



Announcement

John Bridgeman Limited

ACN 603 477 185

JOHN.BRIDGEMAN

26 July 2019

JOHN BRIDGEMAN LIMITED (NSX:JBL)

John Bridgeman obtains orders for preliminary discovery against NSX

John Bridgeman Limited (**JBL**) refers to its application filed on 29 May 2019 to the Federal Court of Australia for preliminary discovery against National Stock Exchange of Australia Limited and NSX Limited (collectively, and each of them, **NSX**), pursuant to rule 7.23 of the *Federal Court Rules 2011* (Cth).

The Federal Court made orders dated 25 July 2019 in relation to that application (**Orders**). The Orders require that, within 14 days, NSX provide to JBL all documents recording or evidencing:

- any complaints or allegations said to have been made to the NSX in relation to JBL, and NSX's response to those complaints, where such documents were made by, or received by, NSX after 31 October 2018;
- communications between the NSX and ASIC in relation to or which led to the decision of the NSX to suspend trading in JBL's securities on 10 April 2019 (**Suspension Decision**); and
- the reasons of the NSX for making the Suspension Decision.

In making the above Orders, Justice Derrington stated, *inter alia*:

- On the material before the Court, NSX have displayed a strong reluctance to disclose to John Bridgeman information in their possession which has adversely affected JBL's financial interests (at paragraph 2).
- In its affidavit material, JBL made a number of assertions of alleged misconduct by NSX which give an appearance that NSX has acted in excess of its power and, despite having a fulsome opportunity to respond to those allegations, the NSX have chosen not to do so, nor explained why they chose not to respond (at paragraph 4).
- The material shows that on several occasions JBL sought from NSX the reason or an explanation for the suspension of its securities. NSX has refused to provide any such reasons and, moreover, has refused to say why it will not do so (at paragraph 17).
- In the circumstances, JBL can have a reasonable belief that it may be entitled to relief arising from the conduct of the NSX. At the very least it might obtain declaratory relief in relation to breaches of contract including the failure to accord JBL natural justice. Injunctive relief might also be appropriate (at paragraph 65).
- The refusal to respond to JBL's requests for information seemed to fall below the standards an entity with a financial market licence would be expected to meet. Although it was probably unintended, by their conduct the NSX did



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everything in their power to give the impression that they had made the decisions to suspend and to maintain the suspension without any legitimate basis. Whether that is so or not may be revealed in any future proceeding. For present purposes the inference exists that the NSX have been attempting to prevent evidence of their shortcomings being exposed (at paragraph 82).

A full copy of the judgment, including the Orders, is annexed to this announcement.

JBL looks forward to the receipt of the documentation contemplated by the Orders from NSX. Following a review of that material, JBL will then determine whether or not to commence legal proceedings and will provide further information as it becomes available.

JBL is being advised by external legal advisers and Counsel.

ENDS

Jody Wright
Company Secretary
John Bridgeman Limited

FEDERAL COURT OF AUSTRALIA

John Bridgeman Limited v National Stock Exchange of Australia Limited [2019]

FCA 1127

File number: QUD 346 of 2019

Judge: **DERRINGTON J**

Date of judgment: 25 July 2019

Catchwords: **PRACTICE AND PROCEDURE** – application for preliminary discovery – prospective applicant listed on stock exchange – suspension of trading in shares – limited explanation given by exchange operator for reasons for suspension – whether reasonable belief that may have right to relief – whether prospective applicant has sufficient information to decide whether to commence proceedings

CORPORATIONS – listing rules – suspension of trading – obligations of operator of stock exchange

Legislation: *Corporations Act 2001* (Cth)
Federal Court of Australia Act 1976 (Cth), s 37M, s 37N
Federal Court Rules 2011 (Cth), r 7.23

Cases cited: *Bonds and Securities (Trading) Pty Ltd v Glomex Mines NL* [1971] 1 NSWLR 879
Butt v M'Donald (1896) 7 QJ 68
Chapmans Ltd v Australian Stock Exchange Ltd (No 3) (1995) 17 ACSR 524
ED Oates Pty Ltd v Edgar Edmondson Imports [2012] FCA 356
ObjectiVision Pty Ltd v Visionsearch Pty Ltd (2014) 108 IPR 244
Optiver Australia Pty Ltd v Tibra Trading Pty Ltd (2008) 169 FCR 435
Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd (2017) 257 FCR 62
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596
Webcot Pty Ltd v Jephcott [2009] FCA 1241

Date of hearing: 19 July 2019

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| Category: | Catchwords |
| Number of paragraphs: | 85 |
| Counsel for the Prospective Applicant: | Mr M Hodge QC with Mr B Wacker |
| Solicitor for the Prospective Applicant: | McCullough Robertson |
| Counsel for the Prospective Respondents: | Mr N Andreatidis QC with Mr S Forrest |
| Solicitor for the Prospective Respondents: | Ashurst |

ORDERS

QUD 346 of 2019

BETWEEN: **JOHN BRIDGEMAN LIMITED ACN 603 477 185**
Prospective Applicant

AND: **NATIONAL STOCK EXCHANGE OF AUSTRALIA LIMITED**
ACN 000 902 063
First Prospective Respondent

NSX LIMITED ACN 089 447 058
Second Prospective Respondent

JUDGE: **DERRINGTON J**

DATE OF ORDER: **25 JULY 2019**

THE COURT ORDERS THAT:

1. Pursuant to r 7.23(2) of the *Federal Court Rules 2011* (Cth), within 14 days from the date of this order National Stock Exchange of Australia Limited ACN 000 902 063 and NSX Limited ACN 089 447 058 (collectively, and each of them, NSX) give discovery in accordance with r 7.25 to John Bridgeman Limited ACN 603 477 185 (JBL) of:

(a) all documents recording or evidencing:

(i) complaints or allegations made to NSX against, or in relation to, JBL by any person, including, without limitation:

A. shareholders of JBL;

B. shareholders of Henry Morgan Limited;

C. shareholders of Benjamin Hornigold Limited; or

D. the Australian Securities and Investments Commission (ASIC);

(ii) the response by NSX to those complaints or allegations,

where such documents were made by, or received by, NSX after 31 October 2018;

(b) all documents recording or evidencing communications between NSX and ASIC in relation to, or which led to, the decision by NSX to suspend from official quotation on the National Stock Exchange of Australia the securities of JBL made on or about 10 April 2019 (Suspension Decision);

(c) all documents that record (in whole or in part) the reasons of NSX for making the Suspension Decision.

