

01/1150

**In the High Court of New Zealand
Christchurch Registry**

CP 68/99

Between MIDLAND METALS OVERSEAS PTE LTD
Plaintiff

And THE CHRISTCHURCH PRESS COMPANY LTD
First Defendant

And ORION NEW ZEALAND LTD
Second Defendant

And T L SCOTT
Third Defendant

And SJJ HIRSH
Fourth Defendant

And WELLINGTON NEWSPAPERS LTD
Fifth Defendant

And NEW ZEALAND PRESS ASSOCIATION LTD
Sixth Defendant

Hearing: 24 July 2001

Appearances: JRF Fardell for Plaintiff
J B Stevenson for First, Fifth and Sixth Defendants
F Miller and J S Baguley for Second to Fourth Defendants

Judgment: 2 August 2001

**JUDGMENT OF MASTER VENNING
On Interlocutory Application For Taking Of Evidence**

Solicitors:

Preston Russell Law, Invercargill for Plaintiff
(Counsel – J Fardell, Auckland)

Jeremy Atkinson, Auckland for First, Fifth and Sixth Defendants
(Counsel – J Stevenson, Wellington)

Chapman Tripp Sheffield Young, Christchurch for Second to Fourth Defendants

APPLICATIONS

[1] The Plaintiff has two applications before the Court. The first dated 2 February 2001 seeks supplementary discovery from the Second to Fourth Defendants, and the second an application for an order to have the evidence of Barry Harrison taken in the United Kingdom.

[2] Counsel agreed the application for supplementary discovery could be adjourned and reviewed towards the end of September. Counsel may be able to resolve it without the need for a hearing.

[3] The argument was restricted to the Plaintiff's application for the taking of evidence.

BACKGROUND

[4] It is sufficient to summarise the general background to the proceedings.

[5] The Plaintiff sources and supplies electrical cable world wide. It specialises in sales to electricity network owners. The Plaintiff supplied cable to the Second Defendant. The Second Defendant experienced problems with the cables, particularly where they were joined.

[6] The problem came to the attention of the First Defendant. It published an article in its newspaper on 26 December 1998 under the headline "Chinese Cables A Problem". The Fifth Defendant publishes "The Dominion" and "The Evening Post" and published articles in almost identical terms on 26 and 28 December 1998. The Sixth Defendant published an article on its news wire database service in similar terms to "The Press" newspaper on or about 25 December 1998.

[7] The Plaintiff alleges a number of causes of action against the various Defendants arising out of the publications. The statement of claim alleges

defamation, and also pleads injurious falsehood, breach of the Fair Trading Act by the Second, Third and Fourth Defendants and negligence by all Defendants except the Fourth Defendant. The cause of action in negligence has been struck out on the Defendant's application, but that decision is subject to appeal. Counsel advised the appeal is to be heard in early September.

[8] The Defendants plead that the contents of the article and imputations pleaded by the Plaintiff are true or not materially different from the truth. In essence the Defendants say the cables were defective and not fit for their purpose.

[9] The Second Defendant sought advice from Mr Barry Harrison. Mr Harrison is a consulting engineer employed by EA Technology Ltd in the United Kingdom. Mr Harrison specialises in the field of power system cables, including their design, installation, cable technology and accessories. He has provided ongoing expert advice to the Second to Fourth Defendants since January 1999 in relation to a number of the technical issues concerning the cables the subject of this proceeding.

[10] Two reports that Mr Harrison has prepared have already been referred to in these proceedings. On 6 December 1999 Mr Harrison authored a services report (T2996) regarding the "evaluation of 11 kV cable samples of Chinese manufacture" for the Second Defendant. His executive summary in that report was:

Examination of three samples of 11 kV cable of Chinese manufacture has shown that they were not manufactured to a standard that would have been expected of a modern cable.

The impregnant was found to consist of two components, one of which readily drained from the cable samples.

The condition of the lead alloy sheath of a cable sample reported to have burst during preparation for jointing was found to be of unusual structure, contained a network of apparently pre-existing cracks resulting from slow straining of the sheath. Concerns with regard to the long-term integrity of the sheath are discussed.

