IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2005-441-739

	BETWEEN	BRIAN MONTGOMERY SALMON Plaintiff
	AND	LYNETTE ANNE MCKINNON Defendant

Hearing: 27 April 2006

Appearances: D McLellan for Plaintiff
M MacFarlane for Defendant

Judgment: 30 May 2006

JUDGMENT OF ASSOCIATE JUDGE D I GENDALL

Solicitors:
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Introduction

[1] This is an application by the defendant for orders as to particular discovery and for the plaintiff to answer certain interrogatories.

[2] The application is opposed by the plaintiff.

Background facts

[3] The plaintiff's claim against the defendant is one made in defamation. It seeks only a declaration pursuant to s 24 Defamation Act 1992 and costs. It relates to an email sent by the defendant to other related business franchisees which the plaintiff says is defamatory of him.

[4] The plaintiff is the sole shareholder and director of a company known as The $2 Shop Limited which franchises "$2 Shop" retail outlets.

[5] The defendant is the director and shareholder of Two Bob Limited a company which is the franchisee of the $2 Shop retail outlet at Hastings.

[6] On 24 August 2005 the defendant sent the email in question to other franchisees and management of the $2 Shop retail network. The email took the following form:

> "Hi everyone
>
> Before anything else is done I believe we should sell the Lamborgini [sic] that was purchased from the Advertising Fund. That product has done nothing to enhance the sales of any of our businesses and put the funds from it back into the Advertising Fund."

[7] In the plaintiff's statement of claim he contends that these words were understood to refer to him directly, he being the sole director of The $2 Shop Limited which company had exclusive authority to manage the advertising fund. The plaintiff says that as sole director of The $2 Shop Limited he controlled the business

affairs of the company and this included matters in relation to the use of monies in the advertising fund. He maintains further that the recipients of the email would have understood the email to mean that the Lamborghini car referred to in the email was purchased by The $2 Shop Limited and the plaintiff had the use of the vehicle.

[8] Paragraph 7.1 of the plaintiff's statement of claim goes on to argue that by way of innuendo the contents of the email meant and were understood to mean that:

> 7.1 The plaintiff had caused The $2 Shop Limited to purchase a Lamborghini motor car using the money in the Advertising Fund when the purchase involved:
>
> (1) a dishonest use of franchisees' funds.
>
> (2) a misuse of franchisees' funds in that the purchase was:
>
> a) for the plaintiff's own purposes; and/or
>
> b) against the interests of franchisees; and/or
>
> c) imprudent and extravagant.

[9] The plaintiff says these meanings were false and defamatory of him.

Counsel's arguments and my decision

[10] Although the principles applicable to discovery and interrogatories are similar, they are best summarised in separate fashion.

Interrogatories

[11] Rules 278-289 High Court Rules provide for interrogatories.

[12] As *McGechan on Procedure* paragraph HR 278.08 notes, the leading statement on interrogatories is that of Lord Esher MR in *Marriott v Chamberlain* (1886) 17 QBD 154 (CA) in the following terms:

> "The law with regard to interrogatories is now very sweeping. It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call, and their names not forming any substantial part of the material facts; and I think we may go so far as to say that it is not permissible to ask what is mere

> evidence of the facts in dispute, but forms no part of the facts themselves. But with these exceptions it seems to me that pretty nearly anything that is material may now be asked. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue."

[13] In *W A Pines v Bannerman* (1980) 41 FLR 175 Lockhart J at 190 noted that there were four objects of interrogatories:

a) To obtain admissions as to facts which will support the case of the interrogating party;

b) To obtain admissions which will destroy or damage the case of the party interrogated;

c) Interrogatories which are in the nature of a request for further and better particulars;

d) Interrogatories which seek to obtain accounts from a party occupying a fiduciary position.

[14] Rule 284 of the High Court Rules prescribes the grounds upon which objection may be taken to answer an interrogatory. This rule states:

> **284 Objection to answer**
> (1) Subject to subclauses (2) and (3) and to rule 285, a party may object to answer any interrogatory on the following grounds but no other:
> (a) That the interrogatory does not relate to any matter in question between him and the party requiring the answer:
> (b) That the interrogatory is vexatious or oppressive:
> (c) Privilege:
> (d) That the sole object of the interrogatory is to ascertain the names of the witnesses.
> (2) It shall not be a sufficient objection that the answer to any interrogatory will determine a substantial issue in the proceeding.
> (3) On an application under rule 280(1) or rule 282 in respect of any interrogatory, the Court may require the applicant to specify on what grounds he objects to answer that interrogatory and may determine the sufficiency of the objection and, if the Court determines that the objection is not sufficient, the applicant shall not be entitled to object to answer that interrogatory in a statement in answer to interrogatories.