2. As to costs:

(a) if within 90 days of the date of this order the prospective applicant has commenced proceedings against the prospective respondents or either of them in relation to the decisions referred to in these reasons, the prospective applicant's costs of this application be its costs in that cause;

(b) if within 90 days of the date of this order no such proceedings have been commenced, then each party shall bear their own costs of the application;

(c) subject to order (d), the prospective applicant shall pay the prospective respondents' cost of giving discovery referred to in order 1 hereof, such costs to be taxed (if not agreed) and paid forthwith;

(d) if the prospective applicant institutes proceedings of the type and within the time referred to in order (a), any costs that it has paid or will pay under order (c) shall be treated as and added to its costs in that cause.

3. Liberty to apply.

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

REASONS FOR JUDGMENT

DERRINGTON J:

Introduction

1 The application before the Court is brought by John Bridgeman Limited (JBL) against National Stock Exchange of Australia Limited (National Stock Exchange) and NSX Limited (NSX) pursuant to r 7.23 of the *Federal Court Rules 2011* (Cth) for what is referred to as pre-action discovery. At this point in time JBL has not commenced any proceeding seeking substantive relief. By the present application it seeks discovery which might assist it in making a decision whether it will bring proceedings against National Stock Exchange or NSX or both of them. The parties agree that this application ought be dealt with urgently.

The facts

Introductory matters

2 The matter has an unfortunate history and, at least on the material before the Court, National Stock Exchange and NSX have displayed a strong reluctance to disclose to JBL information in their possession which has adversely affected JBL's financial interests. They adopt that attitude from a position of power, part of which is afforded them because National Stock Exchange is the holder of an Australian market licence under s 795B of the *Corporations Act 2001* (Cth). NSX is apparently the holding company of National Stock Exchange but there is evidence to suggest that the former has some control or involvement in the decision-making processes of the latter. Where necessary I will refer to the prospective respondents collectively as "the NSX parties".

3 Although the matter before the Court is for relief upon an originating application, the hearing is summary in nature. The relative simplicity of r 7.23 suggests that applications of this type ought to be relatively expeditious and not, of themselves, determinative of any substantive dispute between the parties. The relatively low threshold which justifies relief is indicative that applications of this nature should not become mini-trials. That was a view expressed by Allsop CJ and Perram J in *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* (2017) 257 FCR 62 (*Pfizer*) and one which ought to be followed.

4 Nevertheless, parties are entitled to raise issues which are relevant to the determination of the application and each side has been afforded an opportunity to adduce the

evidence which they desire the Court to consider. An unusual aspect of this matter is that in its affidavit material JBL has made a number of assertions of alleged misconduct by the NSX parties which give an appearance that National Stock Exchange had acted in excess of its power and, despite having a fulsome opportunity to respond to those allegations, neither NSX nor National Stock Exchange have chosen to do so. In addition, neither have explained why they chose not to respond. Of course, they were not obliged to respond to the allegations and nor were they obliged to give any reason for that omission. However, the consequence is that JBL's evidence stands unchallenged and must be accepted for the purposes of this application.

5 The failure of the NSX parties to explain their omission to challenge the criticisms of them arising from JBL's material is not insignificant. Taken with their conduct in this litigation, the failure reflects an apparent strategy which included the making of some form of decision shortly prior to the hearing of the application and relying upon it as a basis for resisting the orders sought by JBL.

The circumstances giving rise to the dispute

6 As the names of the NSX parties suggest, they operate a securities market (the Exchange) on which company shares are listed and traded. National Stock Exchange is licenced to operate a domestic financial market in accordance with Chapter 7 of the *Corporations Act*. The material before the Court shows that the precise manner in which decisions are made by National Stock Exchange in relation to the operation of the Exchange is unclear. It was suggested by JBL that NSX has some controlling influence over the decision-making process and, although the NSX parties were aware of this issue and are possessed of all the relevant information in relation to it, they chose not to adduce any evidence which might clarify the position. Again, that was their right. That said, the inference which arises from JBL's material remains.

7 Since about 2015, JBL has been a listed entity on the Exchange. That market is conducted pursuant to certain listing rules which have statutory backing pursuant to s 793C of the *Corporations Act*. The Listing Rules are or constitute part of the terms of a contractual relationship between the licenced exchange operator and the companies accepted for listing.

8 The gravamen of JBL's claim is that on 10 April 2019, National Stock Exchange announced that JBL's securities were forthwith suspended from trading pursuant to Listing Rule 2.18. The announcement stated that the suspension was to continue whilst NSX

conducted an inquiry into JBL and that the company would be reinstated to official quotation once NSX's enquiries had been completed and the company was in compliance with the rules. On its face there was nothing inappropriate about that announcement although it did imply the suspension occurred because there was some *bona fide* reason for NSX to inquire into the operation of JBL and, further, that JBL was not then in compliance with the Listing Rules.

9 JBL complains that at no time prior to the announcement did National Stock Exchange inform it that it was considering suspending its securities and nor did National Stock Exchange provide JBL with an opportunity to provide submissions as to why the decision to suspend should not be made. The suspension occurred at a critical point in JBL's proposed takeover of the company called Henry Morgan Limited.

10 There is no need to assay the circumstances leading up to the issuing of the suspension in any great detail. That is because the central issue between the parties concerns the validity of the exercise of power by National Stock Exchange and, to a large extent, that involves a consideration of the factors which led National Stock Exchange to make the decision which it did and the manner in which the decision was made.

11 That said, it is appropriate to observe that, from about early September 2018, JBL undertook enquiries with a view to implementing an off-market takeover of two companies, being Henry Morgan Limited and Benjamin Hornigold Limited. From September 2018, the directors of JBL and their legal advisers engaged in various meetings and correspondence with National Stock Exchange in relation to the takeovers. Bidder's statements were lodged with ASIC and responses were provided to ASIC's queries in relation to them. Supplementary bidder's statements were lodged on 22 November 2018 and the matter went before the Takeovers Panel which, on 25 January 2019, made declarations of "unacceptable circumstances" in relation to the affairs of each of the takeover targets. The takeover panel made various consequential orders which were complied with by JBL, although ASIC subsequently required further amendments to a replacement bid which JBL's legal advisers had produced. In March 2019 JBL announced that it would not be proceeding with the proposed Benjamin Hornigold Limited takeover. Thereafter, it and its legal advisors engaged in further activity relating to the bid concerning Henry Morgan Limited. The work involved included the lodging of a replacement bidder's statement on 19 March 2019. It was in the context of JBL proceeding with that takeover bid that the suspension announcement was

made by NSX. It would appear that this bid remains on foot although, as JBL's offers include shares in itself, the present suspension of its shares from the Exchange necessarily adversely impacts on that process.

