Federal Court of Australia

Maverick Biomaterials Pty Ltd v Abouelkheir [2021] FCA 1157

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| File number: | QUD 298 of 2021 |
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| Judgment of: | **DERRINGTON J** |
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| Date of judgment: | 20 September 2021 |
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| Date of publication of reasons: | 23 September 2021 |
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| Catchwords: |  **EQUITY** – confidential information – whether information intended to be used by former employee required to be kept confidential by employment contract – whether former employee not entitled to use information of erstwhile employer by reason of ss 182 or 183 of *Corporations Act 2001* (Cth) **EQUITY –** injunctions– interlocutory – evidence of former employee intending to use erstwhile employer’s confidential information – evaluation of likely damage to flow from granting or not granting interlocutory injunction – balance of convenience favours granting injunction  |
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| Legislation: | *Corporations Act 2001* (Cth) ss 182, 183 |
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| Cases cited: | *SDW2 Pty Ltd v JLF Corporation Ltd* [2017] QSC 1 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Employment and Industrial Relations |
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| Number of paragraphs: | 35 |
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| Date of hearing: | 20 September 2021  |
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| Counsel for the Applicant: | Mr R Green |
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| Solicitor for the Applicant: | IRIQ Law |
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| Counsel for the Respondent: | The Respondent appeared in person |

ORDERS

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|  | QUD 298 of 2021 |
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| BETWEEN: | MAVERICK BIOMATERIALS PTY LTD (ACN 142 628 537)Applicant |
| AND: | MOHAMED ABOUELKHEIRRespondent |

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| order made by: | DERRINGTON J |
| DATE OF ORDER: | 20 sEptember 2021 |

UPON THE APPLICANT UNDERTAKING:

(i) to submit to such order (if any) as the Court may consider to be just for the payment of compensation, (to be assessed by the Court or as it may direct), to any person, (whether or not that person is a party), affected by the operation of the order or undertaking or any continuation (with or without variation) of the order or undertaking; and

(ii) to pay the compensation referred to in (i) to the person affected by the operation of the order or undertaking,

THE COURT ORDERS THAT:

1. Until the trial of this action or further earlier order, pursuant to s 1324 of the *Corporations Act 2001* (Cth), the respondent be restrained from engaging in, or proposing to engage in, conduct that is otherwise a contravention of s 182 or s 183 of the *Corporations Act 2001* (Cth) by continuing to permit to be displayed on his LinkedIn account a preview of his evBook entitled “Pericardium to Heart Valve” as identified in the affidavit of Benjamin Rogers filed on 20 September 2021.
2. Until the trial of this action or further earlier order, the respondent be restrained from:
	1. transferring, transmitting or undertaking any form of sharing or publication (whether by electronic means or otherwise) of any confidential information and intellectual property obtained or generated in the course of employment with the applicant, to or with any person;
	2. recording, storing or undertaking any form of preserving of confidential information and intellectual property otherwise obtained or generated in the course of employment with the applicant (whether by electronic means or otherwise);
	3. using for any purpose related to or connected with the promotion of the evBook entitled “Pericardium to Heart Valve” or any other similar publication, confidential information and intellectual property obtained or generated in the course of employment with the applicant (whether by electronic means or otherwise);
	4. soliciting expressions of interest in the evBook entitled “Pericardium to Heart Valve” or any similar publication from any person whatsoever (whether by electronic means or otherwise).

**AND THE COURT FURTHER ORDERS THAT:**

1. The applicant have leave to read and file the sworn affidavit of Benjamin Rogers dated 20 September 2021.
2. The affidavits of Benjamin Rogers filed on 20 September 2021 be suppressed and not be accessed or disclosed other than by order of this Court.
3. The matter be listed for a further case management hearing at 9:00 am AEST on 19 October 2021.
4. The costs of the application are reserved.

