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B/NORTH

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 67 SD 02

03/206

BETWEEN

STEPHEN DAVIS

Plaintiff

AND

INDEPENDENT NEWSPAPERS LTD & ANOR

Defendants

Date of hearing: 25 February 2003

Counsel: Mr W Akel for plaintiff
Mr J Tizard for defendants
Ms W D Duggan and Ms Arthur for non party (Wilson & Horton Ltd)

Date of judgment: 12 March 2003

JUDGMENT OF MASTER LANG
[re application for review of compliance with orders for discovery by non-party]

Solicitors

Simpson Grierson, Fax 307 0331, Private Bag 92-518, Auckland for plaintiff – facsimile 307 3028
Oakley Moran, Fax 04 472 6657, PO Box 241, Wellington for defendants – facsimile 04 472 6657
Bell Gully, P O Box 4199, Auckland – facsimile 916 8801

Introduction

[1] On 27 June 2002 the defendants filed an application for particular discovery by a non-party Wilson & Horton Limited ("W&H") of:

All documents relating to complaints made against the plaintiff and any inquiry held into the conduct of the plaintiff (including the terms under which his employment as Editor of the New Zealand Herald was terminated or ceased).

[2] On 22 July 2002 counsel for W&H signed a consent memorandum consenting the defendants' application. This memorandum recorded that W&H:

... has no objection to the making of an order so long as the extent of discovery is clear and suitable terms are imposed to protect the confidentiality of those employees who made complaints against the plaintiff.

[3] On 25 July 2002 a conference was held before me at which the application for non-party discovery was granted. The form of the order was varied from that to which W&H had given its consent. The varied order which was made at the conference was in the following terms:

Wilson & Horton Limited shall serve on all parties by 15 August 2002 a verified list of documents relating to the employment of the plaintiff at the New Zealand Herald including any complaints made concerning the personal behaviour of the plaintiff whilst in the employ of Wilson & Horton and to any inquiry held into the conduct of the plaintiff (including the terms under which his employment as Editor of the New Zealand Herald was terminated or ceased and the reasons therefor).

[4] The variation came about because counsel for the plaintiff wished to ensure that full discovery was given regarding all relevant aspects of the plaintiff's employment and the circumstances which led to the cessation of that employment.

[5] W&H was served with the sealed order on 28 August 2002 and filed and served its list of documents on 11 September 2002.

[6] On 25 September 2002 the plaintiff's solicitors wrote to W&H's solicitors. That letter annexed a portion of an earlier letter dated 31 July which they had sent to the defendants' solicitors. In that letter the plaintiff's solicitors requested discovery of 19 further categories of documents. Subsequently W&H's solicitors sought a copy of the pleadings from the plaintiff's solicitors but these were never provided. The plaintiff's solicitors maintain, however, that W&H has not

complied with the order. As a result, a hearing was necessary in order to allow all parties (including W&H) to present submissions as to whether or not they considered that W&H had complied with the order which was made on 25 July 2002. That hearing took place on 25 February 2003.

[7] Both the defendants and W&H contend that W&H has fully complied with the terms of the order which was made on 25 July 2002. The plaintiff disputes this. He argues that, in order to fully comply with that order, W&H must provide discovery of the 19 categories of documents referred to in the letter dated 31 July 2002.

[8] The issue which now arises for determination, and it is a narrow one, is whether or not those categories of documents do in fact fall within the scope of the order.

The documents sought by the plaintiff

[9] The categories of documents in respect of which the plaintiff seeks discovery from W&H are as follows:

- [a] All emails between Stephen Davis and Rachel Ward, and vice versa;
- [b] All emails between Stephen Davis and Michelle Simpson, and vice versa;
- [c] All emails between Stephen Davis and Julie Middleton, and vice versa;
- [d] All emails between Stephen Davis and Alison Horwood, and vice versa;
- [e] All emails between Stephen Davis and Deborah Hill, and vice versa;
- [f] All emails and correspondence between Gavin Ellis and John Sanders relating to Stephen Davis or the company's inquiry including file notes;
- [g] All emails and correspondence between Gavin Ellis, John Sanders and any other members of the management team relating to Stephen Davis or the company's inquiry, including file notes;