12 Immediately following the announcement of the suspension of JBL's securities from the Exchange, lawyers for JBL engaged in a telephone meeting with a representative of the NSX parties. That representative informed them that the suspension was due to a significant increase in the volume of complaints received in relation to JBL and their serious nature, including complaints about potential related party arrangements. Despite a request for details of these complaints the NSX parties refused to provide them.

13 Thereafter, several requests were made by JBL for details of the matters on which the NSX parties relied for making the suspension decision. There was no substantive response to those requests.

14 Subsequently, on 3 May 2019, and in response to a request for copies of the documents on which the NSX parties had relied to make the decision, National Stock Exchange asserted that the suspension was effected in accordance with its obligations under the Listing Rules and the terms of its Australian market licence so as to enable enquiries to be undertaken into the following affairs of the company:

- (a) related party transactions;
- (b) corporate governance practices;
- (c) general market disclosure;
- (d) material uncertainty related to going concern;
- (e) financial reporting assumptions and forecasts.

15 None of that information provided any detail as to the actual conduct which supported the concerns of the NSX parties.

16 During the period whilst JBL was seeking to ascertain the underlying facts on which the suspension in the trading of its shares was based, being between 9 April 2019 and 14 May 2019, National Stock Exchange made nine disclosure enquiries to JBL. The material shows that JBL responded to all of them albeit they ranged across a variety of topics including its takeover bids, its financial affairs, the terms of agreements to which it is a party, related party transactions and intra-corporate group relationships, and purchases of shares in JB Financial

Group Pty Ltd. There was no complaint by NSX that JBL failed to provide it with the information which it sought and nor was it said that the information was not provided in an expeditious manner. Subsequent to the commencement of this application, a further disclosure inquiry was made by National Stock Exchange to JBL and a prompt response was duly made.

17 In summary, the material shows that on several occasions JBL has sought from the NSX parties the reason or an explanation for the suspension of its securities. National Stock Exchange has refused to provide any such reasons and, moreover, it has refused to say why it will not do so. Occasionally, National Stock Exchange has mentioned some of the above general matters, although without any specific details, and has further said the decision was made to protect investors and the interests of maintaining an orderly market. Despite numerous requests for some particularisation of the concerns allegedly held by NSX, none were forthcoming.

18 On several occasions JBL enquired of National Stock Exchange as to the matters which it needed to address such that the suspension would be lifted or what steps needed to be taken in order for it to be reinstated. It is not insignificant that National Stock Exchange refused to respond to the requests for that information. Indeed, on one occasion it even refused to acknowledge the request.

Attempts to acquire documents

19 On 26 April 2019, JBL, by its solicitors, sent a letter to National Stock Exchange seeking the disclosure of the documents which are now sought pursuant to this application. On 3 May 2019, NSX responded but refused to provide any. It referred to its entitlement under Listing Rule 2.18 that listing was always granted subject to the condition that where the exchange considers it necessary for the protection of investors or the maintenance of an orderly market it may at any time suspend trading in any securities. National Stock Exchange's response then asserted that the suspension was effected in accordance with its obligations under the Listing Rules and its Australian market licence to enable it to pursue enquiries into the matters to which it had previously referred.

Procedural matters

20 The originating application was filed by the prospective applicant, JBL, on 29 May 2019 and was supported by a number of affidavits. A first case management hearing

occurred on 11 June 2019 at which orders were made to bring the matter to an expeditious hearing. The matter was obviously of commercial significance to JBL and, necessarily, important to National Stock Exchange to the extent to which it concerned the manner in which it applied the Listing Rules. The orders made included one that the NSX parties were to file their material by 5.00 pm on 25 June 2019. Orders were also made for the exchange of submissions. Naturally, the submissions were to be filed after the exchange of the evidence. It is to be kept in mind that the orders were made with the agreement, if not consent, of the parties.

21 Despite the NSX parties and their solicitors being aware of the terms of this Court's orders of 11 June 2019, no affidavit material was filed by them prior to 25 June 2019. Nothing was filed which sought to contradict the matters raised by JBL and nothing was filed to suggest that the context in which the application was to be heard might change as a result of the actions of National Stock Exchange.

22 However, on 25 June 2019, the solicitors for the NSX parties, Ashurst, sent to JBL's solicitors, McCullough Robertson, a letter enclosing a USB containing various documents. It was said that the NSX parties would be seeking to tender the documents contained on that USB at the hearing of the matter.

23 By letter of 26 June 2019, McCullough Robertson wrote to Ashurst seeking confirmation that the NSX parties did not intend to file and serve any material in advance of the hearing.

24 By a return email later that day Ashurst confirmed that their clients did not intend to file and serve any affidavit material in advance of the hearing. McCullough Robertson immediately responded, advising that JBL will object to the tender of any documents which ought to have been included in affidavit evidence.

25 By a further email on 26 June 2019, Ashurst responded to McCullough Robertson. In part that email read:

We have identified to you the documents that we currently propose to tender.

We are not seeking to take you by surprise, which is why we have identified those documents. If, however, upon receipt of your submissions it becomes apparent that there are further documents which we consider our clients should tender, we do not consider the orders prevent us from doing this.

26 That response was disingenuous. The orders made by this Court on 11 June 2019 were pellucid in their intent. The evidence on which the application was to be heard was by affidavit filed and served in accordance with the Court's directions and prior to the filing and serving of submissions. The suggestion by one party that such orders would not impose some form of impediment to the tendering of documents at the hearing of the application had no substance.

27 Despite the previous assertion by Ashurst that its clients had no intention of filing any affidavit material, on the evening of 17 July 2019, the prospective respondents sought to file in this Court an affidavit which, together with annexures, totalled approximately 2,800 pages. At the hearing on 19 July 2019, counsel for the NSX parties sought to rely upon it. Its contents were, substantially, a letter from National Stock Exchange to JBL dated 16 July 2019 relating to its alleged concerns about JBL's conduct. Counsel for the NSX parties submitted that the letter now provided all of the information which the NSX parties need for the purposes of pursuing any action and that because of the existence of the letter, the relief pursued by JBL should be refused.