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

REASONS FOR JUDGMENT

DERRINGTON J:

## Introduction

1. By an Originating Application filed on 17 September 2021, Maverick Biomaterials Pty Ltd (Maverick) commenced these proceedings against Mr Mohamed Abouelkheir seeking injunctions restraining him from using its confidential information as well as other associated relief. Mr Abouelkheir is a former employee of Maverick and the substance of the claim against him is that he has used, or is proposing to use, confidential information obtained by him in the course of his employment in a forthcoming publication which he intends to author.
2. On the same day as filing the Originating Application, Maverick also filed an interlocutory application seeking to restrain Mr Abouelkheir until the trial of these proceedings, or for further earlier order, from using certain information which it claims is confidential and belongs to it. It also seeks mandatory relief relating to an “electronic visual book” (evBook) which Mr Abouelkheir is in the process of preparing. He has recently advertised the pending publication of the evBook and provided a preview of it on his Linkedin page. Maverick seeks an injunction restraining the continued publication of that preview.
3. It ought to be recorded that the application has been brought on urgently and is of an interlocutory nature only. No substantive findings of fact need to be made for the purposes of making the orders sought, and it ought not to be assumed that any conclusions reached at this point in time have been determined in any conclusive way.

## Background facts

1. Maverick is a business which supplies animal-derived materials to manufacturers of human and veterinary pharmaceutical, diagnostics, medical and cosmetic products.
2. On 12 June 2020, Mr Abouelkheir was employed by Maverick pursuant to a 12 month contract in the role of a “LEAN Coordinator”. He signed an employment agreement incorporating standard terms of employment which included restrictions on the use which he might make of confidential information owned by Maverick. Those obligations were expressed to continue after his employment with Maverick had ceased.
3. In November 2020, Mr Abouelkheir was offered, and he accepted, a new job with Maverick in the role of “Business Excellence Lead” commencing on 20 November 2020 and he entered into a further contract of employment. Although that may have superseded the earlier contract, it too included certain standard terms of employment at Maverick. Of particular relevance to the present matter is cl 13 which provides:

**13. Confidential Information**

13.1. You agree that in order to protect the goodwill and business of Maverick Biomaterials, you will not at any time during your employment with Maverick Biomaterials or at any time in the future (except as required by law or as required to carry out your day to day duties), use or disclose to any person, firm, body corporate, association or government agency, any confidential information of or in relation to the business of Maverick Biomaterials.

13.2. For the sake of clarity, ‘**confidential information**’ includes (but is not limited to):

a. information relating to the business, affairs and practices of Maverick Biomaterials;

b. information relating to the marketing of Maverick Biomaterials;

c. financial information and data (howsoever recorded) of Maverick Biomaterials and any associated Company;

d. information relating to techniques utilised by Maverick Biomaterials;

e. information relating to clients and service providers of Maverick Biomaterials;

f. information disclosed to Maverick Biomaterials or you by any existing or potential client, supplier, contractor, agent, licensor or licensee of Maverick Biomaterials;

g. information relating to the practices and procedures used by Maverick Biomaterials;

h. information relating to training, including training manuals; and

i. all other information (regardless of how it is recorded or stored) relating to the business of Maverick Biomaterials.

13.3. You acknowledge that:

a. a breach of the confidentiality provisions would be harmful to the business of Maverick Biomaterials;

b. monetary damages alone would not be a sufficient remedy for the breach; and

c. in addition to any other remedy which may be available in law or equity, Maverick Biomaterials is entitled to interim, interlocutory and permanent injunctions or any of them to prevent the breach.

