to accept all the evidence and opinions expressed in these reports, but in my opinion they do require him to make significant revisions to some parts of his report in order to address certain issues that they raise.

105 As Lindgren J said in *Australian Securities & Investments Commission v Southcorp Limited* [2003] FCA 804 at [21]:

> 4. ***Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents***; cf *Attorney-General (NT) v Maurice* [1986] HCA 80; (1986) 161 CLR 475 at 481 per Gibbs CJ, 487--488 per Mason and Brennan JJ, 492-493 per Deane J, 497--498 per Dawson J; *Goldberg v Ng* [1995] HCA 39; (1995) 185 CLR 83 at 98 per Deane, Dawson and Gaudron JJ, 109 per Toohey J; *Instant Colour Pty Ltd v Canon Australia Pty Ltd* [1995] FCA 870; *Australian Competition and Consumer Commission v Lux Pty Ltd* [2003] FCA 89 ("*ACCC v Lux*") at [46].
>
> 5. ***Similarly, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents***; *Interchase* at 148--150 per Pincus JA, at 161 per Thomas J.
>
> (emphasis added).

106 It is open to infer from this evidence that someone had provided Dr Brunton with previous Wakaman connection reports for the purpose of preparing his expert reports, and that he had regard to those previous reports. Given that Preston Law engaged Dr Brunton, an inference is further open that that person was Mr Kerr or an employee of Preston Law.

107 If any issues of legal professional privilege were to arise in respect of these previous reports, it would appear that privilege has been waived in light of the relevant references in Dr Brunton's reports and the authority of *Southcorp*.

108 It is appropriate for the Court to order Mr Kerr provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed Interrogatories 32 and 33

109 Proposed interrogatories 32 and 33 seek admissions of fact concerning any inquiries made by Mr Kerr of Mr Chong or Ms Chong concerning obligations of confidence applicable in respect of the supply to Dr Brunton of previous Wakaman connection reports.

110 The proposed interrogatories are relevant to, and go to narrowing, the factual dispute posed by the enjoinder application. I am not satisfied that they constitute fishing because, as I have already noted, Dr Brunton's expert reports include reference to the supply of previous connection reports. There may be issues of legal professional privilege which arise, however as previously noted I am unable to make any observations about this issue at the moment. It is appropriate for the Court to order Mr Kerr provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed Interrogatories 34 and 35

111 Proposed interrogatories 34 and 35 seek admissions of fact concerning any information Mr Kerr may have provided to Mr Chong or Ms Chong concerning the use to which the previous Wakaman connections reports could be put.

112 The proposed interrogatories are relevant to, and go to narrowing, the factual dispute posed by the enjoinder application. There may be issues of legal professional privilege which arise, however as previously noted I am unable to make any observations about this issue at the moment. It is appropriate for the Court to order Mr Kerr provide written answers to these interrogatories and file affidavits verifying those answers.

Kempton Interrogatories

Proposed Interrogatories 2 and 3

113 These proposed interrogatories seek admissions of fact concerning Mr Kempton's relationship with UTAC, Mr Chong and Ms Chong. The proposed interrogatories are relevant to, and go to narrowing, the factual dispute posed by the enjoinder application.

114 They do not constitute fishing because there is already evidence to the effect that there may have been a solicitor-client relationship between these parties. In particular I note that

Mr Chong gave the following evidence in respect of an affidavit signed by him on 30 November 2016:

> MS LONGBOTTOM· I just want to show you this affidavit. You see at the bottom, you see the affidavit says that it's prepared by David Kempton of Preston Law.
>
> RODNEY CHONG: Yeah, that's it, yeah.
>
> MS LONGBOTTOM· Do you know, how did David Kempton come to be preparing an affidavit for you in this matter?
>
> RODNEY CHONG: I have no idea
>
> (transcript 20 November 2020 p 1725 ll 1-10)

115 This evidence is suggestive of a possible solicitor-client relationship between Mr Kempton and Mr Chong at the relevant time.