28 The letter, dated 16 July 2019, is 25 pages long and the annexures consist of approximately 2,740 additional pages. Necessarily, the date on the letter post-dated the date on which National Stock Exchange had been required to file its material. The affidavit annexing the letter stated that the letter was given to JBL and its solicitors on 16 July 2019.

29 No adequate explanation was given as to why the letter was prepared when it was. In a further affidavit filed by the NSX parties in which an explanation for the late filing of the affidavit of 17 July 2019 was given, it was said that "in about late June 2019", National Stock Exchange decided to make a decision in relation to the matter. The identification of the time when the decision was made appears to be deliberately vague such that it cannot be known whether the so-called determination to provide a letter in relation to the applicant's concerns arose prior to or after the date on which the NSX parties were to file their material in this action. It should be observed that this affidavit was produced in response to the Court requiring an explanation why the affidavit had not been filed in accordance with its directions. That, however, does not really matter. The NSX parties and their lawyers had been well aware since 11 June 2019 that this application was to be heard on 19 July 2019 and that orders had been made for the delivery of the parties' affidavit material and, thereafter, their submissions. The programing of the delivery of submissions after the evidence is filed

affords the parties an opportunity to assist the Court by providing their analysis of the evidence on which the matter may turn. Here, the strategy engaged in by the NSX parties and their lawyers was to circumvent the orders made by the Court which had the effect of enabling their written submissions, which were also lodged after the time directed by the Court, to deal with the late affidavit evidence whilst denying that opportunity to JBL's lawyers.

30 In the circumstances in which the application progressed, at the very least it could be expected that some explanation as to why the letter was not written earlier than the date which appears on it (that is, if 16 July 2019 was truly the date on which it was finalised). That is not to deny that the letter would not have taken some time to prepare. Although it appears under the hand of Mr Fitzpatrick, Head of Market Operations, National Stock Exchange of Australia, it has all the hallmarks of having been drawn and settled by lawyers. That, of itself, is not inappropriate. However, that would not necessarily be the case were it to be proffered as constituting the actual thought processes of a decision maker on behalf of the NSX parties.

31 Somewhat unusually, JBL did not oppose the reliance by the NSX parties on the late affidavit. Had objection been taken, it would have been very difficult for those parties to satisfy the Court that it should have been admitted into evidence. The strategy adopted by them appeared to offend s 37N of the *Federal Court of Australia Act 1976* (Cth). Further, no objection was made by Mr Hodges QC for JBL that any part of the affidavit was not relevant to the determination to be made by the Court. The only concern raised in relation to the 2800 page late affidavit came from the Court. After questions were raised by the Court as to which of the 2774 pages of exhibits were relevant to the decision to be made, neither Mr Hodge QC nor Mr Andreatidis QC for the NSX parties were able to identify any apart from the letter itself. After a short adjournment, counsel agreed that none of the letter's attachments were relevant to any decision which needed to be made by the Court. In effect, despite the affidavit having been tendered and no objection being made, even on relevancy grounds, Counsel then agreed that approximately 2740 pages of it was not required. Orders were made that the original affidavit filed be uplifted and replaced with one which contained only the relevant documents.

32 In one particular State in this country there has been, for many years, a prevailing practice whereby litigation is conducted by shovelling vast amounts of documents into

evidence without any real concern by either party as to their relevance to the issues to be decided. During addresses, little or no reference is made to most of them or why they are part of the evidence. The Court is left to attempt to sort through the vast array of tendered documents to try to ascertain their import, if any, in relation to the determination to be made. It is, unfortunately, a practice in which both sides of the legal profession have been complicit. It is wasteful, both in terms of the costs to the litigants and of the courts' ever-diminishing resources and is a practice which ought to be deprecated in the strongest terms. In this Court it is conduct which contravenes ss 37M and 37N of the *Federal Court of Australia Act* and it ought to be met with the punitive provisions which that Act provides.

The contents of the letter

33 As mentioned above, the letter appears to have been drawn and settled by a lawyer or lawyers. An indicator of that is its particularly self-serving nature. Its purported purpose is identified as being that National Stock Exchange, having suspended dealings in JBL's shares, has continuing concerns and by the letter it offers JBL an opportunity to respond to them. The letter said that after considering the responses the National Stock Exchange will consider whether to reinstate JBL.

34 As was submitted on behalf of JBL, the contents of the letter do not purport to evidence the reasons for the decision by National Stock Exchange for its suspension. In paragraph 19, National Stock Exchange gives an overview of the letter's concerns and states that it is concerned that JBL is "not presently suitable to be reinstated to quotation". It identifies what it says are five areas of concern which it had at the time of suspension, some additional areas of concern and complaints which it has received in relation to JBL.

35 At paragraph 21, the letter asserts that there were five areas of concern which National Stock Exchange had at the time of the initial suspension and which allegedly remain of concern. There is no doubt that, in this respect, the letter is carefully crafted. It alludes to the possibility that the five areas of concern were the reason or part of the reason for the making of the suspension decision, but it does not clearly say that such was the case. In the NSX parties' written submissions it is said the letter "identifies, in detail, five concerns that were reasons relevant to the decision to suspend". That is a misstatement of what the letter actually says, but it may have been the letter written with the intent that it be portrayed in that way.

36 The NSX parties also said that the letter identifies and provides copies of relevant documents referred to in detail in the letter and that there are four volumes of them. Whilst that may be so, the difficulty is that the letter is not directed to the decisions of which complaint is made but the subsequent decision of whether to reinstate JBL.

37 In short, and despite the submissions to the contrary, the letter of 16 July 2019 does not explain how the decision to suspend was made or why in the period up to the date of the letter the suspension has continued.

Legal principles relevant to the application

38 Rule 7.23 of the *Federal Court Rules* provides:

7.23 Discovery from prospective respondent

- (1) A prospective applicant may apply to the Court for an order under subrule (2) if the prospective applicant:
 - (a) reasonably believes that the prospective applicant may have the right to obtain relief in the Court from a prospective respondent whose description has been ascertained;
 - (b) after making reasonable enquiries, does not have sufficient information to decide whether to start a proceeding in the Court to obtain that relief; and
 - (c) reasonably believes that:
 - (i) the prospective respondent has or is likely to have or has had or is likely to have had in the prospective respondent's control documents directly relevant to the question whether the prospective applicant has a right to obtain the relief; and
 - (ii) inspection of the documents by the prospective applicant would assist in making the decision.
- (2) If the Court is satisfied about matters mentioned in subrule (1), the Court may order the prospective respondent to give discovery to the prospective applicant of the documents of the kind mentioned in subrule (1)(c)(i).

