IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2015-409-000575
[2016] NZHC 768

UNDER	the Defamation Act 1992
BETWEEN	COLIN GRAEME CRAIG Plaintiff
AND	JOHN CHARLES STRINGER Defendant

Hearing: (by telephone) 13 April 2016

Appearances: C G Craig (applicant in this matter) in person
J C Stringer (opposing) in person
A Ferguson and R Baillie for non-party, Vodafone New Zealand Ltd, in opposition

Judgment: 22 April 2016

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
on non-party discovery application

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[1] In this proceeding Mr Craig sues Mr Stringer in defamation. He pursues 31 causes of action for various publications occurring between June and August 2015.

[2] Discovery and inspection are taking place between the parties to the proceeding pursuant to Court directions.

This application

[3] This judgment concerns Mr Craig's application for non-party discovery by Vodafone New Zealand Limited (Vodafone). The requested order would require Vodafone to search both its online and off-line storage and determine whether it has control of any email correspondence which has been sent to or from Mr Stringer's email account between the dates of 1 November 2014 and 26 February 2016.

The grounds of the application

[4] I summarise below the grounds of the application (which Mr Craig particularised in 19 paragraphs). Both Mr Stringer and Vodafone filed succinct notices of opposition raising points which I take into account in the following findings. I am satisfied that none of the grounds individually or collectively would justify the making of an order. I will identify against each point (my numbering) the valid grounds of objection.

[5] Mr Craig's application was supported by affidavits from himself and his wife. Additionally there were supporting affidavits of five individuals who had been asked by Mr Craig whether they had received or sent any email correspondence to Mr Stringer's email account in the period 1 November 2014 to 26 February 2016. Each of the deponents had had such correspondence and produced from that correspondence "sample illustrations" (their words) in which Mr Stringer discussed Mr Craig. Additionally Mr Craig filed an affidavit of an expert from the information technology industry who deposed that Vodafone would have retained copies of emails sent through its servers (including those involving Mr Stringer's email account) for two years.

[6] Vodafone's notice of opposition was supported by an affidavit of a delivery manager employed by Vodafone. He deposed that it was incorrect to assert that Vodafone, as a matter of practice, keeps copies of customers' emails for two years. He deposes that Vodafone can only retrieve such emails if they have not been removed from the server. But in that situation the customer can also access the emails. Therefore, Vodafone does not have access to emails that the customers cannot also access.

Ground (a) – Refusal of Mr Stringer to provide email correspondence

[7] An order for non-party discovery will be made only if it is reasonably necessary. The first source should always be the party to the litigation if that person controls the document. There are adequate means of enforcing discovery orders against the parties in the present situation without the need to involve non-parties.

Ground (b) – Mr Stringer's loss of his computers/backup/hard-drives

[8] Mr Stringer explained to Mr Craig that his laptops and backup equipment were stolen in November 2015 which had restricted his access to electronic records. As a customer of his service provider, Mr Stringer will have the ability to access such records as his service provider still holds. Such documents are within the "control" of Mr Stringer in the sense that term is used in the discovery rules, in the same way as when a party's solicitor, accountant, bank or similar entity holds records. It would be inappropriate for the Court to encourage any practice whereby organisations such as internet service providers, banks and the like become a first port of call for those seeking discovery of documents relating to one of their customer's affairs when the customer is a party to the litigation. Furthermore, in this case Mr Craig, by his supporting affidavit, has demonstrated an ability to obtain documents from the five deponents I have referred to at [6] above.

Ground (c) – Continued ability of Mr Stringer to access his website

[9] Mr Craig in part relies on the fact that Mr Stringer, notwithstanding the loss of his computer equipment, will be able to continue to access his website. This observation simply serves to emphasise the fact that resort to an order against a non-party, in the present situation, is unnecessary.

