IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP68/99

02/1:50

BETWEEN	MIDLAND METALS OVERSEAS PTE LIMITED Plaintiff
AND	THE CHRISTCHURCH PRESS COMPANY LIMITED First Defendant
AND	ORION NEW ZEALAND LIMITED Second Defendant
AND	TASMAN LIONEL SCOTT Third Defendant
AND	STEPHEN JOSEPH JAMES HIRSCH Fourth Defendant
AND	WELLINGTON NEWSPAPERS LIMITED Fifth Defendant
AND	NEW ZEALAND PRESS ASSOCIATION Sixth Defendant

Hearing: 4 March 2002

Appearances: JRF Fardell for Plaintiff
J D Atkinson for First, Fifth and Sixth Defendants
F Miller and J Costigan for Second, Third and Fourth Defendants
C A Reaich for Fifth and Sixth Defendants

Judgment: 6 March 2002

JUDGMENT OF CHISHOLM J

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[1] This is an application for review of the Master's decision, delivered on 2 August 2001, refusing the plaintiffs application to have evidence taken in the United Kingdom pursuant to Rule 369. To the extent that the witness involved, Mr Barry Harrison, is an expert retained by the second, third and fourth defendants, this can be regarded as an unusual situation.

Background

[2] The plaintiff, a Singaporean company, is a worldwide supplier of electrical cables. It supplied cables to various New Zealand electricity network operators, including Connetics Limited which is a subsidiary of the second defendant. It claims to have been defamed by various articles published in December 1998 and by statements made in January 1999.

[3] The first, fifth and sixth defendants are publishers of the ***"The Press"***, ***"The Dominion"*** and ***"The Evening Post"*** newspapers as well as a newswire database service. These defendants can be conveniently described as ***"the media defendants".*** The remaining defendants can be collectively described as ***"the Orion defendants"***. At all material times the second defendant carried on business as the owner and operator of electricity distribution networks, employing the third defendant as its general manager of network services and the fourth defendant as its network planning engineer.

[4] It is alleged by the plaintiff that on or about 24 December 1998 the second defendant, by the third defendant, made comments to a journalist about the quality of certain Chinese imported underground electric cables. On 26 December 1998 the first defendant published an article in ***"The Press"*** and similar articles were published in ***"The Dominion"*** and ***"The Evening Post"*** newspapers and on the sixth defendant's newswire database service, all of which the plaintiff claims were actionable. The plaintiff further alleges that when the second defendant, by the fourth defendant, met with various people including representatives of the plaintiff

on 22 January 1999, it recapitulated the contents of ***"The Press"*** article and stated that the plaintiffs cables ***"piss oil "***.

[5] Defamation and injurious falsehood are pleaded against all defendants and breach of the Fair Trading Act 1986 is pleaded against the Orion defendants. 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 they maintain that the cables were defective and unfit for their purpose.

[6] Through legal counsel Mr Harrison was instructed by the Orion defendants to act as an expert adviser to them. Mr Harrison practices as a consulting engineer in the United Kingdom, specialising in the field of power system cables including their design, installation, cable technology and accessories. Since January 1999 he has provided ongoing expert assistance to the Orion defendants and their legal advisers in relation to a number of technical issues concerning the cables. Amongst other things instructions to Mr Harrison included his opinion about the general United Kingdom experience with cable leakage. He has also been instructed to carry out specific testing and analysis of certain technical aspects.

[7] Two written reports – dated 6 December 1999 and 29 November 2000 – relating to technical issues concerning the cables were provided by Mr Harrison. His summary in the first report (T2996) stated:

> *"Examination of three samples of II 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 preexisting 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.*

His second report included the following comments:

"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 "

The Orion defendants rely in part upon Mr Harrison's reports to support their defences.

[8] Having received a copy of the first report from Connetics Limited the plaintiff arranged for a solicitor to contact Mr Harrison and indicate to him that the plaintiff wished to discuss issues arising in the litigation. After speaking with the solicitors for the Orion defendants Mr Harrison declined to discuss the matter further. The plaintiff believes, however, that he would be willing to give evidence for the plaintiff if the Orion defendants withdrew their objection. Present indications are that the Orion defendants will call Mr Harrison as their own witness at trial but they are not prepared to commit themselves at this stage.

