

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title: Atarashii Stone Pty Ltd v Granite Transformations Pty Ltd (No 4)

Citation: [2017] ACTSC 230

Hearing Date: 14 August 2017

Decision Date: 15 August 2017

Before: Mossop J

Decision: See [31] and [38]

Catchwords: **PRACTICE AND PROCEDURE – APPLICATION TO ENFORCE ORDER REQUIRING PRODUCTION OF DOCUMENTS** – Whether categories of documents should be required to be produced – duties of solicitors in relation to production of documents

COSTS – NON-COMPLIANCE BY PARTY REQUIRED TO PRODUCE DOCUMENTS – Failure to take appropriate steps to set aside or comply with notice to produce – limited objections to production made out of hearing – defaulting party ordered to pay costs notwithstanding success of objections to production

Legislation Cited: *Court Procedures Rules 2006 (ACT)*, r 6748

Parties: Atarashii Stone Pty Ltd (Plaintiff)
Granite Transformations Pty Ltd (Defendant)

Representation: **Counsel**
W D B Buckland (Plaintiff)
J Roland (Defendant)

Solicitors
Trinity Law (Plaintiff)
Gilberts Legal (Defendant)

File Number: SC 138 of 2017

MOSSOP J:

Introduction

1. The plaintiff's Application in Proceeding, dated 9 August 2017, seeks to enforce compliance with an order of the Court requiring production of documents. On 7 June 2017, the Court order made required notices to produce to be served by 7 July 2017 and prevented such notices being served after that date without leave. Each party was

required to produce documents in response to such a notice within 14 days of service of the notice or by 21 July 2017, whichever was the earliest.

2. Those orders were made in the context of the matter having been listed for a four day hearing commencing 5 September 2017. By the process of notices to produce in relation to which production was compelled by Court order, it was hoped to avoid the necessity for full-scale discovery.
3. The plaintiff served a notice to produce late on 28 June 2017. The effective date of service was therefore 29 June 2017. In accordance with the orders of the Court, production of documents in accordance with that notice was required by close of business 13 July 2017.
4. No documents were produced.
5. Some two weeks after the documents were required to be produced, the solicitor for the defendant, Mr Gilbert, wrote to the solicitors for the plaintiff. That letter made complaints about the scope of the notice to produce and attached a schedule purporting to provide objections to 15 out of the 16 items in the schedule. It invited “reformulation of the notice” within one day in the absence of which an application to set aside the notice would be made.
6. The plaintiff’s application to enforce compliance with the notice was filed on 9 August 2017.
7. The defendant’s filed an Application in Proceeding to set aside parts of the notice in Court at the commencement of the hearing of the plaintiff’s application. It was only immediately prior to the commencement of the hearing of the plaintiff’s application that any documents at all were produced by the defendant in response to the notice to produce, six weeks after the issue of the notice and one month after they were required to be produced.
8. Instead of remedying its non-compliance with the orders of the Court during that period, the defendant prosecuted an application for security for costs, which was heard on 17 July, and an order made on 18 July 2017. It then sought to enforce the order for security for costs and that application was heard on 7 August 2017.
9. At no stage prior to the hearing of the plaintiff’s application was there an attempt to remedy the defendant’s non-compliance.
10. By the time of the hearing of the application the defendant’s objections to the items in the notice to produce had diminished. Instead of the 15 categories which were objected to, the defendant only objected to six of them. Those objected to were items 1, 2, 5, 10, 11 and 16. I will deal with each of those separately.
11. I will not repeat in these reasons the terms of the items which the parties are aware of, being contained in an Annexure to the Application in Proceeding.

Items 1 and 2

12. These two items are missing a verb. The expression “any document between any employee...” needs a verb in order to render it into the English language. Assuming that what is intended was “any document *passing* between any employee...”, the item is too broad in that, although it is limited in time from 1 November 2016, there is no limit on the type of documents passing between the defendant and Mr Miller. I do not

accept the submission of the plaintiff that the requirement for relevance was necessarily incorporated into the item by the terms of r 6748 of the *Court Procedures Rules 2006* (ACT). Rather, in my view, what is required to be produced in response to a notice to produce is the document or the documents described in the notice to produce. The remedy for a notice to produce, the terms of which extend beyond that which is relevant to the proceedings, is to have it set aside. There is no implied qualification of relevance or admissibility that would allow an unacceptably broad item to be read down so as to limit it to a reasonable scope.

Item 3

13. This item was objected to in the 1 August schedule but is no longer objected to. Only a limited number of documents have been produced. There is no explanation in the documents produced as to how the affidavit of Mr Anthony D'Addio, sworn 10 May 2017, was produced.