- [h] All emails and correspondence between Gavin Ellis, John Sanders and John Maasland relating to Stephen Davis or the company's inquiry, including file notes;
- [i] All emails and correspondence between John Sanders and the parent company in Ireland relating to Stephen Davis or the company's inquiry, including file notes;
- [j] Any minutes or notes of Board meetings or management meetings discussing Stephen Davis or the company's inquiry;
- [k] All records of Stephen Davis' company credit card;
- [l] All records relating to the company's inquiry into Geoff Caisley;
- [m] All emails between Rachel Ward and other members of *The Herald* staff and emails between her and outsiders sent via the company's email system from 1 May 2001 to present;
- [n] All emails between Rachel Ward, Julie Middleton and Shenagh Gleeson from 1 May 2001 to present;
- [o] All emails between Julie Middleton and other members of *The Herald* staff and emails between her and outsiders sent via the company's email system from 1 May 2001 to present;
- [p] All records, minutes, emails and file notes relating to meetings or conversations held between John Sanders and/or other members of *The Herald* management team and/or Gavin Ellis and/or Board members and/or the parent company in Ireland about complaints about *The Herald's* coverage or Stephen Davis' editorship by any of the following:
 - [i] the real estate industry;
 - [ii] John Maasland or representatives of the Airways Corporation;
 - [iii] recruitment agencies;

- [iv] Team New Zealand;
 - [v] the National Party;
 - [vi] Paul Holmes;
 - [vii] Ralph Norris or other representatives of the banking industry;
 - [viii] the Business Roundtable;
 - [ix] Brian Mulroney or Tony O'Reilly.
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- [q] Emails, minutes, file notes, letters or other records relating to the resignation of Rod Oram;
 - [r] Emails, minutes, file notes, letters or other records relating to *The Herald's* coverage of a dispute about paper boys in Hamilton; and
 - [s] All emails, minutes, file notes, letters or other records relating to *The Herald's* coverage of the financial results of Wilson & Horton and its parent company.

[10] Before I consider whether these categories of documents fall within the scope of the order it is appropriate that I briefly review the principles which I need to apply in the context of the present application.

Relevant principles

[11] I consider that it is important that I bear in mind that this is not an application by the plaintiffs for further and better discovery against another party to the proceeding. W&H is not a party to the proceeding and discovery has been sought against it as a non-party. To that end the only matter which I can consider is whether or not W&H has in fact complied with the terms of the order which was made.

[12] In this regard I bear in mind Ms Duggan's submission that what the plaintiff is actually seeking is further and better discovery. She submits that the plaintiff does so notwithstanding the

fact that there is no provision in the High Court Rules for further and better discovery to be ordered against a non-party. She drew my attention to the decision of *Butler v Holden* (1990) 3 PRNZ 660 in which Master Hansen (as he then was) held that any party seeking documents from a non-party which are not within the scope of the original order must make its own application under Rule 301 if the documents which it seeks are not within the scope of the original order.

[13] Ms Duggan also referred me to the comments in *McGechan on Procedure* dealing with this issue. In that work the learned authors state at HR301.08:

The non-party giving discovery under this rule may file an affidavit which the party requiring discovery considers inadequate. Rule 277 cannot be relied on to enforce the Court's order, as that rule only applies to parties. If the affidavit is deficient, the better view is that the order should be complied with and that a further affidavit should be obtained from the non-party, provided the presumption of conclusiveness of the first affidavit is rebutted. Such a conclusion is in accordance with r 4 which provides that the rules should be construed so as to secure, among other things, a just determination of a proceeding. One route to securing a further and better affidavit is r 9, by drawing an analogy between non-party and party discovery. This was accepted by Master Hansen in *Butler v Holden* (1990) 3 PRNZ 660.

[14] In the present case both the defendants and W&H contend that the plaintiff has failed to rebut the conclusiveness of the non-party's list of documents. They say that the parties who required the discovery, namely the defendants, accept that the list of documents is conclusive.

[15] I bear in mind also that, to the extent that the documents sought by the plaintiff may be outside the scope of the orders which were made, it remains open to the plaintiff to apply afresh for non-party discovery against W&H. That was in fact the context within which this point came to be considered by Master Hansen in *Butler v Hansen* (supra).