39 Relevantly, r 7.21 provides the following definitions:

Definitions for Division 7.3

In this Division:

prospective applicant means a person who reasonably believes that there may be a right for the person to obtain relief against another person who is not presently a party to a proceeding in the Court.

prospective respondent means a person, not presently a party to a proceeding in the Court, against whom a prospective applicant reasonably believes the prospective applicant may have a right to obtain relief.

40 Neither party attempted to identify how r 7.23 operated. Mr Hodge QC for JBL seemed to submit that if the matters in r 7.23(1) were shown to exist, the order for pre-action discovery followed. He submitted that, in this case, those matters had been established and, therefore, JBL was entitled to the order. In the course of address it was pointed out to him that the power to make the order appears in r 7.23(2), that the power is conditioned upon the Court being satisfied of the matters in r 7.23(1), but the Court had a discretion as to whether to make it. That such is the operation of the rule seems to emerge from the words used. It was pointed out to Mr Hodge QC that, in the exercise of the discretion, the Court could take into account events which have occurred since the filing of the application and, in this case, that would include the provision of information to JBL in the letter dated 16 July 2019.

41 Although Mr Hodge QC urged a different construction, that is how the rule operates and it is pellucid that it does. The applicant's submission to the contrary must be rejected. No other identification of the operation of the rule was suggested and it is apparent that the words of r 7.23(2) must be given some work to do. The satisfaction of the matters in sub-r (1) is the circumstance on which the power to make the order is conditioned. The Rules have quite clearly given to the Court the discretion to make or refuse the order depending upon the circumstances of the case. There may be many reasons as to why the order should not be made despite an applicant having satisfied the matters in r 7.23(1).

The matters in r 7.23(1)

42 There are four matters identified in r 7.23(1) of which the Court must be satisfied before the power to make an order is enlivened. In summary, they are as follows:

- (a) First, that the proposed applicant reasonably believes they may have the right to obtain relief from an identified prospective respondent;
- (b) Secondly, the prospective applicant has made reasonable inquiries but does not have sufficient information to decide whether to commence a proceeding;
- (c) Thirdly, the prospective applicant reasonably believes the prospective respondent has relevant documents to discover; and
- (d) Fourthly, the prospective applicant reasonably believes inspection of those documents would assist it in deciding whether to commence a proceeding.

43 There was no real debate about the latter two of the above matters. The submissions of the NSX parties were that any belief which JBL had as to whether it had a cause of action

could not be reasonable or, alternatively, it had all the information necessary to know whether to commence it.

44 Rule 7.23 was recently considered by the Full Court in *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* (2017) 257 FCR 62. In that case, the Court identified that r 7.23 is a beneficial provision and its purpose is to enable a person who believes they may have a right to seek relief to obtain information to make a responsible decision as to whether to commence proceedings: Allsop CJ at [4] and Nicholas J at [172]. The Chief Justice said at [8]:

The foundation of the application in r 7.23(1)(a) is that an applicant (a person or a corporation) reasonably believes that he, she or it may have a right to relief. The belief therefore must be reasonable (expressed in the active voice that someone reasonably believes) and it is about something that **may be** the case, **not is** the case. It is unhelpful and likely to mislead to use different words such as “suspicion” or “speculation” to re-express the rule. For instance, it is unhelpful to discuss the theoretical difference between “reasonably believing that one **may** have a right to relief” and “suspecting that one **does** have a right to relief” or “suspecting that one may have a right to relief” or “speculating” in these respects. The use of such (different) words and phrases, with subtleties of differences of imprecise meaning, and not found within the rule itself is likely to lead to the proliferation of evidence and of argument, to confusion and to error. One must keep the words of the rule firmly in mind in examining the material that exists in order to come to an evaluation as to whether the relevant person reasonably believes that he or she may have a right to relief. That evaluation may well be one about which reasonable minds may differ. (emphasis in original)

45 To similar effect, Perram J explained that the rule was a broad rule which effectively allowed that which is colloquially known as “fishing”:

[108] As I have noted already, it is not the requirement of this rule that there be a reasonable belief that there *is* a right to obtain relief. This is an important qualification and it colours necessarily the analysis involved in assessing the reasonableness of the belief. FCR 7.23(1) is not about giving preliminary discovery to those who believe they do have a case. Its wording unequivocally shows that it is about those who do not know that they have a case but believe that they may. In terms, it authorises what traditionally have been referred to as fishing expeditions; that is to say, evidentiary adventures in which the goal is not to find proof of a case already known to exist, but instead to ascertain whether a case exists at all. (emphasis in original)

46 There is little doubt that the rule is intended to be a beneficial aid to a prospective applicant who is having real difficulty, and reasonably so, in deciding whether to litigate because of a lack of essential information: *Webcot Pty Ltd v Jephcott* [2009] FCA 1241, [33].

47 JBL submitted that in the application of r 7.23(1)(b) the question is whether after making reasonable enquiries the prospective applicant does not have sufficient information to decide whether they ought to start a proceeding: *Optiver Australia Pty Ltd v Tibra Trading Pty Ltd* (2008) 169 FCR 435, [36]. Importantly, the “sufficient information” includes that which might identify what defences may be available to the prospective respondent and the strength of those defences or to determine the extent of the prospective respondent’s breaches: *ED Oates Pty Ltd v Edgar Edmondson Imports* [2012] FCA 356, [26]. As was said by Perry J in *ObjectiVision Pty Ltd v Visionsearch Pty Ltd* (2014) 108 IPR 244 at [30], even where a prospective applicant may have reason to believe they have a right to relief, they may need further information to know whether the cost and risk of litigation is worthwhile and, in that respect, given its beneficial purpose, the rule should be given the fullest scope which its language will reasonably allow.