116 It is appropriate for the Court to order Mr Kempton to provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed Interrogatories 4 and 5

117 These proposed interrogatories seek admissions of fact concerning Mr Kempton's relationship with UTAC, Mr Chong and Ms Chong in the event that he did not act for them, and in particular whether he met with them and other clients in relation to the transition of UTAC to a Corporations Act entity.

118 Evidence was given by Ms Chong during cross-examination at the hearing that Mr Chong had met with Mr Kempton and representatives of Port Bajool on June 2016 (transcript 23 November 2020 pp 1829, 1830, 1836). Mr Chong also gave evidence of meeting Mr Kempton and Dr Brunton (transcript 20 November 2020 pp 1720-1724).

119 Mr Lance O'Shea also gave evidence that he attended a meeting involving Mr Kerr, James O'Shea, Mark O'Shea, Peter Pantovic, Michael Porter and Mr Kempton (transcript 27 November 2020 pp 2217-2218). Similarly, Mr Michael Porter gave evidence that he attended a meeting with Peter Pantovic, Lance O'Shea, James O'Shea, Mark Porter, David Kempton, and Rex McClymont earlier in 2020 (transcript 27 November 2020 p 2236).

120 The proposed interrogatories are relevant to, and go to narrowing, the factual dispute posed by the enjoinder application. They do not constitute fishing because there is already evidence before the Court relevant to these interrogatories.

121 I am unable to identify at this stage an issue of legal professional privilege arising in respect of these interrogatories. It is appropriate for the Court to order Mr Kempton to provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed Interrogatories 6 and 7

122 These proposed interrogatories seek admissions of fact concerning whether Mr Kempton obtained copies of any of the previous Wakaman connection reports from Mr Chong or Ms Chong, and, if he did, details thereof.

123 The proposed interrogatories are relevant to, and go to narrowing, the factual dispute posed by the enjoinder application.

124 I am unable to identify at this stage an issue of legal professional privilege arising in respect of these interrogatories. It is appropriate for the Court to order Mr Kempton to provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed Interrogatories 8-10

125 These proposed interrogatories seek admissions of fact concerning the provision of previous Wakaman connection reports by Mr Kempton to expert Dr Avery, and the purpose of the provision of those reports. They are relevant to, and go to narrowing, the factual dispute posed by the enjoinder application.

126 They do not constitute fishing because evidence is already before the Court supporting an inference that Mr Kempton provided such material to Dr Avery. I note that, in an affidavit dated 2 December 2016, Dr Avery deposed:

> 3. I have been asked by Mr David Kempton to assess certain reports relating to the Wakaman people and to provide expert advice as to the evidence that the named applicants in this application for a determination of native title
>
> a) may be said to belong to a group known as the Wakaman
>
> b) form a group or society capable of holding native title
>
> c) have any known connection to the land the subject of the application, the present Crystalbrook.
>
> 4. I was asked to consider the following reports:
>
> a) Dr Suzi Hutchings June 2001 Wakaman People Native Title Determination Application (QC 97/40)
>
> b) Dr Bruce Rigsby November 2001 Review of Anthropological Reports on the status of the Chong family (with particular reference to the Wakamin Peoples native title claim QG6148/98)

c) Dr James Weiner June 2006 Wakaman Native Title Anthropological overview

d) Dr Dundi Mitchell (n.d - apparently 2001) Part 1 Evidence of connection (appears to be incomplete)

e) Dr David Wilkinson (n.d - apparently 2001) Wakaman linguistic Research (undated) pages 17 and 43 appear to be missing.

f) Report of Carol Chong dated December 2015.

127 It appears evident that Dr Avery had regard to the reports listed, and that they are "previous Wakaman connection reports".

