[redacted]

561

**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV 2003-404-4113**

| | | |
|---|---|---|
| | BETWEEN | WASAN INTERNATIONAL CO LIMITED<br>Plaintiff |
| | AND | SUNG WOO LEE<br>First Defendant |
| | AND | BONG IL KIM<br>Second Defendant |
| | AND | JUNG HAN JIN<br>Third Defendant |

Hearing: 24 May 2004

Appearances: G Kohler for plaintiff
T Kwon for defendants

Judgment: 26 May 2004

---

**JUDGMENT OF ASSOCIATE JUDGE FAIRE**
**re application for further and better discovery**

---

[1] The defendants apply for orders:

[a] For further and better discovery; and

[b] For production of such documents; and

[c] Costs.

The applications are made in reliance on rr300 and 307 of the High Court Rules.

[2] There are three defendants. The first defendant is the publisher of a Korean language newspaper published in New Zealand under the name and style of *The New Zealand Times*. The second defendant is the editor of *The New Zealand Times*. The third defendant is an employee of the first defendant.

[3] The plaintiff sues the defendants and alleges that it has been defamed by the defendants in articles published in the defendants' newspaper on 18 July 2003 and 8 August 2003 and on the defendants' website and in certain other confirming statements allegedly made to the public.

[4] The plaintiff opposes the application. In summary the grounds advanced in opposition are the following:

[a] The plaintiff has filed a verified list documents and disclosed all relevant documents. The documents sought in the application are not relevant. The defendants' application is of a fishing nature;

[b] having regard to the series of articles that have been published alleging wrongdoing by the plaintiff, the plaintiff has a genuine concern that any information provided by way of discovery will be misused by the defendants;

[c] there has been unnecessary delay in bringing this application.

[5] Before analysing this application it is helpful to look at the general approach which the Court must follow. The application is made pursuant to r300. Rule 300 provides:

> Where at any stage of the proceeding it appears to the Court from evidence or from the nature or circumstances of the case or from any document filed in the proceeding that there are grounds for a belief that some document or class of document relating to any matter in question in the proceeding may be or may have been in the possession, custody, or power of a party, the Court may order that party–(and provision is made for the filing and service of an appropriate affidavit)

[6] There are four jurisdictional requirements which must be met by the defendant in this case. The defendant must establish:

[a] Grounds for belief that the party is, or has been, in possession of;

[b] A document or class of document, that

[c] Relates to any matter in question in the proceeding; and

[d] That discovery is necessary at the time.

[7] The first two jurisdictional requirements are not of real concern. I shall make an observation in paragraph 19 of this judgment in relation to this point..

[8] I deal therefore with the third and fourth jurisdictional requirements.

[9] I am required to consider the pleadings to ascertain the issues between the parties. *NZ Rail Ltd v Port Marlborough NZ Ltd* [1993] 2 NZLR 641, 644, *AMP Society v Architectural Windows Limited* [1986] 2 NZLR 190, 202.

[10] The question of whether a document is relevant for the purposes of discovery was examined by Brett LJ in *Compagnie Financiere du Pacificque v Peruvian Guano Co* (1882) 11 QBD 55, 63

> It seems to me that every document relates to the matters in question in the action which not only would be evidence upon any issue, but also which, it is reasonable to suppose contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of its adversary. I have put in the words "either directly or indirectly", because, as it seems to me, a document can properly be said to contain information which enable a party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.

The test applies to applications under Rule 300. *AMP Society v Architectural Windows Limited* (supra) at p 202.

[11] An order will only be made if the Court is satisfied that same is necessary (Rule 312). The onus of establishing that an order is necessary rests on the applicant: *T D Haulage Ltd v NZ Railways Corporation* (1986) 1 PRNZ 668.

[12] Mr Kwon referred me to the passages from the statement of claim which are relied upon by the defendants in making this application. I quote directly from his written memorandum:

> 8. the core of the plaintiff's claim is that the following statements in the defendant's newspaper article (as translated by the plaintiff, the defendants reserve their rights to dispute the accuracy of the translation) (the "article") were referring to the plaintiff and are defamatory:
>
> A. Statement 8 in paragraph 6 of the second amended statement of claim ("the statement of claim"):
>
> *Then, these consultants entice their clients with sweet words saying that they have exquisite ways in helping their clients to pass IELTS English test within several months, and they gobble up large amounts of fees.*
>
> B. Statement 9 in paragraph 6 of the statement of claim:
>
> *The trick currently played by a "W" company on their clients holding long-term business visas is that if they pay NZ$30,000 a year as management fee, NZ$20,000 a year as various taxes including PAYE (which makes a total of NZ$100,000 for two-year LTBV period), the consultant will prepare flawless documents.*
>
> C. Statement 10 in paragraph 6 of the statement of claim:
>
> *Meanwhile, the trick used for their general category clients is that if they pay NZ$60,000 for a 1.5 year work permit, and NZ$18,000 for helping them pass IELTS.*

[13] The defences raised in the statement of defence in summary are:

[a] The article does not refer to the plaintiff (paragraph 5 of the statement of defence);

[b] If the article is a reference to the plaintiff, which is denied, then it is true.