Item 4

14. This was an item in relation to which there was no objection but no documents produced. The item sought a wide range of documents relating to the establishment of a business in Canberra following the termination of the franchise agreement. This was deposed to by Mr Darren Jones in his affidavit, sworn 9 May 2017 at [102] as follows:

On 1 May 2017, the defendant employed staff and commenced operations in its own right in Canberra. Quotes have been given to potential customers and orders have been taken. The defendant will produce to the court, if required, records of all sales and revenue generated by it.

15. There is an apparent inconsistency between the statements in paragraph 102 and the absence of any documents within the scope of item 4. There is no explanation as to how the statement by Mr Jones is consistent with the absence of any records within the scope of item 4 of the notice to produce.

Item 5

16. This item is objected to. This item seeks to obtain documents recording contact or proposed contact with current or former employees of the plaintiff from 1 January 2017. The objection is that there is no particularisation of the subject matter of the contact. I do not accept that this is a basis for objection. In the circumstances of this case there are likely to be only very limited reasons for there to be contact between the defendant and staff or former staff of the plaintiff, and those reasons for contact likely to be relevant to the subject matter of the proceedings.

Item 6

17. This item is no longer objected to by the defendant. Some documents have been produced in response to the item.

Item 7

18. This item is no longer objected to. No documents were produced in response to this item. That is notwithstanding the fact that a solicitor acting on behalf of the defendant said to the Court on 6 June 2017:

My principal has instructed that they will attend mediation if the Court insists. They would like to say that they believe it's unlikely to resolve the matter, because their client simply is not prepared to do further business with the plaintiff.

19. Notwithstanding what the solicitor said, Mr Gilbert has deposed that he was instructed that there was no document to produce within this category.

Item 8

20. This item was not objected to. Only a single document, being a surveillance report which was previously admitted into evidence on the injunction proceedings, was produced.

Item 9

21. This item seeks documents evidencing that the plaintiff was promoting competing products. This was an allegation raised during the injunction proceedings. No documents have been produced.

Item 10

22. This is an item which is objected to. It requires production of all records of training provided by the defendant to employees contractors and staff of the defendants franchisees. There is evidence that there are some 40 franchisees. The relevance of such material in the light of the suggestion that different standards have been applied to the plaintiff may suffice to warrant production and there is no evidence that production of this material will be oppressive or impractical. However, in the absence of any time limit on the material to be produced, I will not require production of documents in accordance with that item.

Item 11

23. A single training manual has been provided. There is no evidence that the production of the balance of the records within this category will be oppressive or impractical. However, in the absence of any time limit on the documents to be produced, I will not require further production in response to this item.

Items 12 and 13

24. The only document produced is that of the training manual referred to above. Mr Gilbert deposed that he was instructed that there were no documents to produce within category 13.

Item 14

25. No document has been produced. Mr Gilbert deposed to the fact that he was instructed that there were no documents to produce within this category. The affidavit recording his instructions does not record from who those instructions were obtained.

Item 15

26. This item is not objected to however, no documents have been produced.

Item 16

27. This item is objected to. There is no evidence relating to be production being impractical or oppressive. The item seems to be directed at the imposition by the defendant of different payment terms upon the plaintiff than are imposed upon other franchisees. However, having regard to the nature of the business, the generality of the description “document indicating the payment terms” and the absence of any time limit upon the item, I consider that the requirement to produce documents in accordance with that item would be oppressive.

Affidavit verifying production

28. In relation to those items where no documents were produced, or only very limited documents were produced, the plaintiff wishes to have some confirmation that there are no other documents that have not been produced. Having regard to the absence of explanation as to why there are no or only very limited documents within particular items, the lack of identification of the source in Mr Gilbert’s affidavit of his instructions that there are no items within particular categories, and the history of non-disclosure, there is the possibility of incomplete compliance with the orders of the Court.
29. In the circumstances of this case I consider it appropriate to require that each party file an affidavit equivalent to an affidavit that would accompany a list of discovered documents verifying that all documents within the scope of the notice to produce have been produced.

Defendants application

30. The defendant applied to enforce compliance with the notice to produce which it served on the plaintiff on 19 June 2017. Substantial quantities of documents were produced by the plaintiff in accordance with the terms of the notice on 5 July 2017. The defendant asserts that some attachments to emails between a forensic accountant, Mr Thompson of Vincent’s, and the plaintiff, have not been produced. Those documents are drafts of submissions to an insurance company in relation to financial losses suffered as a result of a fire at the plaintiff’s premises. The plaintiff accepts that the documents need to be produced. It says that it will produce them but has failed to specify when they will be produced.