1. There is no need at this stage to articulate the details of the nature and scope of Mr Abouelkheir’s position at Maverick. It suffices to observe that it included developing business and operational strategies. Necessarily, the performance of his job exposed him to information confidential to Maverick’s business and, as a result, he became familiar with its processes relating to the extraction of animal materials for use in the treatment of human heart conditions and related supply chain methodology.
2. On 6 August 2021, Mr Abouelkheir was made redundant on the basis that his erstwhile position was no longer required. He had been offered an alternative position within Maverick but he chose not to accept it. There was no evidence of any ill-will between the parties resulting from Mr Abouelkheir’s departure from Maverick.
3. Subsequently, however, he emailed Mr Benjamin Rogers, Maverick’s chief executive officer, seeking permission to use a video which he had made in the course of his employment relating to the work he had performed. Mr Rogers analysed the video’s contents and concluded that it contained certain confidential information, including clients’ names, production specifications and business priorities. He asked Mr Abouelkheir to delete it and confirm the existence of any other videos or electronic data which he had retained from his work with Maverick. Mr Abouelkheir subsequently emailed Mr Rogers with a list of electronic files and other materials which he had retained in his possession and which he had derived or produced in the course of his employment.
4. On 12 September 2021, Mr Abouelkheir posted on his LinkedIn page a preview of the evBook which he claimed to be in the process of authoring and which he intended to publish. That promotional material indicated that the evBook is to be entitled “Pericardium to Heart Valve” and states that the insights provided from the study will assist businesses in gaining a “competitive advantage within the field” and that it has wider applications.
5. Mr Rogers deposes that the material, data and insights contained in the LinkedIn post and to be included in the evBook are, or will be, derived from Maverick’s intellectual property and confidential information which Mr Abouelkheir had obtained during his employment. In particular, reference is made to the nature and scope of the bovine pericardium supply landscape in Australia which has been developed by Maverick under Mr Rogers’ instruction. Other techniques developed by Maverick, such as the full “Value Stream Map”, are said to also constitute its confidential information.
6. In correspondence with Maverick and its solicitors, Mr Abouelkheir has asserted that his evBook contained no confidential information or intellectual property owned by Maverick or any other company and that it was entirely composed of his own insights regarding publicly available information.
7. As a consequence of Mr Abouelkheir’s refusal to comply with Maverick’s demand that he not publish the evBook or disclose the information which Maverick claimed to be confidential, it has commenced the present proceedings and brought this interlocutory application.
8. It appeared during the course of the hearing that there existed a fundamental dispute between Maverick and Mr Abouelkheir which, to an extent, turns on the scope of the confidential information which Maverick is entitled to protect. It also turns on, perhaps, Mr Abouelkheir’s lack of appreciation of the difference between, on the one hand, his entitlement to identify, at an abstract level, matters within his field of expertise and, on the other, identifying and exposing confidential information which he had obtained during the course of his employment.

## Relevant principles

1. The relevant principles in determining whether or not an interlocutory injunction should be granted need not be discussed at length. They were helpfully articulated by Bond J in *SDW2 Pty Ltd v JLF Corporation Ltd* [2017] QSC 1 [21] where his Honour said:

[21] The legal principles governing the disposition of an application for interlocutory injunction were discussed by me in *Stacks Managed Investments Ltd v Tolteca Pty Ltd* [2015] QSC 234 at 3 to 5 and again in *Tribal Health Pty Ltd v Flush Fitness Pty Ltd* [2016] QSC 103. In the latter case I summarised relevant principle in these terms (at [23]):

(a) The law in Australia has long regarded it to be necessary to make two main inquiries:

(i) whether the applicant has shown that it has a prima facie case; and

(ii) whether the applicant has shown that the balance of convenience favours the granting of the relief claimed.

(b) The significance of the requirement that a prima facie case be shown is elaborated upon in *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 and *Live Earth Resource Management Pty Ltd v Live Earth LLC* [2007] FCA 1034 at [11] to [13].

(c) The considerations brought to bear on the balance of convenience requirement were the subject of discussion in *Australian Broadcasting Corporation v O’Neill* and *Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd* [2011] QCA 334, the latter case clarifying that the adequacy of an award of damages and the question of the sufficiency of the usual undertaking were to be considered as part of the totality of the balance of convenience question.

(d) The progression of the two main inquiries is not a mechanical exercise. Whether the relief sought is prohibitory or mandatory, the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong” in the sense of granting an injunction to a party who fails to establish his right at an ultimate trial, or in failing to grant an injunction to a party who succeeds at trial. In making that decision, the Court should weigh in the balance all relevant factors, including matters pertaining to the strength of the case to be tried and the balance of convenience.

(e) Where the effect of an injunction would be to alter the status quo and effectively finally to determine a respondent’s legal rights against the respondent in advance of a trial, it would be appropriate to require an applicant to establish its case that the respondent should not be afforded those legal rights with a high degree of assurance.

(Footnotes omitted).