[14] What the statement of defence does not do, however, is to particularise the clients which are said to be involved.

[15] It is appropriate that I refer to the obligation cast on a defendant who pleads truth. Section 38 of the Defamation Act 1992 provides:

> **38 Particulars in defence of truth**
>
> In any proceedings for defamation, where the defendant alleges that, in so far as the matter that is the subject of the proceedings consists of statements of fact, it is true in substance and in fact, and, so far as it consists of an expression of opinion, it is honest opinion, the defendant shall give particulars specifying—
>
> (a) The statements that the defendant alleges are statements of fact; and
>
> (b) The facts and circumstances on which the defendant relies in support of the allegation that those statements are true.

[16] Central to the opposition raised by Mr Kohler is the issue that because there has been insufficient particularisation of the defence of truth, the defendants' application is not justified and, put bluntly, is simply a fishing exercise designed to find evidence, if it exists, to bolster an allegation that has already been made.

[17] The categories of documents that are sought are as follows:

> A. Work permit (including Long Term Business Visa) and Resident Permit applications submitted by the plaintiff on behalf of its clients for the last three years up to July 2003;
>
> B. List of bank account in the name of the plaintiff, its director Edward Kang, and its shareholder Eun-Kyong Chun AND statements of those accounts between August 2001 and July 2003;
>
> C. Financial statements of the plaintiff for the last three years up to 31 March 2003;
>
> D. The plaintiff's ledger for the last three years up to 30 June 2003;
>
> E. The plaintiff's client interview files;
>
> F. The plaintiff's contracts with its clients in regard to visa/permit applications, company management services, and English education services;
>
> G. List of companies where Edward Kang has majority share holdings ("Kang's companies");
>
> H. In regard to Kang's companies:
>
> i) Financial statement from their incorporation to 31 March 2003

ii) Ledgers from their incorporation to 30 June 2003;

iii) Bank account details and their statement from their opening to 31 June 2003;

I. Any evidence that will demonstrate the plaintiff's ability to pay costs if order is made against the plaintiff.

[18] Mr Kwon advances the following brief submissions which he submitted justified disclosure and production in respect of each category:

Category A: These applications shall be reviewed to check if such irregularities as described in the article were made in the applications by the plaintiff.

Category B: plaintiff's bank account may show lump sum deposits by its clients of the amount similar to the costs as reported in the article as the plaintiff was charging to its clients.

Category C: These documents may show if the plaintiff is able to pay the defendant's legal costs relating to this proceeding if the Court orders it. The defendants are going to decide whether they will make an application for security for costs after viewing this information.

Category D: Same relevance as the documents described in paragraphs B and C.

Category E: These documents may show if the plaintiff had made such advices as described in the article.

Category F: These documents may also show if the plaintiff has provided such services to its clients and received such costs as described in the article.

Categories G and H: The plaintiff may have used other companies owned by its director, Edward Kang, in receiving monies from its clients. The other companies may also have been used in *preparing flawless documents for the*

*long term business permit holders* (statement 9, paragraph 6 of the statement of claim).

Category I: These evidences are required for the defendants in deciding whether they will make an application for security for costs.

[19] Two general observations can be made in respect of the basis advanced by Mr Kwon for disclosure and production. They are:

[a] Some of the categories of documents sought are documents which are not the plaintiff's. There is no basis advanced to suggest that they are in the possession of the plaintiff. I put to Mr Kwon that if he could otherwise justify their relevance the appropriate application would be an application for non-party discovery. Mr Kwon advanced no argument to counter that proposition;

[b] Some of the categories of documents are sought on the basis that their production might justify a late application for security for costs. Such a basis, however, cannot make their disclosure and production relevant for the purpose of the proceeding. Once again, Mr Kwon advanced no proposition to counter that position.

[20] That leaves the real question to be addressed in this application. That requires a consideration of how the issue of relevance should be approached in this type of proceeding. The short issue can be expressed in the following way: is a defendant entitled to inspect a plaintiff's documents in the categories outlined where:

[a] The proceeding is a defamation proceeding;

[b] The defendant relies on a defence of truth;

[c] The defendant has not provided particulars of the precise facts he relies upon to support the defence of truth.

[21] I have already made reference to s38 of the Defamation Act 1992 and the requirement that the defendant must plead the particulars relied upon to support the defence of truth.

[22] Mr Kohler referred me to passages from *Gatley on Libel and Slander* (10th ed), 2004; *Zierenberg &Wife v Labouchere* [1893] 2 QB 181; *Yorkshire Providence Life Assurance Co v Gilbert & Rivington* [1895] 2 QB 148 and *Arnold & Butler v Bottomley* [1908] 2 KB.

[23] The cases that I have referred to are authority for the general proposition referred to in *Gatley on Libel and Slander* (10th ed), 2004, para 31.8, namely that in a libel proceeding the plaintiff is:

> only obliged to give discovery in relation to matters alleged in the particulars of justification, because the defendant is not entitled to fish for some other defence in the claimants papers.

