

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

CIV 2002-404-1559

CL 32/02

BETWEEN	THE ORDER OF ST JOHN NORTHERN REGIONAL TRUST Plaintiff
AND	GEMINI 10 LIMITED First Defendant
AND	TWINS 10 LIMITED Second Defendant
AND	JUNE 10 LIMITED Third Defendant
AND	QUI RUI KENNETH JOHN LU Fourth Defendant

Hearing: 8 April 2005

Appearances: MS Cole and HH Ifwersen for Plaintiff
RAA Weir for Defendants

Judgment: 12 April 2005

JUDGMENT OF RODNEY HANSEN J

Solicitors: Simpson Grierson, Private Bag 92518, Auckland for the Plaintiff
Dyer Whitechurch, P O Box 5547, Auckland for the Defendants

Introduction

[1] The following applications require determination:

- a) An application by the plaintiff for further particulars, for further and better discovery and to strike out parts of the defendants' statement of defence and counterclaim.
- b) An application by the defendants for further and better discovery.
- c) An application by the defendants for an order that Mr Cole, senior counsel for the plaintiff, be debarred from acting as counsel..

Background

[2] The plaintiff installed 18 gaming machines on sites owned and operated by each of the first-third defendants in South Auckland. The fourth defendant, Mr Lu, is director of each of the defendant companies. Under the site agreements the plaintiff was required to pay to each defendant a weekly space rental figure and to reimburse them for actual and reasonable expenses necessary to the successful operation of the machines. The defendants were obliged to account to the plaintiff for all gaming machine profits.

[3] The site agreements also provided that the defendants would not enter into an agreement for the sale of their business unless such agreement was conditional on the purchaser entering into a site agreement with the plaintiff for a period of four years and on the same terms and conditions as the existing site agreements. The plaintiff claims that, in breach of the site agreements, all defendants sold their sites without making it a condition of the agreement that site agreements be entered into with the plaintiff. The proceeding also alleges that the defendants have failed to account to the plaintiff for part of the gaming machine profits generated by the machines.

[4] The defendants deny the allegations and counterclaim for damages totalling almost \$6M. The counterclaim alleges that the first-third defendants sold the sites for a reduced price in consideration of the new site owners entering into a management consultancy agreement with Mr Lu and that the plaintiff wrongly interfered with the contractual relations thereby created. These are said to have resulted in losses to Mr Lu and, so it is alleged, also to the other defendants. The counterclaim also includes, as part of a single cause of action, a claim for defamation and injurious falsehood.

Plaintiff's applications

Background

[5] On 24 November 2004, the plaintiff served the defendants with a notice to provide further and better particulars and further discovery in respect of an amended statement of defence and counterclaim filed by the defendants a few days earlier. On 26 November, Williams J ordered that the further and better particulars and the further discovery requested by the plaintiff be provided by 10 December. The defendants purported to satisfy the request for further particulars in a letter dated 10 December 2004. No steps have been taken to comply with the order for discovery.

[6] The plaintiff, dissatisfied with the adequacy of the particulars and the failure to provide further discovery, applied on 17 December for “unless” orders and to strike out parts of the counterclaim. It is convenient to deal first with the strike out part of the application.

Strike out application

[7] Mr Cole's first complaint was that two of the causes of action pleaded in the counterclaim were essentially the same. The first, which I will refer to as the second cause of action, alleges that the plaintiff “wrongly and intentionally caused and induced a breach of the three consultancy management agreements”. Damages in

the sum of \$300,000 plus GST in respect of each agreement is sought and a further sum of \$450,000 for what is referred to as the reduced consideration for the sale of the three businesses by the first, second and third defendants.

[8] A further cause of action which appears at paras 69-71 of the statement of defence and counterclaim, and which I will refer to as the fourth cause of action, materially pleads:

“On or about 6 December 2002 the Plaintiff *wrongfully and illegitimately and without just cause and with malice* induced the buyer to repudiate the consultancy contract with the Fourth Defendant by preventing the buyer from operating a gaming business unless the consultancy contract was cancelled.”

Mr Weir accepted that the fourth cause of action was in substance a repetition of the second cause of action and did not resist an order to strike out paras 69-71 of the amended statement of claim.

[9] The second part of the strike out application concerns the fifth and final cause of action. It commences by an allegation in para 72:

“The plaintiff has made defamatory and libellous statements and statements of injurious falsehood towards the fourth defendant and thereby caused the defendant loss of reputation, stress and anxiety.”

Paragraphs 73-75 (inclusive) and 77 provide particulars of such statements. Paragraph 76 claims that, as a consequence, the fourth defendant suffered a loss of reputation and stress and anxiety.