The use of pressure resisting/relieving terminations is discussed and concluded to be impractical. Other matters of technical concern have been identified.

[11] Later, on 29 November 2000, Mr Harrison prepared a further report for the Second Defendant. In it his general conclusion and comments were noted as follows:

Many of the constructional features observed during the examination of these cables were unsatisfactory, as described and discussed in report T2996:

Very poor conductor profiles
Splitting of carbon paper conductor screens
Severe creasing of insulation papers
Impregnant highly susceptible to liquefaction and syneresis
Mechanical impact damage to alloy sheaths

None of the relevant specifications lay down any particular requirements in these matters, hence it is not possible to state that the cable did not comply with the standard in these respects. Nevertheless, they were unsatisfactory and unacceptable in a modern cable. I have no hesitation in stating that, had I inspected these cables in the factory prior to delivery, they would have been rejected.

[12] The Second to Fourth Defendants rely in part upon Mr Harrison's reports to support the defences.

JURISDICTION FOR APPLICATION

[13] The application is made under r369(1)(b):

- (1) Where in any proceeding any party desires to have the evidence of any person or persons taken otherwise than at the time and place appointed or to be appointed for the trial of the proceeding, the Court may, on application by that party, make orders on such terms as it thinks fit—
...
- (b) For the sending of a letter of request to the judicial authorities of another country, to take, or cause to be taken, the evidence of any person.

[14] The present application is unusual insofar as it is an application by the Plaintiff to take the evidence of an expert retained by the Second Defendant. If granted it would effectively give the Second to Fourth Defendants the opportunity to cross-examine their own expert witness.

[15] Jurisdiction to make an order under r369 is discretionary. The prime criterion is whether justice requires such an order: *Ra Ora Stud Ltd v Oliver* (1991) 5 PRNZ 132.

[16] The following factors are relevant to the exercise of the discretion in this particular case:

Purpose of the rule

[17] The purpose of the rule is to enable a party to have the evidence of a witness taken otherwise than at the time of the trial of the proceeding if the witness would otherwise be unavailable to give evidence at the place and time of trial.

[18] In the present case there is no suggestion that Mr Harrison will not be available to give evidence at the substantive hearing of these proceedings. As yet no fixture date has been allocated. Interlocutory matters are not concluded. As noted, there is currently an appeal to the Court of Appeal on the striking out of one of the Plaintiff's causes of action. Pleadings are not closed. On any view of it, the substantive fixture will be well into 2002.

[19] There is no evidence that Mr Harrison will refuse or be unable to come to New Zealand to give evidence at trial.

[20] The evidence concerning Mr Harrison's availability is contained in the affidavits of Mr Baird, a solicitor employed by the Plaintiff's solicitors, and Mr de Vries, one of the Plaintiff's directors.

[21] Mr Baird's evidence is that when Mr Harrison was in New Zealand in March 2001 attending a conference Mr Baird contacted Mr Harrison and advised him that the Plaintiff wished to discuss issues arising out of the litigation. Mr Harrison confirmed that he had been instructed and engaged by the Second Defendant, that he had already provided two written reports to the Second Defendant (referred to above) and that he was:

7. ... willing to discuss with the Plaintiff issues arising in the litigation, provided that the Second Defendant consented to such communications taking place.

[22] The Second Defendant does not consent.

[23] Mr de Vries's evidence is that he sent an e-mail to the Third Defendant on 1 March 2001 noting that Mr Harrison had indicated a willingness to talk to the Plaintiff about issues relating to his reports, and seeking the Second Defendant's clearance. The Second Defendant responded:

Unfortunately we do not agree to any meeting taking place between you and Barry Harrison to discuss the two reports forwarded to you ...

[24] The position then is that Mr Harrison does not feel able to speak to the Plaintiff or its advisers without the Second Defendant's authority. There is, however, no evidence to suggest that Mr Harrison would be unavailable to attend at the trial of this proceeding when it takes place in New Zealand next year.

[25] I note that Mr Miller recorded in his submissions that:

While the Orion defendants are not prepared to undertake to call Mr Harrison at this early stage, they will know the position once interlocutories are completed and the briefs are to be exchanged. The Orion defendants would not object on grounds of delay to an application under r369 being made by the plaintiff then, should they decide not to call Mr Harrison (they would reserve their rights to object on other grounds).