Application to the present case

Whether JBL reasonably believes that there may be a right to obtain relief

48 Although JBL has identified a number of prospective claims which it might pursue, for present purposes it relied upon the evidence of Ms Weeks, the Head of International Operations at JBL, that she believed that JBL may have a right to obtain relief in the Court from the prospective respondents for breach of the Listing Rules. Ms Weeks said she believed the action may arise because of the contractual relationship between JBL and the NSX parties and that, in administering the Listing Rules, the NSX parties have not acted honestly and fairly in making a decision to suspend the quotation of JBL securities. In part, that seems to have been based on a denial of natural justice prior to the making of the decision.

49 There does not seem to be any doubt about the contractual relationship between a listed entity and the holder of an Australian market licence operating an exchange on which a company’s shares are listed. Where those contractual rights and obligations become strained, the conduct of either party may give rise to a cause of action for breach of contract: *Chapmans Ltd v Australian Stock Exchange Ltd (No 3)* (1995) 17 ACSR 524 (*Chapmans Ltd v ASX (No 3)*), 525.

50 Further, JBL asserts that s 793C of the *Corporations Act* has the effect that the Listing Rules which operate between it and National Stock Exchange are given statutory effect. It

also relies on s 1101B(1)(d) of the *Corporations Act* which confers power on the Court to make orders on the application of an aggrieved person for a contravention of listing rules.

Listing Rule 2.18

51 Although Listing Rule 2.18 permits the exchange to suspend trading of any securities when it considers it necessary for the protection of investors or the maintenance of an orderly market, JBL submitted the power is subject to an obligation that it be exercised fairly and reasonably in the sense that it not be exercised capriciously or arbitrarily or for extraneous purposes. In support of that proposition it relied upon Listing Rule 1.2, pursuant to which National Stock Exchange undertook to provide “a fair, orderly and efficient market for the trading of securities issued by issuers that have either a primary or a secondary listing on the Exchange”.

52 Relevantly, the NSX parties did not appear to suggest that National Stock Exchange was entitled to exercise its powers capriciously or arbitrarily or unreasonably or unfairly. However, they submitted that Ms Weeks could not have a reasonable belief that JBL may have a right to obtain relief on the basis that National Stock Exchange’s powers had been exercised unreasonably. They submitted that because National Stock Exchange has not provided any reasons for its decision, Ms Weeks could not believe, reasonably or otherwise, the decision itself lacked an intelligible justification. So the argument went, she could not know how or why the decision was made. However, that submission misapprehends the scope of the rule. It construes the rule as requiring a belief that there *is* a right to relief. What is required is that there be a reasonable belief that there *may* be a right to relief: *Pfizer* at [108].

The limits on the power under the listing rules — Chapmans Ltd v ASX (No 3)

53 The parties were in agreement that the relevant limitation on the powers of the holder of an Australian market licence under its listing rules was that identified by Beaumont J in *Chapmans Ltd v ASX (No 3)*. In brief, that case concerned whether the ASX, as the holder of a market licence, was obliged to comply with the rules of natural justice before suspending a company and whether there was any obligation on it to act reasonably in the exercise of its powers. The answer to those questions depended upon the terms of the contract between the ASX and the company which had been suspended: *Bonds and Securities (Trading) Pty Ltd v Glomex Mines NL* [1971] 1 NSWLR 879. In the matter before Beaumont J it appeared to

have been accepted that the company was entitled to be accorded some procedural fairness before a decision was made to suspend trading in its shares. At 529 his Honour said:

As to the first claim, namely, that the applicant was entitled to a proper opportunity to be heard in relation to any decision to suspend or remove, there is no real dispute between the parties with respect to the legal principles to be applied. It is accepted on behalf of the respondent, correctly, that because the applicant's proprietary interests may be adversely affected by these decisions, then prima facie at least, procedural fairness should be accorded, and that this would usually include an obligation to provide the applicant with a proper opportunity to be heard in that connection (see, for instance, *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 264; 25 ALR 1).

54 Beaumont J then considered whether an entity in the position of the ASX was bound to act in good faith and or reasonably in the exercise of its power. In that respect the parties before the Court had apparently accepted that the ASX had a duty to act honestly in the exercise of power under its listing rules and his Honour also considered that it had a duty to act fairly. That is, the exchange was to give fair and honest consideration to the exercise of its power to list or to suspend. He equated the duty to act fairly and honestly with the duty not to act unreasonably, in the sense that no reasonable person could possibly act in that particular way.

The case advanced by JBL

55 JBL submitted that it may have a cause of action against the NSX parties and, in particular, against National Stock Exchange, for breach of contract on the grounds that it failed to act honestly and fairly in exercising its powers in relation to the suspension of its shares. Ms Weeks' deposed belief that such may be the case is more than reasonable. She deposed to believing that JBL has complied with its obligations under the Listing Rules at all times; provided prompt and fulsome responses to requests for information from ASIC, the Takeovers Panel and NSX; has not engaged in any conduct which could reasonably justify the suspension of its securities from the NSX; and that there is no proper basis for JBL's suspension. With that foundation, on myriad occasions JBL had sought to be informed of the substance of the matters on which the NSX parties acted in suspending its listing. The NSX parties have repeatedly refused to provide that detail, even in the most general form. They did no more than recite broad assertions, the substance of which was not apparent.

56 JBL also sought confirmation that any concerns held by the NSX parties had been addressed and advice as to what steps needed to be taken for it to be reinstated. The NSX parties and, in particular, National Stock Exchange, did not respond to the request. It is

surprising that an Exchange which is apparently in competition with other markets, both domestic and international, would fail to respond to such a request. It also provided no reason as to why it would not respond to JBL's request.

57 It follows that on the material presently before the Court, the conduct of the NSX parties gives rise to a reasonable belief that National Stock Exchange had no justifiable basis for the suspension of JBL's shares. It was not able to provide a scintilla of rationale for its decision. Alternatively, it refused to do so when providing such grounds would have been a simple, easy and rational solution to the concerns raised by JBL in this application. Necessarily, a reasonable inference arises that it had no justification for its decision to suspend trading in JBL's shares and that its decision to do so was neither honest nor fair. If it had no justification, it would also not be reasonable.

58 The NSX parties submitted that because they had not given any reasons for its actions, Ms Weeks could not have any reasonable belief that its decision to suspend was vitiated by a lack of honesty or fairness. Whilst that submission may have some force in certain circumstances, that is hardly the case in the circumstances of this matter which have been set out above.

