

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

CIV 2005-404-1808

BETWEEN	FERRIER HODGSON First Plaintiff
AND	MICHAEL PETER STIASSNY Second Plaintiff
AND	VINCENT ROSS SIEMER First Defendant
AND	PARAGON SERVICES LIMITED Second Defendant
AND	OGGI ADVERTISING LIMITED Third Defendant

Hearing: 20 July 2005

Appearances: M Flynn for plaintiffs
C Henry and D Beston for first and second defendants

Judgment: 22 July 2005

**JUDGMENT OF ELLEN FRANCE J
(Interlocutory application - discovery)**

Application to set aside claim of privilege

[1] The defendants challenge the claim of privilege to the documents listed in Part 2 of the plaintiffs' list of documents.

[2] The defendants are critical, first, of the lack of particularity in Part 2 of the list. They submit the nature of the documents is not described.

[3] Second, they say that privilege is claimed for communications between the plaintiffs and their solicitors or agents but some of the communications for which privilege is claimed are between the plaintiffs and Yahoo who is a defendant, not an agent of the plaintiffs. (As matters developed, Yahoo has not been served and is not a party.)

[4] Third, in the context of a committal proceeding, the defendants say there is an obligation on the plaintiffs to “get their house in order”.

[5] Accordingly, Mr Henry says that at the very least the plaintiffs should be required to submit the documents to the Court for the Court to check the claim to privilege is warranted. The defendants’ primary claim is though that they should be entitled to inspect the documents.

[6] The plaintiffs submit first that the description of the documents is sufficient – every document is dated, its nature is identified, and the parties are also identified.

[7] Second, the plaintiffs say the documents are properly covered by either legal professional privilege or litigation privilege.

[8] Finally, the plaintiffs’ submission is that they have put the defendants properly on notice as to the nature of the claim against them.

Discussion

[9] The privilege part of the list is in two parts. I have no difficulty accepting on its face the claim for privilege relating to the McElroys files. They are the solicitors for the plaintiffs and the documents are dated post the time when the litigation was on foot.

[10] I accepted the defendants’ criticism of the adequacy of the description of the documents in the other part of the list. These are the documents from Ferriers’ files. Accordingly, I directed the plaintiffs to file further particulars of the documents listed as coming from the Ferriers file in Part 2 of the list.

[11] The plaintiffs have now provided further particulars. It is now apparent that the bulk of the material for which privilege is claimed is correspondence between Ferriers and their solicitors and/or counsel or correspondence relating to such communications. The greater particularisation has assisted. For example, on page 25 of the amended list what was described as a file note is now described as a file note by Mr Garrett relating to the hearing before Hansen J with inquiries for discussions with the plaintiffs' solicitors. Similarly, it is now clear that some documentation has been generated in the context of preparation of affidavits. Clearly, privilege is properly claimed for this material.

[12] That leaves a group of documents which are, broadly, Ferrier's research, for example into the operation of the website; and communications with others about the website, the sale agreement, and about the red stickers. With the detail about that research and inquiries I now have, I am satisfied the claim of privilege is properly made in relating to this material as well. This documentation does appear to have the dominant purpose of enabling Ferrier's legal advisers to conduct or provide advice about the litigation.

[13] The defendants' application that the claim of privilege should be set aside and inspection ordered accordingly fails.

Ellen France J

Delivery time in accordance with Rule 540(4): 22 July 2005 at 3:45pm

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