FEDERAL COURT OF AUSTRALIA

Harcourts WA Pty Ltd v Roy Weston Nominees Pty Ltd (No 3) [2014] FCA 133

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| Citation: | Harcourts WA Pty Ltd v Roy Weston Nominees Pty Ltd (No 3) [2014] FCA 133 |
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| Parties: | **HARCOURTS WA PTY LTD ACN 009 120 227 v ROY WESTON NOMINEES PTY LTD ACN 073 213 920****ROY WESTON NOMINEES PTY LTD ACN 073 213 920 v HARCOURTS WA PTY LTD ACN 009 120 227** |
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| File numbers: | SAD 224 of 2012WAD 167 of 2013 |
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| Judges: | **MCKERRACHER J** |
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| Date of judgment: | 24 February 2014 |
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| Cases cited: | *Harcourts WA Pty Ltd v Roy Weston Nominees Pty Ltd (No 2)* [2014] FCA 107 |
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| Date of hearing: | 21 February 2014 |
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| Place: |  |
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| Division: |  |
|  |  |
| Category: | No Catchwords  |
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| Number of paragraphs: | 14 |
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| Counsel for Harcourts WA Pty Ltd: | Mr T Duggan SC with Mr A Britten-Jones |
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| Solicitor for Harcourts WA Pty Ltd: | Thomson Lawyers |
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| Counsel for Roy Weston Nominees Pty Ltd: | Mr A Muscrave |
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| Solicitor for Roy Weston Nominees Pty Ltd: | Elevation Legal |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | SAD 224 of 2012 |

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| BETWEEN: | HARCOURTS WA PTY LTD ACN 009 120 227Applicant/Cross-Respondent |
| AND: | ROY WESTON NOMINEES PTY LTD ACN 073 213 920Respondent/Cross-Claimant |

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| JUDGE: | MCKERRACHER J |
| DATE OF ORDER: | 21 FEBRUARY 2014 |
| WHERE MADE: | PERTH |

**WAD167/2013**

**THE COURT ORDERS THAT:**

1. Harcourts WA Pty Ltd (**Harcourts**) have leave to read and rely on the following evidence filed in SAD224/2012 in WAD167/2013 proceedings and for this evidence to stand as the evidence-in-chief for Harcourts:
	* + 1. The statutory declaration of Adrienne Denise Musca of 24 October 2012;
			2. The affidavit of Adrienne Denise Musca sworn 23 December 2013 – paragraphs 1 to 8 and 66 to 81 with Annexures AM-18 to AM-28;
			3. The affidavit of Andrew Liam Moore sworn 23 December 2013 – paragraphs 1 to 15, 26 and 31 to 37;
			4. Affidavit of Michael Barry Green affirmed 28 January 2014 – paragraphs 1 to 9 and 14(c)(i) with Annexure MGB-1;
			5. Affidavit of Adrienne Denise Musca sworn 29 January 2014 – paragraphs 21 to 23;
			6. Affidavit of Neil Thomas Honey affirmed 12 February 2014 – paragraphs 1 to 17 with Annexures NH1 to NH5, and Harcourts BlueBook as referred to in paragraph 11(b);
			7. Affidavit of Thomas Bernard Massam sworn 12 February 2014 - paragraphs 1 to 11 with Annexures TM-1 to TM5;
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			9. Affidavit of Adrienne Denise Musca sworn 12 February 2014 – paragraphs 7 to 11 with Annexures ADM3-1 and ADM 3-2.
2. On or before 4 April 2014 Roy Weston Nominees Pty Ltd (**RWN**) file and serve all of the evidence in answer that it intends to rely upon at the trial of these proceedings.
3. The trial in these proceedings set down for hearing to commence on 24 February 2014 be adjourned to a date to be fixed.

**(P)SAD224/2012**

**THE COURT ORDERS THAT:**

1. The trial of the proceeding set down to commence 25 February 2014 be adjourned to a date to be fixed.
2. The costs of and incidental to the application by Harcourts, heard on 21 February 2014, be reserved.

**THE COURT DIRECTS THAT:**

*Conduct of trial*

1. Evidence in proceeding WAD167/13 be admitted as evidence in proceeding SAD224/12 and vice versa.
2. The trial of proceeding WAD167/13 be heard concurrently with proceeding SAD224/12.

*Affidavits*

1. By 18 April 2014 the parties serve on each other notice of objections to the:
	* + 1. Ability to rely on the affidavit or annexures; or
			2. Admissibility of the affidavits, including objections to the tender of annexures.
2. If any dispute concerning the ability to rely on affidavits or annexures or the admissibility of any affidavit filed or part thereof has not been resolved, Counsel for the parties shall confer and attempt to resolve any dispute as to objections on or before 28 April 2014.

