



Equity Division Supreme Court New South Wales

Case Name: G&S Engineering Services Pty Ltd v MACH Energy Australia Pty Ltd (No 6)

Medium Neutral Citation: [2022] NSWSC 628

Hearing Dates: 17 May 2022

Date of Decision: 17 May 2022

Jurisdiction: Equity – Technology and Construction List

Before: Stevenson J

Decision: Application to set aside or stay subpoena refused

Catchwords: PRACTICE AND PROCEDURE – application to set aside or stay subpoena – served during discovery process – whether there is a parallel process of issuing subpoenas during course of discovery

Cases Cited: G&S Engineering Services Pty Ltd v MACH Energy Australia Pty Ltd [2019] NSWSC 407
G&S Engineering Services Pty Ltd v MACH Energy Australia Pty Ltd (No 4) [2021] NSWSC 1052
The Owners - Strata Plan 69567 v Baseline Constructions Pty Ltd [2012] NSWSC 502

Texts Cited: Practice Note SC Eq 11

Category: Procedural rulings

Parties: G&S Engineering Services Pty Ltd (First Plaintiff/First Cross-Defendant/First Applicant)
DRA Pacific Pty Ltd (Second Plaintiff/Second Cross-Defendant/Second Applicant)
DRA Group Holdings Pty Ltd (Third Cross-Defendant/Third Applicant)
DRA Global Limited (Fourth Cross-Defendant/Fourth Applicant)
MACH Energy Australia Pty Ltd (First Defendant/First Cross-Claimant/First Respondent)

MACH Mount Pleasant Operations Pty Ltd (Second Defendant/Second Cross-Claimant/Second Respondent)
J.C.D. Australia Pty Ltd (Third Defendant/Third Cross-Claimant/ Third Respondent)
Calibre Group Pty Ltd (Subpoena Recipient) (Respondent)

Representation:

Counsel:

M G Lyons (Plaintiffs/Cross-Defendants/Applicants)
S Doyle QC with M Doyle (Defendants/Cross-Claimants/Respondents)
O Jones (Subpoena Recipient) (Respondent)

Solicitors:

Jones Day (Plaintiffs/Cross-Defendants/Applicants)
Corrs Chambers Westgarth (Defendants/Cross-Claimants/Respondents)

File Number:

2019/71358

EX TEMPORE JUDGMENT (REVISED)

- 1 This is yet another interlocutory dispute in these longstanding and substantial proceedings. The proceedings were commenced over three years ago and this will be the sixth interlocutory judgment in the proceedings. The background is set out in a number of judgments of the Court, including my judgment of 11 April 2019¹ and that of Williams J of 23 August 2021.²
- 2 The proceedings concern an agreement whereby the plaintiffs/cross-defendants were engaged by the defendants/cross-claimants to design and construct a coal handling plant at Mount Pleasant in the Hunter Valley.
- 3 The defendants/cross-claimants claim that the plaintiffs/cross-defendants made various representations when negotiating a "Settlement and Variation Agreement", but for which the defendants/cross-claimants would not have entered that agreement and would have engaged an alternative contractor to perform the works. The defendants/cross-claimants contend that the works

¹ *G&S Engineering Services Pty Ltd v MACH Energy Australia Pty Ltd* [2019] NSWSC 407.

² *G&S Engineering Services Pty Ltd v MACH Energy Australia Pty Ltd* (No 4) [2021] NSWSC 1052.

would, in those circumstances, have been completed earlier and claim damages in the order of some \$270 million as a result.

- 4 The proceedings have reached the stage where the parties have filed and served pleadings and have amended those pleadings on a number of occasions. The parties have exchanged five rounds of evidence since July 2020. I am told there are no current orders for further evidence.
- 5 The parties also commenced discovery over a year ago as a result of an order for discovery made on 2 March 2021 and are currently engaging in what I am told is a substantial and complex process of discovery pursuant to detailed orders made on 8 December 2021, which orders include provision for either party to file a notice of motion if there is any dispute arising about categories or classes of documents to be discovered.
- 6 On 31 January 2022, the defendants/cross-claimants issued a subpoena to Calibre Group Pty Ltd. Calibre is a stranger to the proceedings, although it was at one stage the parent company of the first plaintiff and at one stage had common directors with that entity.
- 7 Calibre appears today to inform me that it is neutral about the subpoena and has no objection to producing the documents and, indeed, was in the process of preparing documents for production when the Notice of Motion before me was filed.
- 8 That motion is one filed by the plaintiffs/cross-defendants on 17 March 2022 seeking to have the subpoena set aside or stayed until discovery is completed.
- 9 The plaintiffs/cross-defendants submit that "absent necessity or good reason" during the process of discovery there should not be a "parallel process of the issuing of subpoenas" and that the "efficient course" is for discovery to be completed "and for subpoenas only to be issued subsequently in respect of documents that were not amenable to the discovery process ordered, supervised and determined by the Court".

- 10 The difficulty I see with that submission is that there is no "parallel process of the issuing of subpoenas" on foot. The defendants/cross-claimants have issued one subpoena to a stranger to the litigation which makes no protest about the production of the documents called for.
- 11 It may be that the categories of documents sought in the subpoena overlap with those sought in discovery. But, as has been submitted on behalf of the defendants/cross-claimants, Calibre no doubt has its own "repository of documents". In any event, it appears that there is disputation between the parties as to categories of documents.
- 12 I see no parallel before me to the procedure that I sought to discourage in *The Owners - Strata Plan 69567 v Baseline Constructions Pty Ltd*³ which was concerned with what I saw as being the vice of issuing a notice to produce prior to the service of evidence and in the face of *Practice Note SC Eq 11*.
- 13 I do not propose to set aside or stay the subpoena.
- 14 However, against the possibility that the plaintiffs/cross-defendants' apprehension that there may be a "parallel process of issuing subpoenas" in the future may materialise, I propose to order that from now on neither party can issue a subpoena to a third party without leave of the Court until such time as the process of discovery is completed.
- 15 There is a dispute between the parties, although not from Calibre, as to the particular categories of documents sought. I propose to direct that the parties prepare a schedule in the nature of a Scott Schedule setting out in columns, first, the plaintiffs/cross-defendants' contentions as to why the documents should not be produced, then in the next column the defendants/cross-claimants' contentions in response and then a final column making provision for my decision.

³ [2012] NSWSC 502.

16 I will reserve the costs of the motion and reconsider it once the ambit of the documents permitted to be produced under the subpoena is known.