[15] In *Bank of New Zealand v Gardner* (1990) 2 PRNZ 278 Master Hansen (as he then was) said at pp 281-282:

> "It seems to me that the New Zealand rules are clearly more interventionist than those to be found in similar jurisdictions. To my mind, the provisions of r 4 highlight this. As Barker J noted the new rules have brought to an end the 'cards close to the chest' form of advocacy. This overall philosophy of the rules may not yet be totally embraced by the profession, but a number of reported cases, including the *Sunde* [*Sunde v Meredith Connell & Co* 19/9/86, Barker J. HC Auckland A1479/85] case just cited, make it clear that this is the basic philosophy of the rules.
>
> In my view, merely because interrogatories seek to obtain an admission of fact which could be proved by a witness at trial, one can no longer say, in the context of the New Zealand rule, that the interrogatory is unnecessary. Depending on the circumstances it may well be that an interrogatory will limit the scope of a witness's evidence, thus saving time and expense. It may go even further and make it unnecessary for certain witnesses to be called. It seems to me that within the context of the New Zealand rules there must be added to the four objects of interrogatories, listed by Lockhart J in *W A Pines v Bannerman* (supra), the aim and object of the rules generally and especially relating to interrogatories mentioned by Barker J at p 4 of *Sunde*, ie:
>
> (1) The aim of the rules is to arrive at the truth.
>
> (2) The rules are designed to assist the parties in coming to a recognition of the proper issues.
>
> (3) Through that recognition to a settlement of disputes.
>
> Certainly, even if the third object mentioned above is not met, if interrogatories answer objects one and two above, it seems to me they must be deemed necessary. The early crystallisation of issues if it does not lead to the promotion of settlement will certainly lead to a meeting of the aims of 4, ie the just, speedy, and inexpensive determination of the proceeding."

[16] It is clear too that interrogatories must be relevant to some matter in question – *McGechan on Procedure* HR 278.08(2). And interrogatories aimed at ascertaining facts which are merely evidence of facts in issue are not permissible – *Evans v Harris* (1992) 6 PRNZ 329.

Discovery

[17] The defendant's discovery application is brought pursuant to Rule 300 High Court Rules, which together with Rule 295 requires that documents "relating to any matter in question in the proceedings" must be discovered. That is, to be

discoverable, the documents in question must be relevant. In addition, any order is also subject to the requirement of Rule 300(2) that it is necessary at the time.

[18] As to relevance, the long-established test is that of Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 (CA) where at 63 he said:

> "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 his 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 may enable the 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 those two consequences: …" *(emphasis added)*

[19] It is clear that relevance is to be tested with regard to matters in question in the proceeding and not to the subject matter of the proceeding – McGechan on Procedure HR 295.03(1). And also, as with interrogatories, a party is not entitled in a discovery application to "fish" for evidence – *Edwards v Edwards* [1976] 2 NZLR 66. As to "fishing" however, the comments of Barker J in *TD Haulage Ltd v NZ Railways Corporation* (1986) 1 PRNZ 668 at 673 need to be remembered:

> "There seems little point in placing a pejorative label on the normal discovery process. Different considerations may apply to interrogatories, but much discovery is essentially "fishing" as indeed the latter part of Brett LJ's quotation recognises."

[20] In considering the present application a preliminary point arises. The plaintiff has taken an initial objection to the defendant's interrogatories application on the basis that he contends that the application is procedurally flawed. He says that it is a pre-condition to seeking an order to answer interrogatories that a notice to answer has been served, and this may not have happened here.

[21] As I see it, however, this point is quickly disposed of. Rule 282(1) permits a Court at any stage of a proceeding to order any party to serve on any other party a statement in accordance with r 283 in answer to interrogatories referred to in the order itself. As I understand it, at the very least, correspondence as to the questions

in issue has passed between the parties. On this basis and bearing in mind Rule 282(1), I dismiss this procedural objection to the defendant's application.

