



Federal Court of Australia
District Registry: Victoria
Division: General

No: VID91/2017

TODD HAYWARD
Plaintiff

SIRTEX MEDICAL LIMITED
Defendant

ORDER

JUDGE: JUSTICE MURPHY

DATE OF ORDER: 15 August 2017

WHERE MADE: Melbourne

THE COURT ORDERS THAT:

Discovery

1. The parties make electronic discovery on or before 15 December 2017 as follows:
 - (a) the Applicant make standard discovery in accordance with r 20.14 of the *Federal Court Rules 2011* (Cth); and
 - (b) the Respondent make discovery of the categories set out in **Annexure A** to these orders and otherwise in accordance with the discovery plan agreed in correspondence between the parties dated 25 July 2017 to 14 August 2017.

Particulars

2. By 31 March 2018, the Applicant:
 - (a) specify the date in paragraph 17 of the statement of claim on which he relies;
 - (b) provide proper particulars of the allegation in paragraph 16 of the statement of claim that the Respondent was “aware of” the matter in sub-paragraph 15(a) of the statement of claim, including particularising:
 - (i) the officer or officers of the Respondent who were aware of the matter;



- (ii) when it is alleged each officer of the Respondent became aware of the matter;
 - (iii) how that awareness was obtained; and
- (c) provide proper particulars of the allegation in paragraph 17 of the statement of claim that the Respondent was “aware of” each of the matters alleged in subparagraphs 15(b)-(d) of the statement of claim, including particularising:
- (i) the officer or officers of the Respondent who were aware of each matter;
 - (ii) when it is alleged each officer of the Respondent became aware of each such matter; and
 - (iii) how that awareness was obtained.

Lay Evidence

3. By 31 March 2018, the Applicant file and serve affidavits of the evidence of all lay witnesses that he intends to call at the initial trial.
4. By 31 July 2018, the Respondent file and serve affidavits of the evidence of all lay witnesses that it intends to call at the initial trial.
5. By 31 August 2018, the Applicant file and serve affidavits of the evidence of all lay witnesses that he intends to call in reply at the initial trial.

Expert Evidence

6. By 31 March 2018, the Applicant file and serve the expert evidence upon which he intends to rely at the initial trial.
7. By 31 July 2018, the Respondent file and serve the expert evidence upon which it intends to rely at the initial trial.
8. By 31 August 2018, the Applicant file and serve all expert evidence in reply upon which he intends to rely at the initial trial.

Security for Costs



9. The Respondent has liberty to file and serve any material in respect of any application for security for costs in respect of the period following discovery and up to and including the initial trial (the **Second Tranche of Security Application**).

Mediation

10. The matter be listed for mediation by a Registrar by no later than 31 August 2018 or such other date as agreed by the parties and the Registrar. The Registrar is authorised to direct that the matter be listed for an initial meeting on an early date, which is aimed at ensuring that the parties exchange such documents and information as will facilitate informed settlement discussions. The Registrar is authorised to give directions as to the conduct of the mediation including as to the attendance at the mediation of any persons the Registrar considers necessary for an effective mediation, and the exchange of such documents and information as the Registrar deems appropriate.
11. The matter be listed for a case management hearing on 7 September 2018 to check the parties' preparedness for trial.
12. On or before 8 October 2018 the parties' experts:
 - (a) meet and confer with any opposing expert in the presence of a Registrar, such meeting to be conducted in the absence of the parties, their employees or agents, and the parties' legal representatives;
 - (b) cooperate in the prompt delivery to the parties' legal representatives of a joint report identifying:
 - (i) the areas of agreement and disagreement between them; and
 - (ii) where there is disagreement – a short statement explaining the bases of the disagreement;
 - (c) the parties and their legal or other representatives shall not direct or instruct an expert witness as to whether to agree or disagree with any other expert witness in the meeting or in the joint report, or as to the basis or terms upon which the expert may agree or disagree with any other expert.