Ground (d) – Slow progress on discovery to date

[10] Mr Craig identifies the fact that Mr Stringer's discovery to date has been inadequate and slow. That is true. I have recently had to give further directions in relation to discovery because of Mr Stringer's failure to accurately meet the requirements of discovery. That said, the parties have chosen to represent themselves and (to the extent that they do not have background legal assistance) some level of inaccuracy and delay was almost inevitable. This is not a situation in which the Court has reached any conclusion that Mr Stringer will stubbornly refuse to meet the requirements of the High Court Rules or to obey Court directions. Enforcement of directions, if necessary, remains the first and immediately appropriate course.

Ground (e) – Non-party discovery to prevent omission of relevant emails

[11] Mr Craig expressed a concern that Mr Stringer may omit "relevant" emails from his discovery. This undoubtedly explains in part why Mr Craig's application is so broadly drafted in that he seeks an order in relation to all email correspondence through Mr Stringer's account between 1 November 2014 and 26 February 2016. In substantial part, Mr Craig's concern as to a potential omission of "relevant" documents is driven by Mr Craig's apparent determination to track through Mr Stringer's entire email correspondence over a 16 month period. This is to be contrasted with the subject matter of Mr Craig's statement of claim which concerns publications during the months of June, July and August 2015. The sheer scope of the application for non-party discovery, well beyond the focussed months of the claim, strongly suggests in old-fashioned terms "a fishing expedition". In terms of the approach to discovery mandated since the current discovery rules came into effect in February 2012, the non-party orders sought by Mr Craig are not proportionate to the subject matter of the proceeding.[1]

Vodafone's holding of records

[12] There remains then the peculiar gulf between the evidence of Vodafone's delivery manager and the evidence of Mr Craig's information technology expert. The latter rejects the suggestion that a full record of two years of emails will still be held by Vodafone. In an interlocutory context the Court cannot resolve that conflict. As the evidence stands, I would be forced to conclude that Mr Craig has not, on the balance of probabilities, established the proposition he advanced in relation to the extent of information held by Vodafone. Having regard to my earlier conclusions, however, the failure of the application does not turn on this point.

Outcome

[13] Considerations directly relevant to the present application were considered by Kós J in *Vector Gas Contracts Limited v Contact Energy Limited.*[2] His Honour there

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1 The test under r 8.2(1)(a) High Court Rules on that basis alone the order sought could not be granted.

2 *Vector Gas Contracts Limited v Contact Energy Limited* [2014] NZHC 3171, [2015] 2 NZLR 670.

observed:[3]

> As Mr Cooper (who carried the burden of the argument for the applicants) candidly accepted, no Court will make a non-party discovery order that is unnecessary. In my view it remains implicit in r 8.21 that the non-party discovery order be necessary, so that the discretion should be exercised. That is to say, without limitation, other sources of evidence are unlikely to be sufficient because they are materially incomplete or unreliable. And that the documents sought may make a real difference, and are not merely marginal.

[14] I adopt those observations. When they are applied to Mr Craig's application, the application inevitably fails. The need for an order has not been demonstrated. Beyond that there are additional considerations such as irrelevance and lack of proportion which are also fatal to the application.

Costs

[15] Mr Craig accepted that, in the event the application was dismissed, costs would follow the event. He accepted also that Vodafone would be entitled to costs on a solicitor/client basis having regard to the non-party nature of the application. In relation to Mr Stringer, who is self-represented, the only relevant item is the disbursement of the filing fee on the Notice of Opposition.

Orders

[16] I order:

(a) The application for non-party discovery dated 11 March 2016 is dismissed.

(b) The plaintiff is to pay to Vodafone New Zealand Limited its reasonable costs and disbursements incurred in opposing the application to be determined on a solicitor/client basis (with leave to the parties by memorandum to ask the Court to fix the costs and disbursements if there is any dispute).

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[3] At [30].

(c) The plaintiff is to pay to the defendant his disbursement of $110 incurred in opposing the application.

Associate Judge Osborne

Copy to:
C G Craig, Auckland
J C Stringer, Christchurch