[22] Turning to the substantive arguments, here the plaintiff's opposition to the defendant's interrogatories and discovery applications is based first on questions of relevance and secondly on his contention that the orders sought are not necessary at this time.

[23] Here from her statement of defence it seems that the defendant has not at this point pleaded affirmative defences such as truth and puts only the following matters in issue:

a) Identification of the plaintiff.

b) The meanings pleaded at paragraph 7.1 of the plaintiff's statement of claim – see [8] above.

[24] Before me, counsel for the plaintiff acknowledged that, in his claim, the plaintiff does rely here on a "legal" (or "true") innuendo, namely, a meaning which arises from the published words in the email only through knowledge of facts which do not appear in those published words; i.e. "extraneous" facts – see Gatley on *Libel and Slander* (10th ed) at 3.19.

[25] To establish this legal innuendo the plaintiff needs first to plead the facts which are said to be extraneous to the published material. At paragraph 6 of the plaintiff's statement of claim he pleads the special circumstances and matters which are said to enable a person to understand the words complained of here in a defamatory sense. That paragraph 6 states in part:

> 6.2 The "Advertising Fund" referred to in the email was a fund contributed to by all franchisees of the $2 Shop retail network and The $2 Shop Limited had the exclusive authority to use such funds solely for the purpose of advertising as determined by The $2 Shop Limited.
>
> 6.3 As sole director of The $2 Shop Limited the plaintiff managed and controlled the company's business affairs including in relation to the use of moneys in the Advertising Fund.

> 6.4 The Lamborghini motor car referred to in the email was purchased by The $2 Shop Limited and the plaintiff had the use of the vehicle.

[26] Again before me it was acknowledged that the plaintiff must prove the following elements to establish such an innuendo:

a) That the facts and circumstances existed at the time of the publication – *Grapelli v Derek Block (Holdings) Ltd* [1981] 1 LR 822.

b) That the facts and circumstances were known at least to some of the persons to whom the words were published since, otherwise, the facts could not have influenced their understanding of the meaning – *Cassidy v Daily Mirror* (1929) 2 KB 331; *Hough v London Express* (1942) KB 507.

[27] In discussing these cases of *Cassidy* and *Hough* both well known in this area, Burrows in *The Law of Torts in New Zealand* (4th ed) at 662 states:

> "Unlike the situation where natural and ordinary meaning is in issue, evidence is admissible in innuendo cases to show the sense in which people to whom the words were published understood them."

[28] It seems likely therefore that either the plaintiff or the defendant would call one or more of the recipients of the email to show the sense in which those persons understood the words complained of. The defendant's position, as I understand it, is that those persons could not have understood the words complained of in the defamatory sense in question if, for example, those individuals knew that the innuendo attaching to the words was actually true.

[29] The defendant's specific concern here focuses on paragraphs 6.2, 6.3 and 6.4 of the plaintiff's statement of claim noted in [25] above. In particular the defendant raises issues as to what knowledge the recipients may have had of the use to which the Advertising Fund could be put and indeed was put, its separateness from other accounts and monies, the actual funding of the purchase of the Lamborghini vehicle, the use of the vehicle and related matters.

[30] In the present case there is a very limited class of recipients of what appears to be a private communication in a business setting. Those recipients included certain other franchisees and the management of the franchisor. To understand the sense in which the recipients understood the published words here, the defendant argues that it must be material to know what the true facts were and to know what those recipients knew and did not know of those facts.

[31] On this basis it is the defendant's position that she should be entitled to have discovery of all documents bearing on those facts, circumstances and matters and to have interrogatories relating to them properly answered.

[32] Counsel for the defendant notes that not only the defendant but also the trial Judge in preparing to consider the case to be put by the plaintiff at trial and in assessing what a reasonable recipient would make of the email in question, should have access to the same information and documents as would all such recipients whether as franchisees or management of the franchisor.

[33] As I have noted, the defendant emphasises that the discovery and interrogatories sought are in all respects relevant to the critical factor of what the recipients of the email here knew. In considering this knowledge of the recipients, the defendant's position is that the full facts must inform the reasonableness of the view the recipients might have of the words used and that this is fundamental and cannot be considered in anyway extraneous.

[34] In response the plaintiff contends that the defendant here is conducting a "fishing expedition" for information through discovery or interrogatories that might assist a defence of truth or honest opinion whereas in her statement of defence no such affirmative defences have been pleaded. He argues also that the discovery and interrogatories sought are not relevant to matters in question because they are not "part of the facts" but merely are evidence of the facts.