Scope of the order

[16] I consider that the scope of the order which was made on 25 July 2002 required W&H to provide discovery of documents relevant to the following matters:

- [i] The employment of the plaintiff at the New Zealand Herald including;
- [ii] Any complaints made concerning the behaviour of the plaintiff whilst he was employed by W&H; and

- [iii] Any inquiry held into the conduct of the plaintiff (including the terms under which his employment as editor of the New Zealand Herald was terminated or ceased and the reasons therefor).

[17] I accept Ms Duggan's submission that the order required W&H to discover documents relating to the plaintiff's employment contract, any review of that contract (including salary and remuneration reviews) together with human resources records relevant to his employment. This would include material relating to any complaints which were made about the plaintiff's conduct whilst employed as the Editor of the New Zealand Herald. It would also require W&H to provide documents relating to any inquiries which were held into the plaintiff's conduct and any disciplinary action which was taken whilst he was in that position. Finally, it would include all documents relevant to the events which led up to his resignation.

[18] Bearing those principles in mind I now turn to consider the individual categories of documents in respect of which the plaintiff seeks discovery.

(a) *All emails between Stephen Davis and Rachel Ward, and vice versa*

[19] It is common ground that these have been provided and no further order is required.

(b) *All emails between Stephen Davis and Michelle Simpson, and vice versa*

[20] The plaintiff maintains that these are necessary because he wishes to establish that his relationship with Ms Simpson was completely appropriate in all respects. That may be relevant in broad terms so far as the conduct of the plaintiff's case is concerned. I do not consider, however, that it would fall within the scope of the order unless the communications in question related either to specific complaints which were made about the plaintiff's conduct or, alternatively, any inquiry which was carried out into that conduct. Any such communications should already have been discovered. If they have not, W&H will need to file a supplementary list of documents to cover them.

(c-e) *All emails between Stephen Davis and Julie Middleton, Alison Horwood and Deborah Hill, and vice versa*

[21] My conclusion in relation to these categories of documents is the same as that in relation to category (b).

(f-i) All emails and correspondence between Gavin Ellis, John Sanders, John Maaslan, the parent company and any other members of the management team relating to Stephen Davis or the company's inquiry, including file notes of meetings discussing Stephen Davis

[22] All of the documents sought within these categories would have fallen squarely within the terms of the order which was made on 25 July 2002. W&H confirms that any such documents have now been provided. The plaintiff has not provided any evidence to suggest that any such documents have not been provided. On that basis I do not propose to make any further order in relation to these categories.

(j) Any minutes or notes of Board meetings or management meetings discussing Stephen Davis or the company's inquiry;

[23] My conclusion in relation to these items is the same as that relating to categories (f) to (i).

(k) All records of Stephen Davis's company credit card

[24] The plaintiff seeks disclosure of these details in an endeavour to refute the allegations which he anticipates that the defendants' will make that he regularly socialised and that he was a "man about town".

[25] I do not see how these allegations will be relevant to matters raised by the pleadings but I do accept that they probably have some relevance to his employment by the plaintiff in the broader sense. I would have thought that it would be a relatively simple matter for W&H to provide details of the plaintiff's credit card accounts and that it should not be necessary for a formal order to be made that this be done. I suggest that W&H forward the plaintiff's solicitors copies of those accounts within 21 days of the date of this judgment.

(l) All records relating to the company's inquiry into Geoff Caisley

[26] The plaintiff seeks this information on the basis that he maintains that his employer acted inconsistently in its dealings with him to the manner in which it acted in dealing with similar

incidents involving other employees. The plaintiff seeks to illustrate this point using the manner in which the company allegedly dealt with Mr Caisley.

[27] I am advised, however, that the incident involving Mr Caisley occurred approximately ten years prior to the plaintiff's employment by W&H. I cannot see how it could possibly be relevant to the matters raised in this proceeding and, in any event, it is clearly outside the scope of the terms of the order. I do not propose to make any order in relation to this category.