[10] Mr Cole submitted the fifth cause of action pleaded in the counterclaim was deficient in a number of respects, among them:

- The claims for malicious or injurious falsehood and defamation are distinct claims which, pursuant to r 181 of the High Court Rules, should have been pleaded separately.

- The particulars provided did not, in any event, provide any basis for a claim in injurious falsehood as it had not been pleaded that the words were false, published maliciously and caused special damage or pecuniary loss.
- The four alleged acts of publication should each have been the subject of a separate cause of action by s 7, Defamation Act 1992.
- In respect of each publication, contrary to s 37 of the Defamation Act, the fourth defendant had not pleaded the precise words alleged to have been published; particulars of the date, author and recipient of the publication; and the defamatory meaning alleged to have arisen out of the publication.
- The prayer for relief wrongly sought to claim separate damages for stress and anxiety, on the one hand, and for loss of reputation and failed to provide the particulars necessary to support or justify an award of exemplary damages.

[11] Mr Weir accepted the substance of the criticisms of this part of the pleading. He also acknowledged that three of the four instances of publication relied on could not found an action for defamation. He accepted that only the publication referred to in para 77 was capable of founding a claim for defamation. The fifth cause of action cannot survive in its present form and paras 72-75 are accordingly struck out. The claim, based on the existing para 77, must be repleaded to meet the deficiencies identified in para [10].

Further particulars

[12] The request for further particulars which formed the basis of the order of Williams J was set out in paras 3-24 of a letter dated 24 November 2004 from Simpson Grierson, the plaintiff's solicitors. The plaintiff complains that the responses to paras 3, 6, 7, 9(b), 15, 17, 18, 19, 20, 22 and 23 were inadequate. It is not necessary to deal with paras 18, 19, 20, 22 and 23 as they relate to paragraphs of the amended statement of defence and counterclaim which have been struck out.

Particular 3

[13] The request in para 3 relates to para 51 of the amended statement of defence and counterclaim which alleges:

“The First to Third Defendants inclusive entered into agreements with the Plaintiff (respectively the Gemini 10 Agreement, the Twins 10 Agreement and the June 10 Agreement) on the representation of the Plaintiff’s then director Graham Billings that the First, Second, Third and Fourth Defendant would be treated fairly and in good faith and in the same manner as all other site operators (and their respective officers and employees). This was a representation inducing the First to Third Defendants to enter into the contract and was an essential implied term of the contract.”

[14] The particulars sought and the responses provided to date are as follows:

“(a) The date upon which Graham Billings is alleged to have represented to the defendants that they would be treated fairly and in good faith and in the same manner as all other site operators

From many discussions with Jeff Morris at dates unknown prior to the site agreements.

(b) Whether the alleged representation was made orally or in writing

The representation was made orally

(c) If it is alleged to have been made in writing please identify the document in which such writing is to be found

Not in writing

(d) If it is alleged that such representation was made orally please specify

(i) The place at which such representation was made; and

(ii) To whom it was made

During the many discussions that Mr Morris had with Mr Lu at Mr Lu’s place of work at the National Bank, Panmure and at the Ocean Restaurant, Epsom.

(e) The facts and matters by virtue of which it is alleged that the alleged representation was an essential term of the contract

The defendant companies would not have entered into the agreements if they were to have been treated unfairly, without good faith and not in the same manner as all the other site operators.”

[15] Mr Cole accepts that the responses to subparas (b) and (c) are sufficient but says the responses to subparas (a), (d) and (e) are inadequate. I agree. The references to Mr Jeff Morris in the responses to (a) and (d) suggest that it was he, not Mr Billings, who made the representation. The plaintiff is entitled to have the pleading clarified by specifying in unambiguous terms who made the representations, to whom and when. I agree also with Mr Cole that the response to para (3)(e) fails to specify the facts and matters relied on.

Particular 6

[16] The request in para 6 relates to para 55 of the amended statement of defence and counterclaim which alleges:

“The board of directors of the Plaintiff took six weeks to approve the contract because of ‘background checks’ into the Plaintiff based solely because the Fourth Defendant was of Chinese origin and the board did not trust Chinese whereas other site operators were approved in a period of approximately three days.”

[17] The particulars sought and the response was as follows:

“With reference to paragraph 55 please identify each of the site operators referred to in that paragraph and specify the matters by virtue of which it is alleged that:

- (a) The board did not trust Chinese
- (b) Other site operators were approved in a period of approximately 3 days

Sufficient to this paragraph following letter from Jeff Morris to Ken Lu dated 18 September 2002 but further particulars as requested cannot be provided until further and better discovery by the plaintiff of information within its control clearly to Mr Morris by Mr Lu and Grace Xu that the defendant companies would receive the same benefits of older venues in terms of the site agreement. This being an essential term in the respective companies committing to the contract.”