[35] The plaintiff contends also that the questions asked and discovery sought go too far and that they do not have a sufficient association to relate to the matters in issue in this proceeding themselves.

[36] As to possible defences of truth or honest opinion, counsel for the defendant contends that while it may be an incident of discovery in this case that these defences might become possible to plead at a later stage, that is not the point here. Counsel argues that the point is that contrary to these allegations of fishing, it is reasonable and appropriate for the defendant here to require discovery of facts, circumstances and matters through documentation or interrogatories which are relevant to matters at issue in the proceeding in the sense that they relate first to the plaintiff's reliance upon innuendo, secondly to knowledge of the recipients of the email and thirdly to the facts that inform the reasonableness of the views of those recipients of the words used.

[37] In my view there is substance in these arguments on the part of the defendant here. I reject the plaintiff's contention that the present applications are a mere "fishing expedition".

[38] There can be no doubt that as Master Hansen noted in *BNZ v Gardner*, the aim of the Rules generally and relating especially to both interrogatories and discovery is to arrive at the truth and to assist the parties in coming to a recognition of the proper issues.

[39] With this in mind, here I am satisfied that the interrogatories and discovery insofar as they relate to the purchase, use and treatment of the Lamborghini car and its use for promotional or advertising activity are relevant to facts directly in issue between the parties.

[40] Paragraphs 5.1, 5.2 and 5.3 of the defendant's interrogatories application however relate to the ownership and use of vehicles <u>other than</u> the Lamborghini which the plaintiff may have had at the time. In my view these questions are not relevant here. The email in question and the facts directly in issue here concern the Lamborghini car solely and no other vehicle owned or used by the plaintiff. The defendant's interrogatories application so far as it relates to questions 5.1, 5.2 and 5.3 only must fail.

[41] But subject to this, the answers to the other interrogatories sought by the defendant and all the discovery sought from the plaintiff here must be seen, in my view, as both relevant and necessary.

Conclusion

[42] It will be apparent therefore that the defendant's application here largely succeeds.

[43] Subject to the rider noted in [40] above, the orders sought are now made.

[44] As to discovery, an order is now made that the plaintiff, within 10 working days of the date of this judgment, is to file and serve an affidavit in terms of Rule 300(1) in respect of the following documents:

1. The purchase of the Lamborghini car and its number plate(s).
2. The payment of its running costs.
3. The use of that car for personal, promotional and advertising purposes.
4. The tax and accounting treatment of the vehicle by the plaintiff and The $2 Shop Limited by way of tax returns and annual statements of account.
5. The fringe benefit tax returns associated with the vehicle.
6. The accounts (both bank statements and internal accounts for The $2 Shop Limited) showing the payment out of money for the purchase [44](1) or use [44](2 and 3) of the car, and any transfer of funds between accounts for such purposes.

[45] As to interrogatories, an order is now made that the plaintiff within 10 working days of the date of this judgment is to file and serve on the defendant a verified statement in accordance with Rule 283 in answer to the following interrogatories:

1. Who has driven the Lamborghini car from the date of its purchase through to 24 August 2005 (identifying the drivers as between employees of The $2 Shop Limited and any of its subsidiaries or related companies and others)?

2. Have any such employees been paid money from the advertising fund of The $2 Shop Limited (for example a marketing manager) in connection with any promotional or advertising activity in connection with the Lamborghini car?

3. How many kilometres have been covered, from purchase to 24 August 2005, and of these how many have been by the plaintiff for his private purposes?

4. (1) What was the source of the purchase price of the Lamborghini car?

(2) If any of the price came from any account other than the fund known as the advertising fund in The $2 Shop Limited then has any payment ever been made from the advertising fund into that account in connection with the purchase and/or the running costs of and/or the promotional use of the Lamborghini car?

(3) When was the payment(s) in 4(2) made?

(4) Identify the account in 4(2) by its name, owners, bank and account number.

Costs

[46] The defendant has been largely successful with her application here. In my view she is entitled therefore to an award of costs on costs and incidental to the present application, which are ordered against the plaintiff on a category 2B basis together with disbursements as fixed by the Registrar.

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Associate Judge D.I. Gendall

Judgment delivered at 4pm on Tuesday 30th May 2006.