128 I am unable to identify at this stage an issue of legal professional privilege arising in respect of these interrogatories. It is appropriate for the Court to order Mr Kempton to provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed Interrogatories 11-14

129 These proposed interrogatories seek admissions of fact concerning information Mr Kempton gave Mr Chong or Ms Chong in respect of Port Bajool or GAG Crystalbrook, the provision of previous Wakaman connection reports by Mr Kempton to expert Dr Avery, the purpose of the provision of those reports, and any inquiries made by Mr Kempton of Mr Chong or Ms Chong concerning obligations of confidence applicable in respect of the supply to Dr Avery of previous Wakaman connection reports. They are relevant to, and go to narrowing, the factual dispute posed by the enjoinder application.

130 As I noted earlier, Dr Avery's expert report includes reference to the supply of previous Wakaman connection reports.

131 The proposed interrogatories are relevant to, and go to narrowing, the factual dispute posed by the enjoinder application. There may be issues of legal professional privilege which arise, however as previously noted I am unable to make any observations about this issue at the moment. It is appropriate for the Court to order Mr Kempton to provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed Interrogatories 15-19

132 These proposed interrogatories are in similar terms to proposed interrogatories 11-14, but seeking admissions of fact concerning the receipt of previous Wakaman connection reports by Mr Kempton and disposition to expert Dr Brunton. They are relevant to, and go to narrowing, the factual dispute posed by the enjoinder application.

133 For similar reasons to those I gave in respect of proposed interrogatories 11-14, I consider that it is appropriate for the Court to order Mr Kempton to provide written answers to these interrogatories and to file affidavits verifying those answers.

Proposed interrogatories 20-21

134 These proposed interrogatories seek admissions of fact concerning information Mr Kempton provided to Mr Chong, Ms Chong or UTAC concerning the use of previous Wakaman connection reports by Dr Avery and Dr Brunton. They go to narrowing the factual dispute posed by the enjoinder application. They do not constitute fishing because evidence has already been filed from which it can be inferred that previous connection reports were provided to Dr Avery and Dr Brunton, and that Dr Avery and Dr Brunton were engaged as experts for non-claimants. It is appropriate for the Court to order Mr Kempton to provide written answers to these interrogatories and file affidavits verifying those answers.

Proposed interrogatories 22-24

135 These proposed interrogatories seek admissions of fact concerning information Mr Kempton provided to Mr Chong and Ms Chong concerning the engagement of Ms Chong as an expert for Port Bajool, and the use of Ms Chong's report. They go to narrowing the factual dispute posed by the enjoinder application. They do not constitute fishing because:

- Evidence has already been given by Ms Chong that she prepared an anthropological report for Port Bajool Pty Ltd (transcript p 1797 l 44 – p 1798 l 9).
- In evidence is a report entitled Wakaman People #3 Native Title Determination QUD746/2015 & QC2015 Applicants Summary Connections Report for Port Bajool Pty Ltd, Compiled by Cultural Consultancy Services. The report is dated October 2015, and includes the following detail on the cover: "Carol D Chong, editor."
- Dr Avery refers to Ms Chong's report at item [4](f) of his affidavit filed 6 December 2016, noting that he assessed that report.

136 It is appropriate for the Court to order Mr Kempton to provide written answers to these interrogatories and file affidavits verifying those answers.

CONCLUSION

137 The enjoinder application and the affidavit material filed by the Wakaman Applicant engage the Court's inherent jurisdiction to protect the due administration of justice. Leave to issue interrogatories is a matter for the discretion of the Court. Fundamentally, as observed in such cases as *Alliance Craton* and *Hanson-Young v Leyonhjelm (No 2)*, the ultimate aim of the process of discovery of information by interrogatories is to shorten the trial, ensure the fair disposition of the proceeding, and to save costs. In general the Court will only order a party to provide written answers to interrogatories when the interrogatories will satisfy those objectives.

138 I am satisfied that the proposed interrogatories will satisfy those objectives in this case. Accordingly, it is appropriate that I make the orders sought by the Wakaman Applicant in respect of the proposed interrogatories, including that compliance with r 21.02 of the Federal Court Rules be dispensed with.

I certify that the preceding one hundred and thirty-eight (138) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Collier.

Associate:

Dated: 12 July 2021