[18] The response is not easy to comprehend and fails, in any event, to address the request for particulars. The other site operators are not identified. The facts and matters to support the plea that the board did not trust Chinese is not at all clear from the response. The request must be addressed again.

Particular 7

[19] Paragraph 7 relates to para 56 of the statement of defence and counterclaim which alleges:

“The Plaintiff’s Board was reluctant to approve the contract with the First to Third Defendants inclusive because their director was of Chinese ethnicity.”

[20] The particulars sought and response was:

“With reference to paragraph 56 please specify the facts and matters by virtue of which it is alleged that the board was reluctant to approve the contracts with the defendant companies because of their director’s Chinese ethnicity.

See particulars outlined in paragraph 6 herein.”

[21] The particulars provided and response to para 6 are inadequate in relation to that particular and cannot be relied on in relation to particular 7. The defendants must separately specify the facts and matters relied on to support the essential allegation in para 56.

Particular 9(b)

[22] The request in para 9(b) relates to para 58 of the amended statement of defence and counterclaim which alleges:

“The plaintiff failed to provide upgraded gaming machines despite repeated requests by the Fourth Defendant and/or did so maliciously and deliberately so as to cause vexation and loss to the fourth defendant.”

[23] The particulars sought were:

“With reference to paragraph 58 please specify the facts and matters by virtue of which it is alleged:

- (a) That the fourth defendant made repeated requests to the plaintiff to provide upgraded gaming machines; and
- (b) The plaintiff failed to do so maliciously and deliberately so as to cause vexation and loss to the fourth defendant.”

The particulars provided in response to the request in subpara (a) are accepted as adequate. The response to subpara (b) was:

“The failure to attend to the repeated requests was malicious and deliberate given that the failure followed such particular representations as pleaded in paragraph 4 herein and in the general climate as described in paragraph 8 herein when the plaintiff had sufficient resources to satisfy the requests.”

[24] I agree with Mr Cole that the response is inadequate. The defendants must provide particulars of the facts and matters they rely on to support the allegation that the plaintiffs acted maliciously and deliberately.

Particular 15

[25] Paragraph 15 relates to para 66 of the statement of defence and counterclaim which alleges:

“On or about 16 October 2002 the First, Second and Third Defendants entered into a contract to sell the business to Zenith HK Limited, Fortune HK Limited and Titan HK Limited (‘the buyers’) at an undervalue.”

[26] The particulars sought and responses were:

“With reference to paragraph 66 please specify in respect of each business

(a) The fair market value of each business as at 16 October 2002

\$450,000.00

(b) How such value has been calculated.

By reference to annual profit and comparable sales of like businesses.”

[27] Mr Cole complains that the particulars provided are inadequate as the value specified is inconsistent with other allegations bearing on value made in the statement of defence and counterclaim. He further submits the plaintiff is entitled to a more informative response as to how the fair market value of each business has been calculated. I do not agree. The fact that there are inconsistencies in the pleading in relation to value does not mean that the particulars of value provided are inadequate. A figure has been provided which is what was requested. I doubt that

the plaintiff is entitled to particulars of how value was calculated. That is a matter of evidence. Whether or not that is so I consider the answer is a sufficient response.

Particular 17

[28] Paragraph 17 sought further particulars of the amounts claimed by the defendants arising out of the third cause of action. They comprise three separate claims for loss of profits and one for loss of revenue. In response to a request that they state how each of the figures set out in the prayer for relief has been calculated, the defendants purported to provide information as to the basis of the calculation.

[29] In two instances, those relating to paras A and B of the prayers for relief, the formula put forward does not produce the figure set out in the claim. For example, para A refers to loss of profits of \$90,000 which, in their response, the defendants say is based on a “profit of \$500,000 per machine per week x 18 machines x 52 weeks”. That calculation produces a total of \$468,000 per week. Para B refers to loss of profits of \$50,000. The response to the request for further particular refers to a potential loss of \$1,400. For a 52 week period that would amount to \$72,800.

[30] I doubt that the plaintiff is entitled to a full breakdown of the way in which loss of profits has been calculated but if particulars are provided, it should at least be possible to reconcile them with the amounts in the prayer for relief. The plaintiff is entitled to further particulars of the claims in paras A and B.

[31] In summary, therefore, I order the defendants to provide, on or before 29 April 2005, the particulars requested in paras 3(a), (d) and (e), 6, 7, 9(b) and (in relation to paras A and B of the prayer for relief) 17 of Simpson Grierson’s request dated 24 November 2004.

