

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

CIV 2004-404-3903

BETWEEN	SIMUNOVICH FISHERIES LTD First Plaintiff
AND	PETER SIMUNOVICH Second Plaintiff
AND	VAUGHAN WILKINSON Third Plaintiff
AND	TELEVISION NEW ZEALAND LIMITED First Defendant
AND	WILSON AND HORTON LIMITED Second Defendant
AND	BARINE DEVELOPMENTS LIMITED Third Defendant
AND	NEIL PENWARDEN Fourth Defendant
AND	THOMAS NORMAN MUNRO NALDER Fifth Defendant

Hearing: 18 December 2006

Counsel: J G Miles QC, A E Ivory and M Keall for plaintiffs
A Galbraith QC, T Walker and H Wild for the first defendant
B D Gray QC, A Ringwood and K Newland for second defendant

Judgment: 10 July 2007

In accordance with r 540(4) I direct that the Registrar
endorse this judgment with the delivery time of 4.30 pm
on Tuesday 10 July 2007

**JUDGMENT No.5 OF ALLAN J
(PLAINTIFFS' DISCOVERY APPLICATION AGAINST FIRST AND SECOND
DEFENDANTS)**

Solicitors

Craig Griffin Lord, PO Box 9040, Newmarket for plaintiffs reception@cglord.co.nz

Gilbert Walker, PO Box 1595, Shortland St, Auckland Dianne.yovich@gilbertwalker.com

Tracey.walker@simpsongrierson.com for first defendant

Helen.wild@simpsongrierson.com

Bell Gully, PO Box 4199, Auckland for second defendant alan.ringwood@bellgully.com

Simpson Grierson for fifth defendant ; William.akel@simpsongrierson.com

David Trounson Law Office, drt@trounsonlaw.co.nz

Bruce.Scott@chapmantripp.com

Counsel

J Miles QC, Miles@shortlandchambers.co.nz

A E Ivory, alanivory@sylo.co.nz

M G Keall Mkeall@clear.net.nz

B D Gray: bdgray@shortlandchambers.co.nz

J Billington QC: jb@shortlandchambers.co.nz

D H McLellan McLellan@shortlandchambers.co.nz

[1] This is a further interlocutory judgment in this complex defamation proceeding. A brief account of the background to the litigation is to be found in an earlier interlocutory judgment reported as *Simunovich & Ors v Television New Zealand & Ors* [2005] 3 NZLR 134.

[2] On 17 July 2006 the plaintiffs filed an application in which a number of orders for further and better discovery were sought against the first and second defendants. Certain of the issues raised in that application have been settled between the parties and others have been deferred. Two matters currently require resolution; namely whether the plaintiffs are entitled to:

- a) an order, sought at paragraph 13(a) of the application, requiring the first defendant to discover and produce to the plaintiffs for inspection, draft scripts prepared in advance of the Assignment television programme to which this proceeding relates in part;
- b) an order, sought at paragraph 14(b) of the application, requiring the second defendant to provide a typed transcript of the handwritten documents listed as No's.245-250 inclusive in the second defendant's list of documents.

Discovery of draft scripts of Assignment programme

[3] The plaintiffs' claim against the first defendant relates to material screened in the first defendant's "Assignment" television series. In the course of preparing the material concerned, the first defendant's employees prepared draft scripts which were reworked from time to time as the final shape of the programme developed. Within TVNZ, older drafts were not retained, but were deliberately over-written in the course of the preparation of fresh drafts. Evidence for TVNZ is to the effect that in so doing, staff were able to ensure that older drafts were not mistakenly used during the programme as screened. So the first defendant itself retains no copies of draft scripts, but its solicitors,

Simpson Grierson, do. TVNZ routinely referred draft scripts to that firm in order to take legal advice on various matters relating to the content of the scripts. Simpson Grierson has retained the drafts as part of the files maintained on behalf of its client. The application for discovery and production therefore relates to the copies of the draft scripts held by Simpson Grierson.