## The present application

1. Turning to the circumstances of the present matter, the foundations for the applicant’s assertion that any information held or proposed to be disclosed by Mr Abouelkheir is confidential are the terms of his employment contract and/or the *Corporations Act 2001* (Cth).
2. It can be observed that cl 13 of that contract was drafted in wide terms. In particular, the scope of the information which is described as “confidential” is expressed broadly and includes information which would not fall within common concepts of “confidential information” or which would not be protected in Equity. Nevertheless, Mr Abouelkheir agreed to keep the information so described confidential after the cessation of his employment with Maverick.
3. For the purposes of this application only, cl 13 is a sufficient foundation for the applicant’s entitlement to keep its information confidential. The evidence of Mr Rogers establishes that the information which Mr Abouelkheir seeks to use is, *prima facie*, within the scope of cl 13. There is a possibility that the terms of Mr Abouelkheir’s prior employment contract with Maverick also imposed similar obligations on him, although given that it was superseded by a subsequent contract, there may be doubt as to its continuing applicability.
4. Mr Green, for Maverick Biomaterials, also relied upon ss 182 and 183 of the *Corporations Act*, being the general obligations of officers of companies, including employees, to keep confidential material which they have obtained in the course of their employment. In the present case, that would also provide a foundation for the making of an order on an interlocutory basis.
5. As mentioned, cl 13 is in wide terms and includes any information about Maverick’s internal techniques, its clients and service providers, its practices and procedures, and information relating to its trading and training manuals. By an affidavit of 20 September 2021, Mr Benjamin Rogers has deposed to the circumstances of Mr Abouelkheir’s employment, his role and the termination of his employment. He also identified the information to which Mr Abouelkheir was privy during that employment. He has reviewed the videos which Mr Abouelkheir has made in the course of his employment and of which he has retained copies. He has set out at some length the information contained in those videos, and identified information in them peculiar to Maverick which would, at first blush, fall within the definition of “confidential information” in cl 13 of the employment agreement.
6. He also identified that Mr Abouelkheir has copies of electronic information owned by Maverick which are known as “Trello Boards”. These are electronic worksheets, which contain specific information about projects or operational procedures of Maverick, that were produced in the course of Mr Abouelkheir’s employment and related to Maverick’s specific operational matters. Unbeknown to Mr Rogers, it appears that Mr Abouelkheir has retained copies of those documents.
7. More importantly for the purposes of this application, Mr Abouelkheir has stated his intention to publish an evBook pertaining to the production of pericardium for use in heart valves. Mr Rogers has analysed Mr Abouelkheir’s assertions as to the content of his proposed evBook, identified the likely topics to be considered, and concluded that it is likely that any discussion of those topics will refer to Maverick’s confidential information. In particular, he identified that Mr Abouelkheir intends to discuss Maverick’s processes in the collection of appropriate bovine pericardium in Australia and also apparently intends to discuss the full “Value Stream Map” in relation to the collection of bovine pericardium which is the essence of a substantial portion of Maverick’s business.
8. The evBook preview which Mr Abouelkheir has placed on his LinkedIn page also indicates that the evBook as published will discuss techniques which Maverick has developed in the course of its business for the purpose of identifying suitable animal tissue. Otherwise, Mr Rogers identified how the evBook is likely to refer to Maverick’s development of its technical manufacturing processes, specific issues in relation to the production of pericardium tissues, its collaboration system with slaughterhouses, and other business processes.
9. It was not disputed at the hearing that Mr Abouelkheir had no knowledge or expertise in the area of pericardium tissue supply prior to his employment with Maverick and that everything he has come to know about this topic was derived from his employment.
10. As has been mentioned, the interlocutory application was brought on for hearing as a matter of urgency. Mr Abouelkheir, who resides in Dubbo, NSW, attended the hearing by video. He had not yet obtained legal advice and, therefore, was not in a position to adduce evidence in defence of the application. Whilst this was unfortunate, he was however able to explain his position and, as mentioned earlier, it is that he believes that he will not disclose confidential information in his intended publication because all he intends to do is highlight conceptual matters relating to supply chains from specific circumstances he encountered during his employment with Maverick.
11. After hearing Mr Abouelkheir’s submissions, it can be concluded that there is a real likelihood that he does not appreciate the risk that publication of his evBook will have the consequence of disclosing information which is protected by cl 13 of his employment contract. There is no need at this stage to reach any final conclusion as to that topic. It suffices to observe that Maverick has established at least a *prima facie* case that its confidential information will be disclosed by Mr Abouelkheir in his forthcoming book if he is not restrained from doing so.