Discovery

[32] In support of the application for further discovery, the plaintiff filed an affidavit by a chartered accountant, Mr John Leonard, in which he explained that the

defendants' pleading required the provision of further discovery in a number of categories. In particular, he identified accounting and business records in relation to the claims for damages and loss of profits and documents to support a claim by the defendants that as a result of thefts they are not required to account to the plaintiff for the full amounts of gaming profits earned. These documents are set out in para 47 of Mr Leonard's affidavit. With the exception of subpara (n), which requires the discovery of all bank statements, I consider the categories of documents identified are properly discoverable. Mr Weir accepted this to be the case.

[33] Accordingly, I direct that the defendants file and serve an affidavit, on or before 29 April 2005, in the form prescribed by the High Court Rules, listing those documents in their possession or power that are or may be relevant to the matters in issue, including the documents referred to in para 47 of the affidavit of Mr Leonard (excluding subpara (n)); and explaining what has happened to any documents in those categories which are or may be relevant to the proceedings and which are no longer in the defendants' possession or power.

[34] In relation to both particulars and discovery, Mr Cole sought an "unless" order which stipulated that in the event of non-compliance, the statement of defence and counterclaims would be struck out. While acknowledging that in the case of discovery there has to date been non-compliance with an order of this Court, I am not prepared to make "unless" orders until the defendants have had a further opportunity to provide particulars and discovery in response to a fully argued and particularised order.

Defendants' applications

Further and better discovery

[35] The defendants sought further and better discovery of documents in 40 categories specified in the schedule to their application. As I understand it, all are said to have become relevant by virtue of matters pleaded in the amended statement of defence and counterclaim. However, to date the plaintiff has not sought to

provide supplementary discovery following the filing of the amended statement of claim and amended statement of defence and counterclaim. I agree with Mr Cole that it should have the opportunity to do so (having regard, of course, to the categories of documents which the defendants claim in their application to be relevant) before it is appropriate to entertain an application for particular discovery. The plaintiff's supplementary list of documents is to be filed by 29 April.

Application that Mr Cole not act as counsel

[36] The defendants seek an order that Mr Cole not act as counsel because of the possibility that he will be called as a witness in the proceeding. That possibility is said to arise as a result of Mr Cole's involvement as solicitor for the plaintiff in dealings with the new site owners who purchased the sites from the first-third defendants. Those dealings materially involved a stipulation by the plaintiff that neither the fourth defendant, Mr Lu, nor his wife should be involved in the future management or operation of the sites. That stipulation is relied on by the defendants in relation to their counterclaim for unlawful interference in contractual relations between the defendants and the new site owners.

[37] At this stage the evidence of Mr Cole's involvement is limited to correspondence between him, as solicitor for the plaintiff, and the solicitors acting for the new site owners. Mr Weir accepts that this correspondence alone is unlikely to justify any attempt by the defendants to have Mr Cole called as a witness, but he submits it is likely that the plaintiff's further discovery will show a further level of involvement which would justify the defendants taking the step of calling Mr Cole as a witness.

[38] It is elementary that a practitioner must not act as both counsel and witness in the same matter. That obligation is enshrined in r 8.06 of the New Zealand Law Society's *Rules of Professional Conduct for Barristers and Solicitors*. If Mr Cole were to be required to give evidence at the behest of his own client or pursuant to a witness summons from the defendant, he would be ethically obliged to withdraw as counsel. However, until that possibility becomes a reality, there is, in my view, no basis on which I could require Mr Cole to withdraw as counsel.

[39] In any event, on the evidence presently available it seems unlikely that he would be called as a witness in the proceeding for any party. Mr Graham Billings, the Director of Health Services and Marketing Director of the plaintiff, has deposed that, to the best of his knowledge, the correspondence between Simpson Grierson and the solicitors for the new site owners records the totality of negotiations between the parties which resulted in site agreements being entered into between the plaintiff and the new site owners.

[40] I am satisfied there is no foreseeable possibility of Mr Cole being called as a witness and no reason why Mr Cole he should not continue to act as counsel. The application for an order that he not act as counsel is accordingly dismissed.

Result

[41] In summary I make the following orders:

- a) The fourth cause of action (paras 69-71 and paras 72-75) of the amended statement of defence and counter claim are struck out.
- b) The defendants are to provide the further particulars referred to in para [31] of this judgment.
- c) The defendants are to provide discovery as directed in para [33] of this judgment.
- d) The plaintiff will provide discovery as directed in para [35] of this judgment.

[42] The proceeding is adjourned to the Commercial List on 13 May for mention.