[4] The plaintiffs say that the draft scripts are relevant in relation to their allegations of ill will and malice against the first defendant, and in consequence, to the quantum of general, aggravated and punitive damages. By way of example, they argue that the omission in the material broadcast of material tending to exonerate them of blameworthy conduct, suggests wilfulness and/or recklessness on the first defendant's part, given that earlier drafts of the script are claimed to have included exonerating material. Field tapes already discovered by the first defendant support the plaintiffs' view, it is argued, that there were deliberate excisions from the programme as screened, which aggravated the sting of the alleged defamatory material.

[5] For its part the first defendant says that the draft scripts are not relevant to the matters in issue in the proceeding, neither is discovery necessary. Moreover, it is contended, the scripts are covered by legal professional privilege.

[6] The plaintiffs rely upon r 300 which provides:

300 Order for particular discovery against party after proceeding commenced

(1) If 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 believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered, the Court may order that party—

- (a) to file an affidavit stating—
 - (i) whether the documents are or have been in the party's control; and
 - (ii) if they have been, but are no longer, in the party's control, the party's best knowledge and belief as to when the

documents ceased to be in the party's control and the person who now has control of them; and

(b) to serve the affidavit on any other party.

(2) The Court may not make an order under this rule unless satisfied that the order is necessary at the time when the order is made.

[7] Before making an order pursuant to r 300 the court must be satisfied that the documents sought “should have been discovered”. The obligation to make discovery arises only if the documents concerned are relevant to the matters in issue in the proceeding. The law is long settled. It is sufficient to refer to the judgment of the Court of Appeal in *M v L* [1999] 1 NZLR 747, and to the useful summary which appears in the judgment of Tipping J (for the Court) at p 750:

Discovery/inspection

A brief general survey of the discovery and inspection process will be helpful at this point. Discovery enables a party to know what documentary material another party has. That material may either assist the party seeking discovery, or harm the case of the other party. By obtaining disclosure in advance of trial, parties are able to reduce or eliminate surprise disclosures at trial. This enables the case to be more fairly determined, and often assists settlement negotiations. Strengths and weaknesses are out in the open well in advance of trial. The first question which arises when a party is served with a notice for discovery under R 293 is for that party to identify and assemble all relevant documents. Almost invariably legal assistance will be necessary for that purpose.

The concept of relevance in the discovery area is an expansive one. The classic formulation is that of Brett LJ in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 (CA) at p 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 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: . . .”

[8] Mr Galbraith argues that the draft scripts (of which there are apparently about 15 or so), are not relevant for present purposes, because they are not referable to the

plaintiffs' pleadings. He draws the Court's attention to three provisions in the Defamation Act which impose upon a plaintiff pleading obligations in circumstances which arise in this case:

- a) Section 39(2) which requires a plaintiff to particularise any facts or circumstances in support of an allegation that an opinion is not genuinely held;
- b) Section 41(2) which requires a plaintiff to provide particulars of facts and circumstances in support of an allegation of ill will and/or impropriety;
- c) Section 44 which requires a plaintiff to particularise the facts or circumstances which the plaintiff alleges would justify an award of punitive damages against a defendant.

[9] The plaintiffs have provided such particulars. They are to be found in Schedule B of the second amended statement of claim. Mr Galbraith points out that the particulars do not touch upon the draft scripts – they relate either to the programme as broadcast or to aspects of the first defendant's conduct not related to the production of draft scripts. He argues therefore, that the plaintiffs' request is speculative and that it amounts to "fishing". Moreover, he contends, the draft scripts amounted to no more than snapshots taken at a particular point in time. They were not intended for broadcast and provide no insight into the first defendant's state of mind in respect of the programme as broadcast.

[10] In my opinion the plaintiffs have established relevance in the broad sense laid out in the authorities. There is, in my view, sufficient connection between the draft scripts on the one hand, and the programme as broadcast on the other. It is conceivable, for example, that the central thrust of the proposed broadcast may have changed over time, and that the drafts may demonstrate a trend. The plaintiff may thereby be able to relate the trends to other evidence and so to draw inferences relevant to its case against the first defendant. The argument that the draft scripts cannot provide insight into the first defendant's state of mind at the time of the broadcast is entirely dependent, in my view,

upon the contents of the draft scripts. It is not an argument against relevance in the *Peruvian Guano* sense.