[9] The plaintiffs application for the evidence of Mr Harrison to be taken in the United Kingdom is upon the grounds:

"(a) ***the said Barry Harrison resides within the jurisdiction of the United Kingdom;***

(b) *the said Barry Harrison can give evidence to assist the Court in the determination of the contentious issues at trial, such evidence to be provided in both oral and documentary form;*

(c) *the said Barry Harrison is unavailable to the plaintiff to give such evidence, but he* ***is otherwise willing to do so. "***

The expression *"contentious issues at trial"* includes whether the defence of truth has been made out and whether any perceived problems are attributable to the handling of the cables by the second defendant.

[10] Both sides maintain that the other is attempting to take advantage of the situation that has arisen. According to the plaintiff its reasonable endeavours to persuade Mr Harrison to give evidence are being blocked by the Orion defendants with the result that in the absence of an order requiring his evidence to be taken in the United Kingdom there is a risk that Mr Harrison's evidence will not be available at the substantive hearing. On the other hand, the Orion defendants, supported by the media defendants, maintain that the plaintiff is seeking, by a sidewind, to gain access to documents held by Mr Harrison and relied on by him in preparing his reports to the Orion defendants.

Master's Decision

[11] Given the unusual nature of the application, its timing and the plaintiffs request for documentary evidence, the Master inferred that in substance the plaintiff wished to obtain discovery of documents that might back up the reports Mr Harrison had prepared for the plaintiff and that this constituted an improper use of Rule 369. He reasoned that use of the Rule in this way would infringe the general rule that a mere witness is not usually subject to discovery.

[12] Other considerations were also mentioned by the Master: it was likely that the Orion defendants would call Mr Harrison to give evidence and if, after the exchange of expert briefs, the defendants were not willing to confirm Mr Harrison would 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 had raised; fundamentally the application was premature; if an order is made other defendants would need to be represented at the taking of evidence; the exercise may be pointless; and if Mr Harrison's evidence was taken prior to trial he might then give evidence again at the trial.

Review Principles

[13] It is common ground that this review pursuant to Rule 6 1 C is essentially appellate in character. Counsel are also in agreement that the Master's decision was a fully reasoned decision following full argument. The burden is on the plaintiff to satisfy the Court that the Master made unsupportable findings of fact and/or applied wrong principles of law. ***Marine Resources NZ Limited (in receivership) v Attorney General*** (Hamilton Registry, 8 August 2000, CP213/91, Gendall J).

[14] One other matter should be mentioned at this point. Issues concerning the circumstances under which the Harrison reports were provided to the plaintiff were debated. In essence the plaintiff claims that the Orion defendants put these documents in play as part of an unprotected tactical move and that since there is no property in an expert witness the plaintiff is entitled to examine and call Mr Harrison. In response the Orion defendants claim that the disclosure arose during without prejudice settlement negotiations and that privilege not having been waived it is improper for the plaintiff to now put the reports in play. Apart from the fact that the without prejudice issue cannot be resolved on the information currently available, it seems that the Master was not called on to address the issue. Under those circumstances the justification or otherwise for the documents having been put into play by the plaintiff must remain unresolved at this juncture.

Arguments

[15] For the plaintiff Mr Fardell submitted that the Orion defendants will not come clean and say whether they are intending to rely on the Harrison evidence for trial purposes. If they are intending to rely on the evidence then the plaintiff is entitled to have it fully and properly tested and should not be constrained by the Orion tactical manoeuvres. Mr Fardell submitted that having regard to the nature of the claim and the defence of truth Mr Harrison's evidence would be important and

material and that the discretion conferred by Rule 369 is wide enough to accommodate the application. He argued that it would be unreasonable to expose the plaintiff to the risk that Mr Harrison's evidence will not be available at the substantive hearing. Any suggestion that the application is premature is misconceived because the need for Mr Harrison's evidence will be unaffected by any further changes to the pleading.