[26] There is no evidence that Mr Harrison will not be available to give evidence at the substantive hearing of this case. On that basis I would be minded to dismiss the application.

[27] However, there are further reasons which lead me to conclude the application ought to be declined at this time.

Object of the application

[28] Throughout his submissions for the Applicant Plaintiff Mr Fardell confirmed that the Plaintiff wanted to obtain access to the documents Mr Harrison must have had regard to and relied on when he prepared the two reports referred to above. He emphasised that when giving his evidence Mr Harrison would be entitled to, and would need to, refer to the documents that back up his reports, and that the Plaintiff sought the documents relevant to those reports. He submitted the Plaintiff needed to have access to the background documents to ensure it was able to test Mr Harrison's evidence and conclusions.

[29] The application itself refers to evidence, both oral and documentary, and the draft letter of request to the United Kingdom identifies the evidence of Mr Harrison which is sought to be taken as:

19.1 the oral evidence of Mr Harrison, bearing on the contentious issues as referred to ... and bearing on his written opinions ...; and

19.2 the documentary evidence that Mr Harrison would require to support the opinion evidence he would proffer.

[30] Given the unusual nature of the application, its timing and the request for documentary evidence, the inference is that the Plaintiff wishes to obtain discovery of documents that might back up the reports Mr Harrison has prepared for the Plaintiff. That is an improper use of r369.

[31] In *Platt v Platt* [1948] NZLR 5 the Court held on a similar application under the Code of Civil Procedure that before allowing evidence to be taken abroad the Court was required to be satisfied the application was made in good faith and not for the purposes of delay and embarrassment. To the extent the application effectively seeks discovery of documents rather than principally being to take evidence it cannot be said to be made in good faith.

[32] Rule 369 applies to proceedings, not to interlocutory applications.

[33] More than that, however, to allow r369 to be used in the way proposed by the Plaintiff would be to infringe the general rule that a mere witness is not usually subject to discovery: *Macmillan Inc v Bishopgate Investment Trust Plc* [1993] 1 WLR 837.

[34] In the *Macmillan Inc* case the plaintiff brought an action to recover assets that had been transferred to the defendant. The second defendant called as a witness an employee of one of its associated companies. Under cross-examination by the plaintiff the witness was asked to produce copies of transcripts of a previous examination under the Insolvency Act. The witness refused to do so. In the course of declining the application by the plaintiff that the witness be required to produce the transcripts Millett J stated:

... a mere witness is not amenable to discovery, and cannot be subpoenaed to produce documents so that a party to litigation can examine them in order to decide whether or not he wishes to make use of them.
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[35] Justice Millet declined to read the Civil Evidence Act 1968 as being intended to circumvent that fundamental rule. In my view nor can r369 be used to circumvent that fundamental rule either.

[36] Reference can also be made to the decision of *Seyfang v G D Searle & Co* [1973] 1 All ER QB 290. In the *Seyfang* case the appellants were medical experts. They had conducted research into whether birth control pills were or could be a cause of thrombo-embolic disease. The Committee's research suggested there could be a connection between the two. The appellants published their results in articles in medical journals. Subsequently the respondents brought proceedings in America against two drug manufacturing companies. Letters rogatory were issued by the Ohio Court. An application was made for the appellants to give oral testimony on oath in the Ohio proceedings and to produce the working papers from which the articles in the medical journals had been prepared. They declined.

[37] Justice Cooke considered the exercise of the discretion available to the Court on such an application. He formulated a number of principles, including inter alia, the following:

(1) Judicial and international comity requires that any request of a foreign court for evidence to be taken under the Act should be treated with sympathy and respect and complied with so far as the principles of English law permit. ... (5) Finally the English courts will not allow the procedure of the Foreign Tribunals Evidence Act 1856 to be used as a means of obtaining discovery against a person not a party to the proceedings. That is the familiar principle laid down in *Burchard v Macfarlane, ex parte Tindall* [1891] 2 QB 241 and applied in other cases.
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[38] Justice Cooke concluded:

... insofar as the order requires the production of documents, it is in my view so widely worded as to amount in effect to an order for discovery, thus contravening the well-known principle to which I have referred.
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[39] I note that *Seyfrang* (supra) has been followed in part (although not directly on this point in New Zealand) in *Re Natrass* (1997) 10 PRNZ 335 where Tompkins J approved the approach of the Court in *Seyfrang*.