*Chronology, Statement of Agreed Facts and Statement of Issues in Dispute*

1. By 25 April 2014, Harcourts serve on the RWN a proposed chronology, statement of agreed facts and statement of issues in dispute.
2. By 2 May 2014, RWN notify Harcourts in writing of any proposed amendments or proposed additions to the proposed chronology, statement of agreed facts and statement of issues in dispute.
3. If any dispute concerning the proposed chronology, statement of agreed facts and statement of issues in dispute has not been resolved, Counsel for the parties shall confer and attempt to resolve it on 6 May 2014.
4. By 25 April 2014, the parties exchange lists of the documents they intend to tender during the trial of the proceedings by notice in writing to the other parties, with such lists to identify (if applicable) the annexure number of each affidavit filed in the proceedings which contains the document.
5. By 13 May 2014, Harcourts file and serve a book containing, in accordance with a list agreed by the parties:
	* + 1. The pleadings (Part 1);
			2. All affidavits, with notations referred to in paragraph 14 below (Part 2); and
			3. Legible copies of each of the documents proposed to be tendered at trial by the parties (including documents to which objection is taken) (Part 3);

(**Trial Book**).

1. The Trial Book must satisfy the following form requirements:
	* + 1. Each page of the Trial Book will be paginated;
			2. The Trial Book will contain an index of its contents;
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(ii) A handwritten notation of a reference to the pages where the annexures appear in Part 3 is to be included at the margin of the affidavit where the reference to the annexure is first made and at the margin of the contents table at the commencement to the affidavit;

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Attachments to documents should appear immediately after the document notwithstanding that they bare a date preceding the date of the document.

1. By 19 May 2014, Harcourts deliver two hard copies of each book of documents to the Associate to the Honourable Justice McKerracher for the exclusive use of his Honour.
2. On the commencement of trial Harcourts will provide a copy of each book of documents for the exclusive use of the witnesses in the course of their examination.

*Mediation*

1. Each of these disputes be referred to mediation by a Registrar of this Court, at the earliest available date.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| GENERAL DIVISION | WAD 167 of 2013 |

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| BETWEEN: | ROY WESTON NOMINEES PTY LTD ACN 073 213 920Applicant |
| AND: | HARCOURTS WA PTY LTD ACN 009 120 227Respondent |

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| JUDGE: | MCKERRACHER J |
| DATE OF ORDER: | 21 FEBRUARY 2014 |
| WHERE MADE: | PERTH |

THE COURT ORDERS THAT:

**WAD167/2013**

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	* + 1. The pleadings (Part 1);
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1. The Trial Book must satisfy the following form requirements:
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1. Each of these disputes be referred to mediation by a Registrar of this Court, at the earliest available date.

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| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | SAD 224 of 2012 |

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| BETWEEN: | HARCOURTS WA PTY LTD ACN 009 120 227Applicant/Cross-Respondent |
| AND: | ROY WESTON NOMINEES PTY LTD ACN 073 213 920Respondent/Cross-Applicant |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| AND: | HARCOURTS WA PTY LTD ACN 009 120 227Respondent |

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| JUDGE: | MCKERRACHER J |
| DATE: | 24 FEBRUARY 2014 |
| PLACE: | PERTH |

**REASONS FOR JUDGMENT**

# INTRODUCTION

1. These are reasons for orders made on 21 February 2014 following argument in relation to an urgent interlocutory application filed on 19 February 2014. These reasons should be read in conjunction with the reasons of the same date (19 February 2014) in *Harcourts WA Pty Ltd v Roy Weston Nominees Pty Ltd (No 2)* [2014] FCA 107 (**Harcourts No 2**).
2. By the further urgent interlocutory application, Harcourts WA Pty Ltd (**Harcourts**) sought the following orders:

1. That the matter be made specially returnable at the commencement of the trial on Monday, 24 February 2014 or at an earlier time at the convenience of the Court.

2. [Harcourts] seeks leave to tender the following paragraphs of affidavits and annexures, which have been filed in SAD 224 of 2012, at the trial of these proceedings:

a. [1]-[8] and [66] to [81] of the affidavit of Adrienne Denise Musca, sworn 23 December 2013, together with annexures AM-18 to AM-28;

b. [1] to [15], [26] and [31] to [37] of the affidavit of Andrew Liam Moore sworn 23 December 2013;

c. [1] to [9] and [14(c)(i)] of the affidavit of Michael Barry Green, affirmed 28 January 2014, together with annexures MGB-1;

d. [21] to [23] of the affidavit of Adrienne Denise Musca, sworn 29 January 2014;

e. [1] to [17] of the affidavit of Neil Thomas Honey affirmed 12 February 2014, together with annexures NH-1 to NH5;

f. [1] to [11] of the affidavit of Thomas Bernard Massam affirmed 12 February 2014, together with annexures TM-1 to TM-5;

g. [1] to [9] of the affidavit of Bronwyn Jane Furse sworn 12 February 2014, together with annexures BF-1 to BF-5; and

h. [7] to [11] of the affidavit of Adrienne Denise Musca, sworn 12 February 2014, together with annexures ADM 3-1 and ADM 3-2.

3. [Roy Weston] pay [Harcourts] costs of the Application.