The reason for that is referred to in *The Laws of New Zealand*, Defamation, para 170 where the author refers to the proposition that a plaintiff cannot be expected to come to trial prepared to justify his or her entire life.

[24] I now refer to the authorities where the position has been examined.

[25] In *Zierenberg &Wife v Labouchere,* p 188 Lord Esher MR said:

> I now come to the contention that the defendant ought not to be made to answer now, but should be allowed discovery by way of interrogatories and inspection before being called on to do so. This is not a case in which, before the action was brought, there was any relation between the parties, such for instance as that of principal and agent which would entitled the defendant to discovery. The only connection between them is that of plaintiffs and defendant in an action for libel, and the defendant is not entitled to discovery for the purpose of finding out whether he has a defence or not. Such discovery has never been allowed in the absence of some relationship between the parties to the action, except under exceptional circumstances, such as one party keeping back something which the other was entitled to know. Here the justification, for want of sufficient particulars, is not a well-pleaded defence, and till there is such a defence there can be no right to discovery, in the absence both of the relationship of which I have spoken and of any special circumstances. The pleading by the defendant of his justification, which consists of his general plea and his particulars, is not yet a well-pleaded defence, and until there is such a defence the defendant has no right to discovery.

> Upon principle and authority the defendant's contention that he is not bound to give the particulars till he has had discovery fails.

[26] The position was reinforced in *Yorkshire Providence Life Assurance Co v Gilbert & Rivington.* At page 151 Lindley LJ said:

> Supposing that after that the defendants had merely sworn an ordinary affidavit of documents and of discovery, I should think the principle which was applied in the case of *Metropolitant Saloon Omnibus Co v Hawkins* 4 H&N 146, and *Zierenberg &Wife v Labouchere* [1893] 2 QB 183 would protect the plaintiffs from having their books thrown open to the discovery of their opponents. Such a case would be what is called a fishing application, and would be discouraged and stopped.

[27] Further, at page 152 he said:

> I think it would be a very bad precedent to suggest that a person can simply by libelling another obtain access to all his books and see whether he can justify what he has said or not.

[28] In *Arnold & Butler v Bottomley* Vaughan Williams LJ at 155 said:

> It is plain that the defendant Bottomley in this case is not entitled to inspection unless and until he has by his particulars precisely stated the facts on which he relies in support of his plea of justification.

[29] In the same case Farwell LJ at p 156 said:

> A defendant in a libel action who pleads justification must state in his defence or particulars the facts on which he relies to prove such a justification, and he can obtain discovery only in respect of such facts so stated: *Yorkshire Providence Life Assurance Co v Gilbert & Rivington* [1895] 2 QB 148.

[30] At page 159 of the report Kennedy LJ said:

> I do not give any reference to any particular person who has dealt with you, or to any particular transaction in which you have been concerned, or to any particular document in your possession "but I hope to find evidence in support of my justification by examining the entries in your books between January 1, 1906, and October 13, 1906." I am of the opinion that the allegation of a system of wrong-doing is a wholly insufficient basis for a claim to inspect the plaintiffs' business books.

[31] I have cited passages from the above judgments because it is plain that the answer to the proposition that I have referred to in paragraph 20 is clearly "No".

[32] In one instance in the statement of defence, there is a reference to an applicant, without the applicant being named. Mr Kwon invited me to consider the position if that applicant were named. I am not prepared to do that in this application. If a party wishes to re-plead and to provide particulars, that may well justify further disclosure. It is not for the Court, however, to speculate on such matters. As I had earlier referred to in this judgment, I must measure the relevance of the disclosure which is to be made by reference to the pleadings which are advanced and placed before me. It is not for me to speculate what might or might not be pleaded by a party at some later time. Accordingly, I am not prepared to make any exception in the event that the defendant does make some disclosure.

[33] The analysis which I have carried out and the answer to the proposition which I have specified leads to one conclusion, and that is that this application clearly must fail. There is in fact no need to go on to consider the other grounds advanced in opposition to the application. They are, in any event, only secondary grounds and acknowledged as such by Mr Kohler.

[34] In the course of argument I discussed with counsel the next step. A trial date can now be fixed. The trial directions that I make at the conclusion of this judgment are made on the basis that both counsel agree with the time estimate and confirm availability for the trial date which I have selected. Because there seems to be no reason why a trial date should not be allocated at this time, I make the directions which are recorded below.

**Orders and directions**

[35] I make the following orders and directions:

[a] The defendants' application for further and better discovery is refused;

[b] The plaintiff is entitled to costs on such application, based on Category 2 Band B together with disbursements as fixed by the Registrar;

[c] I make the following trial directions:

This proceeding shall be heard in the week commencing 13 September 2004. It shall be set down as at 19 July 2004. Three days is allowed. In all other respects rr441B to 441I and 441M to 441Q shall apply. The proceeding shall be placed in the Judges' callover at 9am on 5 September 2004.

JA Faire
Associate Judge

Delivered at 11.55 am/pm on 26 - 5 - 2004

Solicitors: Connell & Connell, PO Box 5275, Auckland for plaintiff
Song Jae Hon, PO Box 33 359, Takapuna for defendants