59 In the result JBL has satisfied that it holds a reasonable belief that it may have a right to obtain relief in this Court from the NSX parties. That relief would flow from the prospective respondents' breach of the Listing Rules and in particular the implied obligation to act honestly and fairly: *Chapmans Ltd v ASX (No 3)*.

60 JBL also sought to rely upon an obligation to act in good faith which it claims was implied into the agreement between it and National Stock Exchange. Given what has been decided above there is no need to consider that submission.

A failure to act honestly and fairly by denying natural justice

61 JBL further contended that National Stock Exchange may have failed to act honestly and fairly by failing to accord it procedural fairness, by not providing it with an opportunity to be heard before the NSX parties made the decision to suspend the quotation of its securities on the Exchange. Particular reference is made to Listing Rule 2.21 which provided:

Where trading has been suspended, the procedure for lifting the suspension will depend on the circumstances and the Exchange reserves the right to impose such conditions as it considers appropriate...The continuation of a suspension for a

prolonged period without the issuer taking adequate action to obtain restoration of trading may lead to the Exchange cancelling the listing.

62 There is much force in JBL's submission that implicit in those requirements is that the company be informed of the reasons for suspension, the procedure for lifting the suspension and the actions required of it to obtain restoration of trading. In the absence of such knowledge it cannot take the restorative steps.

63 As identified previously, the NSX parties refused to inform JBL of the substance of their concerns or of the perceived non-compliance(s) by JBL with the Listing Rules. On the basis of the evidence presently before the Court, this is also likely to give rise to a breach of the implied obligation on each party to a contract to do all that is necessary to secure performance of the contract and, in particular, to enable the other party to have the benefit of the contract: *Butt v M'Donald* (1896) 7 QJ 68 at 70-71; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596.

64 However, JBL primarily relied upon the absence of procedural fairness in the making of the suspension decision on the basis that National Stock Exchange failed to afford it an opportunity to be heard before making the decision which detrimentally affected its interests. That, so it was submitted, would require National Stock Exchange to disclose the critical issues or factors on which a decision to suspend was likely to turn so that JBL might have the opportunity to respond. This is slightly different to the above allegations of a failure by the NSX parties to act honestly and fairly, but it nevertheless supports that allegation. In particular, it could be reasonable to infer that National Stock Exchange did not invite JBL to respond to its concerns prior to making its decision as it did not then hold any valid concerns.

Relief to which JBL may be entitled

65 In the above circumstances, JBL can have a reasonable belief that it may be entitled to relief arising from the conduct of the NSX parties and, in particular, of National Stock Exchange. At the very least it might obtain declaratory relief in relation to breaches of contract including the failure to accord JBL natural justice. Injunctive relief might also be appropriate. JBL also relies upon the ability of the Court to make directions under s 793C(2) or orders under s 1101B of the *Corporations Act*. In particular, that the Court might give directions about complying with a provision of the operating rules of a licensed market. Such directions could include a requirement that National Stock Exchange reinstate trading in JBL securities or, advise JBL as to the critical issues or factors upon which its decision was made.

66 The NSX parties did not deny that if there were a breach of the terms of the Listing Rules or any implied obligations, JBL would be entitled to relief of some description whether that be damages for breach of contract or declaratory relief, or damages under the *Corporations Act*

Identity of the proper prospective respondents

67 In correspondence, the solicitors for the NSX parties have asserted that NSX is a holding company for National Stock Exchange and does not make listing decisions and, therefore, no discovery should be sought from it. However, as JBL submits, the correspondence which communicated the decision to suspend its shares and other correspondence lists both of the NSX parties without distinction on its letterhead and the website for the Exchange refers only to NSX under the heading of “Governance”. The prospective respondents have declined to put on any affidavit material explaining the position when they are obviously in the position to do so. The absence of any such material, in the circumstances of the NSX parties’ conduct in relation to the suspension and in this litigation, affords more than sufficient basis for an inference that NSX as well as National Stock Exchange was involved in the decision making process. Even if NSX was not directly involved in making the decisions, in the circumstances it is more than possible that it was knowingly concerned in contraventions of the *Corporations Act* committed by National Stock Exchange: ss 1101B and 1324 of the *Corporations Act*.

Does JBL know too much?

68 An argument advanced by the NSX parties was to the effect that JBL was not in the position of a party who reasonably believed they *may* have a cause of action. It was submitted that it believed that it *did* have a cause of action with the result that the benefit of r 7.23 was not available to it. In particular, reliance was placed on paragraph [108] of the reasons for judgment of Perram J in *Pfizer* which is set out above. There, his Honour said that the rule was not about giving preliminary discovery to those who believe they *have* a case but those who believe they *may* have a case. On this basis it was argued that once a prospective applicant passes beyond a belief that they may have a case and believes they do have a case, they are no longer entitled to relief.

69 The insurmountable difficulty with this submission by the NSX parties is that in her affidavit of 28 May 2019, Ms Weeks deposed that she believed that JBL *may* have a right to obtain relief in the Court from the NSX parties for breach of the Listing Rules. Ms Weeks

was not cross-examined on that affidavit and it was not put to her that she in fact believed that the company *had* a cause of action. It is a matter of basic fairness that if counsel intends to submit to the Court that a deponent, under oath, has engaged in misstating their evidence that allegation must be put to the witness and they be given an opportunity to respond: *Browne v Dunn* (1893) 6 R 67. Non-compliance with the eponymous rule from that authority has the consequence that the submission of the NSX parties which suggested that Ms Weeks was not telling the truth ought to be rejected.

70 In addition, the part of the reasons of Perram J (at 92 [108]) relied upon by the NSX parties has been taken out of context. His Honour was comparing the terms of r 7.23 with the terms of the former rule in O 15A which some authorities had suggested required there be reasonable grounds to believe the prospective applicant actually had a cause of action. His Honour's comments were directed to identifying that r 7.23 clearly set the standard of belief at a low level; being that the prospective applicant reasonably believe that they *may* have a case. Once that is satisfied the criterion in r 7.23(1)(a) is met, as it was in this case.

71 It was also somewhat disingenuous of the NSX parties to suggest that Ms Weeks must have believed that JBL *had* a right to relief when they alternatively submitted that it could not have any cause of action because there was no basis on which JBL could believe that the decision of National Stock Exchange lacked an evident and intelligible justification. That submission would suggest that if Ms Weeks believed JBL actually had a cause of action, she would be wrong.

72 The submission of the NSX parties to the effect that JBL had a heightened state of knowledge about its entitlement to relief and that prohibited it from relief under r 7.23 should be rejected.