12. In this affidavit, Mr Rogers also identified that the confidential information which he says ought to be protected is especially valuable to Maverick’s business. He said that Maverick is a specialist company in a niche market, and he expressed concern that if Mr Abouelkheir disclosed the information which he intends to, it is likely that Maverick will suffer substantial damages. He has expressed the opinion that the value of the confidential information which Mr Abouelkheir is intending to disclose may be in the vicinity of $10 million. That opinion can be accepted for present purposes, however, if the matter is to proceed, further evidence of the information’s value might need to be obtained.
13. On the evidence before the Court, there is a real risk that, if unrestrained, Mr Abouelkheir will act in breach of his obligations to maintain the confidentiality of the information which he obtained in the course of his employment with Maverick. There are a number of reasons for this. The first was his apparent lack of candour as to the number and identity of the electronic files he retained after his cessation of employment. At one point, he advised Mr Rogers that he had not kept any of Maverick’s material, however he subsequently revealed that he possessed a number of videos which contained confidential information owned by Maverick. It must be pointed out that when all the evidence is received on this topic, this matter may amount to no more than a misunderstanding or miscommunication. However, for present purposes, Mr Green’s submission can be accepted that Mr Abouelkheir had not been entirely forthright in revealing the information which he possessed.
14. Second, despite Maverick and its solicitors expressing concerns to Mr Abouelkheir about his intention to disclose confidential information, he declined to agree not to publish his intended work. It seems that he does not fully appreciate the likelihood that the information in his possession and which he intends to use is of a nature which his employment contract prohibits him from disclosing. Although this may arise as a result of his failure to understand the extent of his obligations, that does not diminish the risk that he may disclose information in breach of his obligations and expose Maverick to substantial loss if he is not restrained.
15. For the purposes of this application, it can be accepted that the damage which Maverick might suffer could be substantial. Its value may well be such that if Mr Abouelkheir were to breach his obligations of confidentiality, he might ultimately be unable to provide sufficient compensation for any damage that he causes. In those circumstances, Maverick is in the position of being at risk of suffering substantial irreparable damage if the injunction is not granted.
16. On the other hand, Mr Abouelkheir indicated in the course of hearing that he does not intend to publish his evBook until sometime next year, that is 2022. That is significant because any injunction to restrain him from publishing cannot cause him any damage at this stage. Indeed, it should be expected that a matter of this nature could be completed well before the middle of next year if the parties work in a cooperative manner. If that were so, it may be that Mr Abouelkheir will not suffer any measurable detriment from the making of an interlocutory injunction.
17. When Maverick commenced the application, there was no evidence that it intended to provide a valuable undertaking as to damages for the purposes of securing the injunction. However, during the course of the hearing, Mr Green offered an undertaking on his client’s behalf from the Bar table. Unfortunately, what is required is that there be evidence that such an undertaking is valuable. Although there was very little evidence of the value of Maverick’s undertaking, what was there was just sufficient given the absence of any evidence that Mr Abouelkheir is at risk of suffering any significant detriment by virtue of being restrained. First, the evidence discloses that Maverick’s business is substantial with an annual turnover of in excess of $20 million. This is confirmed by the fact that it had the capacity to employ Mr Abouelkheir in his role with a salary of greater than $80,000 per annum and that it has a significant number of other employees.
18. Second, Mr Green informed the Court from the Bar table that the annual profits of the company are approximately $2.6 million. Pursuant to an undertaking given to the Court, Maverick’s solicitor has filed an affidavit confirming that matter. It follows that Maverick has provided a valuable undertaking as to damages and, in the circumstances where the injunction will not cause any perceivable harm to Mr Abouelkheir, the balance of convenience weighs in favour of granting it.
19. The injunction is to be interlocutory in the sense that it will continue until the trial of the action or earlier order of this Court. In that way, Mr Abouelkheir may seek legal advice as to his position, become fully informed as to his legal rights, and determine the approach he might take to this litigation in the circumstances. If he is so minded, he may apply for an order that the interlocutory injunction be dissolved.
20. In light of the foregoing, the Court makes the orders which have been set out prior to these reasons for decision.

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| I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington. |

Associate:

Dated: 23 September 2021