Joint List of Factual and Legal Issues and Template for Submissions



13. By 8 October 2018 the Applicant to prepare and provide to the Respondent a list of the factual and legal issues in the matter. By 11 October 2018 the Respondent to add any further issues to this list. The Applicant to file a joint list of factual and legal issues immediately thereafter.
14. By 15 October 2018 the Applicant to file a template for written submissions that has been agreed with the Respondent comprising a framework within which each party can set out its written submissions on each of the factual and legal issues identified in the list.
15. The template for written submissions will substantially form the framework of any opening written submissions to be made. The template will be added to and updated as evidence is heard, and likely varied as the positions taken by the parties change. In its updated and varied form it will substantially form the framework of any closing written submissions. The Court will assume that it is only the factual and legal issues raised in the template for written submissions that it is required to consider, and that the parties do not rely on any other matter.

Other Trial Preparations

16. By 22 October 2018 the parties shall prepare an approximate timetable for the hearing, such timetable to operate as a guide subject to change, and to include dates/times/cross examination/openings etc in a table format.
17. By 23 October 2018 the Applicant to file two copies of a Court Book and serve one copy on the Respondent.
18. By 23 October 2018 the parties to file a joint book of authorities.
19. By 23 October 2018 the Applicant to file his written submissions in accordance with the template.
20. By 25 October 2018 the Respondent to file its written submissions in accordance with the template.

Initial Trial

21. The initial trial be fixed to commence on 29 October 2018 with a provisional estimate of three weeks.



22. The venue of the initial trial is to be Sydney.

23. The initial trial determine the whole of the Applicant's individual claim.

Other

24. Liberty to apply generally.

25. Costs reserved.

Date that entry is stamped: 17 August 2017

Warrick Soden
Registrar



Annexure A

Categories of Documents for Respondent's Discovery

In accordance with the discovery plan agreed between the Applicant and the Respondent, the Respondent is to give discovery of the following categories of documents:

1. Documents in the following categories created in the period from 1 July 2016 to 31 December 2016 in respect of the Respondent's dose sales in the 2017 financial year ("**Sirtex's FY17 Performance**"):
 - (a) budgets, forecasts, analyses and reports (including drafts) given to or by any SSM concerning Sirtex's FY17 performance;
 - (b) communications to, from or between any SSM concerning Sirtex's FY17 performance;
 - (c) drafts of any ASX, public or media disclosure or announcement concerning Sirtex's FY17 performance (collectively, disclosure concerning Sirtex's FY17 performance);
 - (d) documents recording any advice to or from, or discussions with, or consideration or decision by, any SSM concerning Sirtex's FY17 performance or disclosure concerning Sirtex's FY17 performance.
- 1A. Documents in the following categories created in the period from 1 February 2016 to 30 June 2016:
 - (a) all management papers recording the preparation of the Respondent's dose sales budget for the 2017 financial year ("**Sirtex's FY17 Budget**");
 - (b) all drafts of the Sirtex's FY17 Budget given to the Respondent's board;
 - (c) all minutes of the Respondent's board by which Sirtex's FY17 Budget was approved.
2. [deleted]
3. If documents in the following categories are not caught by categories 1 or 1A above, documents created in the period from 1 July 2016 to 31 December 2016 in the following additional categories:
 - (a) communications to, from or between any SSM referring to the representation that Sirtex's business has "a very short sales cycle, measured in days" made in paragraph (c) of the letter sent by Sirtex to the ASX dated 15 December 2016 and published by the ASX (**15 December 2016 letter**) in respect of Sirtex's FY17 performance;
 - (b) communications to, from or between any SSM referring to any of the matters referred to in paragraph (e) of the 15 December 2016 letter in respect of Sirtex's FY17 performance;
 - (c) communications to, from or between any SSM referring to any of the matters in paragraph (f) of the 15 December 2016 letter in respect of Sirtex's FY17 performance.
4. All daily dose sales reports in the period from 1 July 2016 to 31 December 2016.



Definitions:

In these categories, the following terms have the following meanings:

SSM means any member of the board of directors, the CEO, CFO, Company Secretary, Global Investor Relations Manager, Chief Medical Officer, CEO (EMEA), CEO (Americas), Global Financial Controller, Financial Reporting Manager, Financial Controller (EMEA), Financial Controller (Asia Pacific), Financial Controller (Americas), or Financial & Management Accountant.

Note: Discovery in relation to category 1A is to be given on the standard basis.