[40] For that reason I would not permit r369 to be used in the way the Plaintiff proposes to use it.

Other considerations

[41] Mr Fardell submitted that the Court should adopt a liberal and permissive approach to the use of r369 and relied upon the comments of Barker J in the *Ra Ora Stud* (supra) case where Barker J referred to the ease of travel and communications in the modern commercial world. Mr Fardell also noted that Barker J held that it was for the applicants to shape their case as they choose and call what witnesses they choose in discharging their onus of proof. However, in that case the plaintiffs were the ones who had had contact with the witness. The witness had refused to attend the hearing. If the plaintiffs had not called the witness none of the other parties were going to call the witness.

[42] In the present case, at this stage, it is likely the Second to Fourth Defendants will call Mr Harrison to give evidence. If, after the exchange of expert briefs, the Defendants are not willing to confirm Mr Harrison will be called as a witness or at least made available to be called by the Plaintiff if necessary, then an application to have Mr Harrison's evidence taken might then be appropriate, subject to the other issues the Defendants have raised.

[43] The position of the media Defendants, the First, Fifth and Sixth Defendants must also be considered. As Mr Stevenson submitted, the media Defendants have no real knowledge of what evidence Mr Harrison may give. There is no affidavit or draft brief of Mr Harrison's evidence. There are only the reports referred to. The media Defendants would have to prepare fully on all expert and factual aspects of the case to be in a position to cross-examine Mr Harrison. There is also force in Mr Stevenson's submissions that as yet the pleadings are not closed. To that degree the application is somewhat premature.

[44] I note that Mr Fardell was opposed to the Defendants' suggestion that if an order were granted under r369 the Plaintiff ought to pay full costs of counsel attending in the United Kingdom for the taking of Mr Harrison's evidence.

[45] It may be that proper arrangements could be made for the taking of the evidence by video link. That would require further investigation. If not, however, and counsel and (possibly) the parties did need to attend then the Plaintiff would have to accept, as a precondition of any order, that the Plaintiff would have to pay the costs of the examination, including all costs properly payable to the witness, the travel and accommodation costs of senior counsel for the Defendants and possibly representatives of the Defendants together with the costs associated directly with the taking of evidence. The comments of Barker J in *Ra Ora Stud* (supra) can be noted in that regard:

Had the plaintiffs not made the offer to pay all the costs and leave the question of an assessment as to the necessity of calling Ms Logan to the trial Judge, I should have been disinclined to have made an order.

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[46] Even in the *Ra Ora Stud* (supra) case which, with respect, was a clear case where an order was appropriate, Barker J had reservations that were only overcome on the basis the plaintiff would meet the costs associated with the exercise, including counsel for the other parties' costs.

[47] The last point that can be made is that the exercise may be pointless. As noted at paragraph 369.17 to the commentary to McGechan On Procedure:

... an order may be made that the evidence taken abroad is not to be used at the trial unless it is then proved that the witness is still unable to attend: *Boggon v Chicken* (1903) 23 NZLR 795, 796 (medical); *Turner v Mutual Assurance Soc of Victoria Ltd* (1889) 7 NZLR 658, 667 (CA) (custody pending trial).

[48] There is the potential in this case that even if Mr Harrison's evidence were taken prior to trial as sought by the Plaintiff, Mr Harrison could then attend the hearing next year and give evidence again. His earlier evidence would perhaps only be relevant to the extent of forming the basis of cross-examination on a prior inconsistent statement.

[49] For the above reasons the application is declined.

COSTS

[50] Costs to the Defendants on a 2B basis together with disbursements to include the reasonable travel expenses of counsel.

DIRECTIONS

[51] The proceedings are to be reviewed before me at a telephone conference on 2 *October 2001 at midday*. The Plaintiff's application in relation to supplementary discovery is adjourned for call on that day at that time as well.

Signed at: 4-30 am/pm

on: 2 August 2001