Orders

31. In relation to both the Applications in Proceedings, the orders that I make are:
1. The time for service of the Application in Proceeding dated 10 August 2017 and filed in Court on 14 August 2017 is abridged so as to permit it to be dealt with.
 2. The defendant is not required to produce items identified as items 1, 2, 10, 11 and 16 in the plaintiff’s notice to produce.
 3. Each party is required to produce any further documents in accordance with the respective notice to produce and to file and serve within seven days an affidavit by a person who would be entitled to make an affidavit verifying a list of documents verifying that:

- (a) the deponent has made all reasonable inquiries in order to locate documents within the scope of the notice to produce;
- (b) that the deponent believes that there are no documents other than those disclosed that fall within the terms of the items on the notice to produce; and
- (c) identifying any documents or category of documents within the scope of the notice to produce that were but are not longer in the possession, custody, or control of the party, and who presently has possession of the document or documents.

32. I will hear the parties as to costs and any further adjustment of the directions that are necessary.

[The parties were then heard on costs]

Costs

33. In a case such as the present, the obligations upon the parties to disclose documents is central to the fair disposition of the proceedings. The role of the solicitors in ensuring compliance with orders of the Court requiring disclosure of documents cannot be overstated. It requires solicitors to ensure that their clients are fully aware of their obligations to the Court.
34. The manner in which the defendant has addressed compliance with the notice to produce given to it by the plaintiff does not reflect well on the defendant or its solicitor. The defendant has ultimately been successful in having enforcement of the requirement to comply with certain items in the plaintiff's notice to produce refused. However, that should not obscure the manner in which it has done so. First, it completely failed to comply with the order of the Court requiring production in accordance with the notice to produce. Second, when it did provide a response, it was a poorly thought through response refusing to comply with all except one item in the notice. Thus it remained in breach of the order of the Court and failed to take any step to set aside the notice or to vary the order of the Court. Third, only after the plaintiff had made a formal application to enforce compliance with the Court's earlier order were any documents produced and then only on the morning of the hearing of the application. It was only upon the hearing of an application that a properly considered scope of objections was ultimately pursued.
35. Not only was this an inappropriate course to have adopted in circumstances where the Court had required production of documents in accordance with the notices, but it also occurred in the context of the defendant's solicitor pursuing complaints about the completeness of the production by the plaintiff who had already produced a very substantial number of documents in response to the defendant's notice to produce. The absence of any attempt by the defendant to comply with the order of the Court in relation to production of documents contrasts significantly with the energy with which its solicitor pursued the plaintiff's non-compliance and the energy with which the defendant pursued the issue of security for costs which was agitated during the period of the defendant's non-compliance. In that context I do not accept that the explanation given by Mr Gilbert in paragraph 8 of his affidavit is a complete explanation for the non-compliance by his client. Having regard to the centrality of disclosure of documents in a case such as the present, the lack of attention to disclosure by the

defendant is more consistent with a forensic decision to focus upon issues where the plaintiff was perceived to be on the defensive and overlook proper attention to disclosure of documents which might ultimately not assist the defendant's case. Such an approach is inconsistent with the just resolution of the real issues in the proceedings and inconsistent with the duties of the parties to assist the Court in achieving that objective.

36. In the present case the requirement for the application has been generated by the defendant's substantial non-compliance with its obligations under the order of the Court of 7 June 2017. While ultimately at the hearing of the application it has taken a defensible position in relation to some aspects of the notice to produce, its position prior to that time was not defensible. It represented an inappropriate approach to compliance with orders of the Court. Notwithstanding the defendant's ultimate success on part of its application, I consider that it should pay the plaintiff's costs arising from its non-compliance, the costs of the Application in Proceeding dated 9 August 2017, and the cost of the hearing on 14 and 15 August 2017.
37. Had the defendant not been successful on some of the items in the notice to produce, I would have ordered that it pay costs on a solicitor and client basis.
38. The orders of the Court are:
 1. The defendant is to pay the plaintiff's costs arising out of its non-compliance with the order of the Court on 7 June 2017 relating to production of documents pursuant to the plaintiff's notice to produce, the application in proceedings dated 9 August 2017 including the cost of the hearing on 14 and 15 August 2017.
 2. Except as dealt with by the previous order, the costs of the defendant's application dated 10 August 2017 (filed 14 August 2017) are costs in the cause.
 3. Costs the subject of these orders are not to be assessed until the proceedings end.

I certify that the preceding thirty-eight [38] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Mossop.

Associate:

Date: 18 August 2017