[16] Mr Miller submitted for the Orion defendants that none of the factors which would allow a Court to review a Master's discretionary decision are present. Exceptional circumstances are required before Rule 369 can be invoked and the plaintiff cannot surmount the threshold of demonstrating that the order is necessary. Moreover, the application is premature and is pursued for the collateral purpose of discovery. If it is granted the plaintiff would be afforded an opportunity to embark upon a fishing expedition by interrogating the defendant's expert about the defendant's case before trial. Mr Miller submitted that in any event the United Kingdom Court would probably decline to take the evidence. Submissions on behalf of the media defendants generally supported those advanced on behalf of the Orion defendants.

Determination

[17] Rule 369 relevantly provides:

> *"(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 appointedfor 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."*

As the Master noted, jurisdiction to make an order is discretionary and the prime criterion is whether justice requires such an order: *Raora Stud Limited v Oliver* (1991) 5 PRNZ 132. It also needs to be kept in mind that an order under this section

represents a departure from the usual requirement for the evidence of witnesses to be taken at trial.

[18] Despite Mr Fardell's comprehensive submissions I have not been persuaded that the Master erred in the exercise of his discretion. I am satisfied that it was open to the Master to reach the conclusion that the making of an order would not only be unprecedented but would also require Rule 369 to be used for a collateral purpose which was itself contrary to principle.

[19] Underlying the Master's decision was the inference that the plaintiff was seeking to achieve further discovery against a witness when discovery would not otherwise be available in respect of that witness. It is hardly surprising that the Master reached that conclusion. In terms of the letter of request Mr Harrison would be required to supply *"the documentary evidence that [he] would require to support the opinion evidence he would proffer"*. Nothing that I have heard dispelled my impression that the Master's analysis was accurate. Although it is true that no-one has property in an expert witness (see *Waeranga Forest Partnership v P F Olsen & Co Ltd* (1999) 12 PRNZ 561 at p566) it is equally true that as a general rule a mere witness is not usually subject to discovery: *Macmillan Inc v Bishopgate Investment Trust Plc* [1993] 1 WLR 837. Nothing has emerged that would suggest that the general rule is inapplicable in the case of Mr Harrison.

[20] Another important plank in the Master's decision was his conclusion that the application was premature. Again it seems to me that this view is unassailable. Given the likelihood that the Orion defendants will call Mr Harrison as their own expert witness, the taking of his evidence in the United Kingdom would introduce unnecessary complications, The Master was prepared to leave the door open for a future application if Mr Harrison is not called by the Orion defendants or released by them to the plaintiff. Under those circumstances the plaintiffs situation is protected and it is difficult to see how justice could require the making of an order at this time. Mr Fardell suggested that any order could lie in the Court until an appropriate time. The problem with that submission is that the Master's refusal to make an order was a perfectly proper exercise of his discretion and it would not be proper for this Court to substitute its own discretion by making such an order.

[21] To some extent the appellant has packaged its application for review around the submission that Mr Harrison's evidence will *assist the Court.* But that submission needs to be kept in perspective. Present indications are that this is not a situation where the Court itself might require the evidence to be taken, for example, because there is only one expert and the evidence of that expert should be before the Court. Affidavit evidence before the Court suggests that there are other experts in this particular field and that the plaintiff has in fact instructed its own expert. Nor is it a situation where Mr Harrison is a witness as to fact.

[22] Problems standing in the way of a successful review are compounded by unresolved privilege issues. There does not seem to be any doubt that privilege will impact on Mr Harrison's evidence, at least to some extent. And it is accepted by Mr Fardell that any privileged communications would be inadmissible. Counsel for the defendants argued that privilege would probably render most of his evidence inadmissible and that privilege and related issues could well deter the United Kingdom Court from giving effect to the request in terms of the Evidence (Proceedings In Other Jurisdictions) Act 1975. All those considerations count against this review.

Outcome

[23] The application for review is dismissed. The plaintiff is to pay costs to the defendants in terms of the 2B scale together with disbursements which will include reasonable travelling expenses of counsel.

Fisher J

Signed at: 2.30 am/pm on: 6 March 2002

Solicitors: Preston Russell, Invercargill for Plaintiff (Counsel: J Fardell, Auckland)
Izard Weston, Wellington for First Defendant
Chapman Tripp Sheffield Young, Christchurch for Second to Fourt Defendants
Bell Gully, Wellington for Fifth and Sixth Defendants