JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	:	FRANK JASPER PTY LTD -v- GLEW [2009] WASC 13
CORAM	:	MARTIN CJ
HEARD	:	ON THE PAPERS
DELIVERED	:	29 JANUARY 2009
FILE NO/S	:	CIV 2179 of 2007
BETWEEN	:	FRANK JASPER PTY LTD (ACN 008 810 802) Plaintiff AND WAYNE KENNETH GLEW First Defendant GLEW TECHNOLOGIES PTY LTD (ACN 100 243 703) Second Defendant

Catchwords:

Costs - Adequacy of conferral between the parties prior to the plaintiff's application - O 59 r 9

Legislation:

Rules of the Supreme Court 1971 (WA), O 25 r 6, O 59 r 9

Result:

Costs of the plaintiff's application be costs in the cause

Category: B

Representation:

Counsel:

Plaintiff	:	No appearance
First Defendant	:	No appearance
Second Defendant	:	No appearance

Solicitors:

Plaintiff	:	Solomon Brothers
First Defendant	:	Curwood & Co Pty Ltd
Second Defendant	:	Curwood & Co Pty Ltd

Case(s) referred to in judgment(s):

Nil

1 **MARTIN CJ**: On 25 June 2008, the plaintiff in these proceedings issued a chambers summons for further and better and specific discovery. The parties have been unable to agree as to the appropriate costs orders, if any, to be made in respect of that application. Each party seeks to be awarded its costs of the application. I directed that the parties exchange written submissions on the topic, which I would resolve on the papers and without further argument. These are my reasons for the conclusion to which I have come.

The discovery application

2 It is appropriate to put the discovery application in its context. These proceedings were commenced by writ issued on 21 November 2007. The plaintiff made an unsuccessful application for an ex parte injunction. Each of the defendants were initially unrepresented, and there was contention as to the capacity of the second defendant (a corporation) to participate in the proceedings given its lack of legal representation.

3 On 15 April 2008, I ordered that the parties give discovery on affidavit by 5 May 2008. The defendants did not provide discovery in accordance with that order, and on 8 May 2008, the plaintiff applied for a springing order as a result of the defendants' failure to provide discovery. That application was made returnable on 5 June 2008.

4 Before the return of that application, on 12 May 2008, the first defendant filed an affidavit taking the form of an affidavit of discovery. However, the affidavit listed only four documents which were discovered, and claimed privilege from inspection of documents said to be 'private and confidential'.

5 A further affidavit of the first defendant was sworn on 21 May 2008 and filed on 22 May 2008. This affidavit took the more conventional form of an affidavit of discovery and discovered a significant number of documents in various folders.

6 In the meantime, it seems that the plaintiff's application for a springing order had been brought before Justice Newnes who, on 22 May 2008, presumably without knowledge of the second affidavit of the first defendant, made the order sought.

7 The matter came before me on 5 June 2008, when I directed that the question of the costs of the plaintiff's application for a springing order be adjourned until a further directions hearing to be held on 25 June 2008.

8 On 9 June 2008, solicitors entered an appearance on behalf of the first defendant. Shortly thereafter, the solicitors for the first defendant executed a memorandum consenting to an order that the defendants pay the plaintiff's costs of the application for a springing order on an indemnity basis. I made orders in terms of that memorandum.

9 When the matter came back before me on 25 June 2008, the plaintiff had provided a chamber summons for further and better and specific discovery and an affidavit in support of that application each dated 24 June 2008, but which had not yet been filed. The plaintiff sought to address argument to that application at the hearing on 25 June 2008, notwithstanding that, quite obviously, the defendants had been given inadequate notice of that application. During the course of argument, I suggested to counsel appearing on behalf of the plaintiff that the process of conferral required by O 59 r 9 of the *Rules of the Supreme Court 1971* (WA) had been quite inadequate, and further, that the affidavit filed in support of the application for discovery did not specifically address the issues required to be addressed by O 26 r 6, and in particular, that the affidavit did not identify the basis of the deponent's belief that the defendant had in his possession, custody or power the specific documents sought, or the relevance of those documents to the issues in the proceedings. After making those observations, I suspended argument on the application and directed that any further affidavits of discovery from the defendants be filed by 2 July 2008, that thereafter counsel for the parties confer with respect to any outstanding contentious issues relating to discovery, after which a list of categories which remained in contention were to be produced. I further directed a timetable for the exchange of affidavits and submissions in relation to any further contentious issues relating to discovery.

