IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.517-IM/01

1405

BETWEEN HON. WILLIAM CLIVE EDWARDS Minister of Police, Prisons and Fire Services of Nuku'alofa, Tonga

(Intending) Plaintiff

AND TELEVISION NEW ZEALAND LIMITED Broadcaster of Auckland

(Intended) Defendant

Hearing: 7 November 2001

Counsel: D.P.H. Jones for Intending Plaintiff
W. Akel and C.E. Sheehy for Intended Defendant

Judgment: 14 November 2001

JUDGMENT OF SALMON J.

Solicitors: Antony Mahon, PO Box 47-452, Auckland (Counsel: David P.H. Jones, PO Box 1614, Auckland)
Simpson Grierson, Private Bag 92518, Auckland

[1] This is an application for leave to cross-examine deponents who have filed affidavits in opposition to an application for pre-commencement discovery. The intending plaintiff claims that he was defamed in a 60 Minute programme broadcast by the intended defendant. During that programme reference was made to an audio tape said to contain a record of a discussion between the intending plaintiff and an interviewee on the programme. Portions of the tape were heard on the television sound track and a translation was made from Tongan to English of those portions.

[2] In his application for pre-commencement discovery the intending plaintiff claims that it is not possible, and/or is impracticable for him to formulate his claim without reference to the audio tape and its contents. He says that the material sought is required so that:

> [a] The number and extent of defamatory statements in the 60 Minute programme can be properly ascertained;
>
> [b] The issue of malice can be considered and pleaded;
>
> [c] The issue of punitive damages can be properly assessed and pleaded so as to comply with ss.28 and 44 of the Defamation Act 1992;
>
> [d] The pleading contains sufficient particulars to comply with the High Court Rules.

[3] In response to the application the intended defendant has filed affidavits by three of its employees, each of whom says that they have searched TV New Zealand's files but have not been able to locate the recording. Each then says:

> To the best of my knowledge the recording is no longer in the possession of TVNZ.

[4] The intending plaintiff claims that this is an extraordinary statement and one, which if it is to be accepted, should be accompanied by much more detail as to the

chain of possession of the audio tape and the standard practice of the intended defendant in relation to the care and storage of such items.

[5] The intended defendant opposes the application and claims that the intending plaintiff has not demonstrated that there are special circumstances justifying the orders sought. It is also claimed that the orders sought are irrelevant to, and would not assist the Court in determining, the application for pre-commencement discovery and are contrary to public policy and the public interest in protecting the identities of confidential media sources.

[6] The only comment I make on the last of these propositions is that I am far from satisfied at this stage that the question of media privilege is so clear that to argue the substantive application would be a waste of time. The proper occasion for argument of that issue, if it is to be argued, is at the hearing of the application for pre-commencement discovery.

[7] Rule 254 of the High Court Rules provides that the Court may order the attendance for cross-examination of any person making any affidavit in support of, or in opposition to interlocutory application; but such order shall only be made in special circumstances.

[8] In *Kidd v van Heeren* (1997) 11 PRNZ 422 the Court of Appeal held that the words "special circumstances" indicate something abnormal, uncommon or out of the ordinary, but less than extraordinary or unique.

[9] In support of the application for leave Mr Jones relies upon the claimed inadequacy of the evidence relating to the search for the tape. In my view this inadequacy does not constitute special circumstances as required by the Rule. If the Judge hearing the application for pre-commencement discovery decides that the applicant has made out a case for an order in his favour he or she will then have to determine whether or not making such an order would be futile because of the claim that the tapes cannot be found. Before reaching such a conclusion the Judge would have to be satisfied that the evidence put forward on behalf of the defendants establishes, to the high standard required for discovery, that an adequate search has

been made. In considering that issue he or she will take into account the submissions on behalf of the intending plaintiff as to the inadequacies of the evidence supplied by the intended defendant. If the Judge accepts those submissions then no doubt an order for discovery will be made leaving it to the intended defendant to make a more structured search for the tape and to provide a better explanation than has so far been provided if that search is fruitless.

[10] For the above reasons it seems to me that cross-examination is unnecessary and the application is, therefore, dismissed. Costs are reserved.

Delivered at 11.30 a.m./~~p.m.~~ on 14/11/ 2001.

J.