A reasonable belief was held

73 It follows that the Court can be satisfied that Ms Weeks, on behalf of JBL, did hold a reasonable belief that it may have the right to obtain relief against the NSX parties in relation to the decision to suspend and the decision not to terminate the suspension. That belief was based on alleged failure by National Stock Exchange to accord JBL natural justice or to act fairly and honestly.

Has JBL made reasonable enquiries and does it have insufficient information to decide?

74 The prospective respondents did not contend that JBL had not make reasonable enquiries about the information now pursued. That, of course, would have been a logically impossible position to adopt. JBL made numerous requests for information as to the circumstances of its suspension and continued suspension. The NSX parties refused to respond in any substantive way. Necessarily, JBL remains uncertain as to the reasons for its suspension including the nature of the underlying complaints said to have been made about it or on which any decision was made. Similarly, it is bereft of relevant information in relation to communications between ASIC and the NSX parties. It has sought voluntary disclosure from the NSX parties which they have refused to provide, saying that they were “unable” to disclose any such documents.

75 In this case the conduct of the NSX parties in refusing to provide JBL with the information on which it relied, if any, to suspend trading in JBL shares and to continue that suspension, gives rise to an inference that it had no basis for the decisions which it made. That inference may be dispelled by evidence in the future but that is not relevant for present purposes. For this application it is sufficient to observe that the events of which complaint is made, being the making of the various decisions, occurred in the absence of JBL. All matters relevant to the validity of the decisions are within the knowledge and possession of the NSX parties. It is reasonable to believe that the information which is in their possession will assist JBL in deciding whether to commence an action. JBL does not have that information.

76 There are many matters which affect any decision whether to commence proceedings in a court. There may be questions about the strength of the case to be advanced or the strength of any possible defence. There may be difficulties as to how the supposed cause of action might be appropriately particularised so as to be safe from summary dismissal. Here JBL is not in possession of important information which relates to the decisions which adversely affected its interests. The information which it does have is not sufficient for it to make a properly informed decision about whether to commence proceedings.

77 The NSX parties relied upon the existence of the letter of 16 July 2019 for the submission that JBL now knows all of the information it needed to determine whether to commence a proceeding. However, that submission should be rejected. The letter is not and does not purport to be a record of the reasons for the decision made to suspend JBL’s shares and nor does it appear to be a record of the decision to continue the suspension in the period

from 10 April 2019 to shortly prior to the writing of the letter. In effect, the letter does not assist in determining whether the original decisions to suspend and continue the suspension were validly made. It follows that the suggestion that JBL has sufficient information to determine whether to commence proceedings should be rejected.

Possession of the documents and their relevance to the decision

78 The NSX parties did not seriously suggest they were not in possession of documents which were directly relevant to the question of whether JBL has a right to obtain relief. For the reasons given above it is obvious that they are and JBL's belief that they do is reasonable. It is also not in doubt that those documents would assist JBL in making the relevant decision and no serious submission was made by the NSX parties to the contrary.

79 It follows that the Court can be satisfied of the matters in r 7.23(1)(c) have been met.

Discretion

80 Despite JBL's submissions to the contrary, the Court has a discretion to exercise when satisfied of the matters in r 7.23(1). That said, the satisfaction of those matters is not merely some technical step to be overcome. It is substantive in the sense that the fulfilment of the criteria provides a foundation for the making of an order. Nevertheless, the discretion remains, and it may have a substantial impact on the scope of any order made.

81 In this case, however, there are no significant ameliorating factors. The NSX parties did not adduce any evidence of any difficulty they might sustain in producing documents. Although they raised the possible existence of public interest immunity in some documents, whether that can be validly claimed is a matter for another occasion.

82 One factor which may weigh significantly in the exercise of the discretion is the conduct of the NSX parties in both the manner in which they dealt with JBL and in the manner in which they have engaged with the application. The conduct in each respect is consistent. The refusal to respond to JBL's requests for information seemed to fall below the standards an entity with a financial market licence would be expected to meet. Although it was probably unintended, by their conduct the NSX parties did everything in their power to give the impression that they had made the decisions to suspend and to maintain the suspension without any legitimate basis. Whether that is so or not may be revealed in any future proceeding. For present purposes the inference exists that the NSX parties have been attempting to prevent evidence of their shortcomings being exposed. That might also be

perceived from their conduct in the litigation which was suggestive of an attempt to avoid responding to legitimate queries about their behaviour. Whilst this factor is significant, even without it, the discretion to make discovery orders should be exercised in JBL's favour.

Appropriate orders

83 JBL has confined the relief which it seeks on this application to narrow classes of documents. They are directed to the question of whether it has a right to obtain relief and the documents sought are those recording or evidencing:

- (a) the complaints or allegations said to have been made to the NSX parties against, or in relation to, JBL and the response by the NSX parties to those complaints (but only such documents as were received or made after 31 October 2018);
- (b) communications between the NSX parties and ASIC in relation to or which led to the suspension decision; and
- (c) the reasons of the NSX parties for making the suspension decision.

Those categories of documents are within the kind mentioned in sub-rule (1)(c)(i).

84 The relief sought in the originating application ought to be granted.

Costs

85 No party made any significant submissions in relation to the costs of the application. In the circumstances where the application was opposed and the conduct of the NSX parties in opposing it was as described in these reasons, JBL should not even be in the position where it is required to pay the costs of the prospective respondents. However, the costs of the NSX parties in complying with the order for discovery should be costs paid by JBL or, if proceedings are commenced, should be costs in those proceedings. Therefore the costs orders should be:

- (a) If within 90 days of the date of this order the prospective applicant has commenced proceedings against the prospective respondents or either of them in relation to the decisions referred to in these reasons, the prospective applicant's costs of this application be its costs in that cause.
- (b) If within 90 days of the date of this order no such proceedings have been commenced, then each party shall bear their own costs of the application.

(c) Subject to order (d), the prospective applicant shall pay the prospective respondents' cost of giving discovery referred to in order 1 hereof, such costs to be taxed (if not agreed) and paid forthwith.

(d) If the prospective applicant institutes proceedings of the type and within the time referred to in order (a), any costs that it has paid or will pay under order (c) shall be treated as and added to its costs in that cause.

I certify that the preceding eighty-five (85) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Derrington.

Associate:

Dated: 25 July 2019