1. The application was supported by an affidavit sworn by Harcourts’ solicitor confirming that, in his opinion, the evidence was relevant to prove continued use of the ‘Roy Weston’ trade mark and was said to be of a narrow compass. In particular:

(a) the evidence of Ms Musca in her affidavit sworn 23 December 2013 related to the promotion, hosting and marketing of the Roy Weston Medal and the Hall of Fame. Both Mr Massam and Mr Honey were previous winners of the Roy Weston Medal. They give evidence of what winning the medal has meant for them and the media coverage and public reaction they have received as a result. Mr Moore also deposes to the Roy Weston Medal;

(b) the evidence also related to the use of the ‘Roy Weston’ name as a domain name and on web pages on websites. In Mr Moore’s affidavit he referred to the promotion of the Roy Weston name on the Harcourts’ website. Mr Green, Ms Furse and Ms Musca’s affidavit deposed to the use of the domain name ‘royweston.com.au’ and the ‘Roy Weston’ entry in the white pages to redirect readers to the Harcourts website and the Harcourts listing in white pages respectively.

1. In light of the issues canvassed and in light of my reasons in Harcourts No 2, the application to rely upon the additional material was strenuously opposed by Roy Weston Nominees Pty Ltd (**Roy Weston**). Roy Weston described the application as being transparently the same application brought on the Monday and dismissed in Harcourts No 2 on Wednesday, 19 February 2014. Roy Weston placed reliance on [34] of my reasons in which I said:

34 The same observation may be made in relation to the application that the matters be heard together but, in my view, that may be an appropriate and functional way of proceeding provided that proper notice is given before the commencement of trial and there are adequate opportunities to respond to any evidence beyond the evidence of Ms Musca on the non-use issue. I have an open mind on that proposal.

1. This is the last business day before the trial is due to commence. There is no doubt that Roy Weston is entitled to respond to the evidence (*Trade Mark Regulation* 5.9). It is highly unlikely that it would be possible to do so in the few business hours prior to commencement of the trial on Monday, 24 February 2014.
2. At the interlocutory hearing, senior counsel for Harcourts sought to reduce the affidavit evidence on which it would rely but even then, with the case changing so late in the piece, it was impossible to rule out the possibility that Roy Weston would be prejudiced by the need to explore the circumstances surrounding the evidence on which Harcourts sought to rely. It may be that there could be no answer to the evidence on which Harcourts seek to rely (as senior counsel asserts) but, until matters are investigated and having regard to the fact that the disputation arises out of events some several years ago, it is certainly not possible to conclude that Roy Weston would not be prejudiced.
3. The Roy Weston Proceeding, (as defined in Harcourts No 2), having been transferred from IP Australia, is not supported by pleadings or particulars. For that reason the evidence on which Harcourts could rely in discharging its onus of proving use of the trade mark was specifically identified and confined by order of the Court. As indicated, that dispute has been on foot for a number of years. There has been ample opportunity prior to the day before commencement of trial to identify which further evidence Harcourts would seek to adduce and lead in support of its usage case.
4. Putting the issue of which party is responsible for delay to one side, I remain firmly of the impression, (as I have been for at least two weeks), that this dispute is not ready for trial. The modern conventional trial procedures have not been finalised. To the extent that Harcourts have been extremely active in the last few days, the late activity has either been directed towards changing the case or preparing the case for trial at a time when Roy Weston has been preoccupied with Harcourts’ proposed changes.
5. As I indicated in Harcourts No 2, the restructuring of the case certainly had merit but the parties (in particular, Roy Weston), needed the opportunity to respond to the late changes. I remain of the view, as indicated in Harcourts No 2, that most of the changes sought in the three interlocutory applications heard this week would be beneficial providing there is the proper opportunity to respond to them.
6. The further difficulty occasioned by the very late changes which have been sought by Harcourts in this application is that Roy Weston have necessarily been focussed on attempting to address those proposed changes rather than preparing for trial. Clearly, that activity has distracted from trial preparation and also given rise to considerable cost.
7. As I have indicated to the parties, I believe I can accommodate a trial in late May. Further, with proper attention to trial preparation it is quite possible the duration of the trial need not be as much as the five days for which it is presently listed.
8. In the meantime, I have no doubt that, consistent with the usual course, attempts to mediate the dispute would have at least some prospects of being productive.

# CONCLUSION

1. While Roy Weston do not oppose Harcourts’ reshaping its case, they oppose being required to respond to the reshaped case at the shortest possible notice. I accept both that the further evidence may be relied upon should Harcourts wish to do so and that trial of both matters should proceed together with the evidence in one being the evidence in the other subject only to the trial dates next week being vacated and being listed as soon as reasonably convenient, probably in late May. In my view, Roy Weston’s arguments on this topic are correct and I have made orders substantially in accordance with the minute provided by Roy Weston.
2. In relation to costs, I have not made the costs orders sought by Roy Weston at this stage but will consider further argument on costs on all the applications heard this week following delivery of judgment at trial. The following orders are made:

**WAD167/2013**

**THE COURT ORDERS THAT:**

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**(P)SAD224/2012**

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*Mediation*

1. Each of these disputes be referred to mediation by a Registrar of this Court, at the earliest available date.

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| I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher. |

Associate:

Dated: 24 February 2014