10 Pursuant to those directions, the defendants filed a further affidavit of discovery on 3 July 2008, and the plaintiff filed a supplementary affidavit of discovery on 22 July 2008.

11 Affidavits in support of the plaintiff's application for specific and further and better discovery were sworn on 23 and 24 July 2008. A further affidavit of discovery was sworn by the first defendant on 26 July 2008, listing further categories of documents. An affidavit of the first defendant in opposition to the application for further and better and specific discovery was sworn on 26 July 2008.

12 When the matter came before me on 29 July 2008, it again appeared that conferral in respect of the outstanding issues relating to discovery had

been inadequate, and I directed counsel for both parties to again confer in relation to those issues. I made directions for a further timetable for the exchange of affidavits in relation to any issues which remained outstanding following that conferral.

13 On 19 August 2008, new solicitors were appointed for each of the defendants. By consent, orders were made without appearance empowering the defendants to file and serve an affidavit of supplementary discovery by 26 August 2008. In fact, such an affidavit was sworn and filed on 4 September 2008. On 9 September 2008, I was advised that the parties had resolved their differences in relation to the adequacy of the defendants' discovery, other than the outstanding issue in relation to the costs of the plaintiff's application.

The contentions of the parties

14 The plaintiff submits that it should have its costs of the application for discovery because:

(a) that application was ultimately successful;

(b) the provision of the various tranches of supplementary discovery provided by the defendants reveal that the defendants' discovery was inadequate at the time the plaintiff's application was made.

15 The defendants submit that the plaintiff's application was ultimately unsuccessful and premature, because, pursuant to the process of conferral directed by the court, adequate discovery was ultimately provided.

16 The defendants further submit that the documents sought by the plaintiff in its application were not relevant to the issues in the case at the time the application was brought, but were only relevant to a claim for misleading and deceptive conduct which was introduced into the plaintiff's case after the application for discovery had been concluded. However, that submission cannot be accepted. The categories of documents sought in the plaintiff's application for discovery were, in my view, plainly relevant to the issues which were joined at the time of that application, as was implicitly conceded by the defendants by the discovery of those documents prior to the introduction of any claim for misleading and deceptive conduct.

Conclusions

17 The plaintiff's application for specific and further and better discovery was brought with inadequate notice to the defendants, without adequate conferral, and was not supported by an adequate affidavit.

Thereafter, the progress of the application for further and better discovery was characterised by inadequate conferral between the legal representatives of the parties. That is why it was necessary for me to specifically direct such conferral on two occasions. In the result, that process of conferral brought about a resolution to the matters in contention, without the need for adjudication by the court. If the process of conferral had been properly pursued by the parties, these issues could have been resolved without curial intervention.

18 On the other hand, it is clear that the discovery provided by the defendants was inadequate, and remained inadequate for some time, despite the provision of supplementary affidavits of discovery.

19 In these circumstances, it seems to me that each party must bear an equal degree of responsibility for the costs incurred in relation to the application for further and better discovery which would have been unnecessary if the parties and their representatives had applied themselves diligently to the process of conferral mandated by O 59 r 9. The costs incurred by the parties were the consequence of their respective attitudes towards the conduct of the litigation and their mutual failure to comply with O 59 r 9. Accordingly, in my view, the proper exercise of my discretion is to regard those costs as the product of the way in which these parties have engaged in their litigation, with the consequence that the burden of those costs should be borne by whichever party is ultimately unsuccessful in the litigation. Accordingly, I will direct that the costs of the plaintiff's application for further and better and specific discovery be costs in the cause of the proceedings.