(m-o) All emails between Rachel Ward and other members of the Herald staff (including Julie Middleton and Shenagh Gleeson) and outsiders sent via the company's email system from 1 May 2001 to the present

[28] The scope of this request is extraordinarily wide, and without doubt would involve W&H in extensive enquiries to locate the documents sought. I do not see how they could be relevant to the proceeding and, unless they relate to the matters referred to in paragraph (14), they are certainly outside the scope of the orders which were made on 25 July 2002. If they are within the scope of the matters referred to in paragraph (14) they should already have been discovered. I do not propose to make any further order in relation to them.

(p) All records, minutes, emails and file notes relating to meetings or conversations held between John Sanders and/or other members of The Herald management team and/or Gavin Ellis and/or Board members and/or the parent company in Ireland about complaints about The Herald's coverage or Stephen Davis' editorship by any of the following:

- [i] the real estate industry;*
- [ii] John Maasland or representatives of the Airways Corporation;*
- [iii] recruitment agencies;*
- [iv] Team New Zealand;*
- [v] the National Party;*
- [vi] Paul Holmes;*
- [vii] Ralph Norris or other representatives of the banking industry;*
- [viii] the Business Roundtable;*
- [ix] Brian Mulroney or Tony O'Reilly.*

[29] The plaintiff seeks discovery of these documents because he says that they will assist him to prove that the events which led to his dismissal had their genesis in a number of earlier events in which he clashed with the management of W&H. That might be the case, but I do not consider that the discovery sought could be said to fall within the scope of the orders made on 25 July 2002.

None of these matters relate to the plaintiff's employment, to the complaints which were made against him, the inquiry which was subsequently held or the circumstances surrounding his resignation. If the plaintiff wishes to obtain discovery in respect of these items he would need to file his own application and persuade the Court that they are in fact relevant to the pleadings as they presently stand.

[30] I do not propose to make any further order in relation to these categories.

(q-s) Emails, minutes, file notes, letters or other records relating to the resignation of Rod Oram; the Herald's dispute about paper boys in Hamilton and the financial results of Wilson & Horton and its parent company

[31] Mr Akel outlined the bases upon which he considered that these matters were relevant to the present proceeding. Broadly speaking they also relate to the plaintiff's contention that the cessation of his employment was brought about by events other than those which related to the inquiry into the allegations of sexual harassment. I have to say, however, that I cannot see how they could be said to come within the scope of the order which was made on 25 July 2002. They do not appear to relate in any way to the plaintiff's employment or to the subsequent events which gave rise to his resignation. They would not have been within the contemplation of any party (except perhaps the plaintiff) when the order for non-party discovery was made. Again, if the plaintiff considers that they are relevant to his case he should make his own application for non-party discovery and persuade the Court at that stage that they are in fact relevant.

Result

[32] For the reasons set out above I do not consider that any further orders are necessary at this stage. I do not consider that the plaintiff has shown that the non-party has failed to comply with the orders which were made by the Court on 25 July 2002.

[33] I have commented on a number of occasions (paragraphs [19], [20], [21], [22] and [27]) on the fact that certain of the categories of documents now sought by the plaintiff fall within the scope of the order and should already have been discovered. Mr Akel expresses surprise at the fact that, for example, there appears to have been no mention of the allegations, the inquiry or subsequent events in the minutes of any Board or management meetings. For the sake of completeness,

counsel for W&H is to refer this judgment to her client so that it can ensure that no material has been omitted which falls within the classes of documents now sought by the plaintiff and which also comes within the scope of the orders made on 25 July 2002.

[34] Counsel for W&H is to file and serve either a supplementary list of documents or a memorandum confirming that W&H has checked again and is satisfied that no such documents exist. That memorandum is to be filed and served no later than 3 April 2003.

Costs

[35] I will determine the issue of costs once the list or memorandum has been filed by W&H. If any party wishes to be heard further on the issue of costs at that point, they are to file a memorandum within 7 days of the date upon which the affidavit or memorandum is received from W&H.

[36] The cost of carrying out the check and preparing the list or memorandum is initially to be met by the defendants, but is to be a cost in the cause.

Next event

[37] The proceeding will be called in the Chambers List on 11 April 2003 at 2.15 pm. The matter will be reviewed further at that time. Counsel for W&H will not need to attend at that time or at any other hearing unless specifically asked to be present.



Master G Lang

Signed at: 12.40 am/pm

on: 12 March 2002