[11] It is therefore not appropriate to characterise the plaintiffs' application as mere "fishing". It is beside the point that the plaintiffs are currently unaware of the contents of the draft scripts. Indeed, if they knew what the scripts say, they may not need an order. In my opinion the draft scripts pass the test of relevance.

[12] I therefore turn to consider whether the plaintiffs have established that an order for discovery is necessary: r 300(2). The first defendant accepts that the word "necessary" in r 300(2) means "reasonably necessary", that being a point somewhere between "absolutely essential" and merely "desirable": *Tasman Charters Inc & Ors v Kamphuis* HC AK CP404-16-02 16 May 2003. But it says that the test of "reasonable necessity" is not satisfied in this case, in that the plaintiffs do not need the draft scripts to pursue issues of malice or ill will, arising from the suspected omission of available exonerating material.

[13] Again, the first defendant says that it can be of no assistance to the plaintiffs or to the Court to consider "snapshots of arbitrary moments in the time leading up to the broadcast". Moreover, Mr Galbraith argues, the introduction of the draft scripts would increase the complexity of the trial by creating a "trial within the trial". It would be nothing more than a time-consuming and confusing diversion from the real issue: see *Hubbard v Fourth Estate Holdings Ltd* HC AK CIV 2004-404-5152 13 June 2005 at [35]-[38].

[14] It is important to appreciate, Mr Galbraith points out, that it is for a plaintiff to prove, in rebutting a defence of qualified privilege, that the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication. So the focus must, he argued, be on the occasion of publication – the plaintiffs' case will not be advanced by trawling through earlier scripts that were not broadcast, and are not the subject of the claim or any of the defences.

[15] While understanding the force of Mr Galbraith's argument, I am not persuaded it leads to the conclusion that the documents sought are not reasonably necessary. The draft scripts may well contain material that is relevant to an assessment of ill will and/or the taking of improper advantage of the occasion of publication by the first defendant. Mr Galbraith's characterisation of the various drafts as "snapshots" is only partially valid, in that it discounts the possibility that the plaintiffs may be able to establish a trend through the various drafts, which they are able to call in aid. Accordingly, I think that the plaintiffs have established reasonable necessity.

[16] I therefore turn to the third ground of opposition, namely that the various draft transcripts (all now in the hands of Simpson Grierson), are the subject of legal professional privilege.

[17] The first defendant filed two affidavits in opposition to the plaintiffs' application. The first is by Mr Vautier, company secretary and general counsel of the first defendant. He says that he has conducted a thorough search within TVNZ and has concluded that the only hard copies of draft scripts still in existence are those provided to Simpson Grierson to enable that firm to advise TVNZ. Further, as noted above, all electronic copies of draft scripts formerly held by TVNZ were subsequently over-written as further iterations were prepared.

[18] There is also an affidavit by Mr Vaughan, a free-lance journalist who was the reporter on the Assignment programme which was the subject of the claim against the first defendant. He says:

5. I have read the affidavit of Noel John Vautier sworn 28 August 2006, and confirm that it is also my understanding that the only copies of the draft transcripts for the programme that exist are those that were sent to TVNZ's solicitors for legal advice prior to the broadcast of the programme, and that earlier drafts were not retained by TVNZ for the reasons Mr Vautier has explained at paragraph 4 of his affidavit.
6. Once the initial background research for the programme had been done, and most of the interviews and filing was carried out, I then started to work on pulling the story together by writing an initial script. Inevitably with any substantial investigative piece, the development of a script is a

long process. The initial script is very much just a starting point for what is a work in progress.

7. In this case the team was conscious that legal appraisal of the programme would be critical from an early stage. I had had a number of discussions with TVNZ's legal advisers about the programme prior to the script being first developed. Then, once the broad structure for the proposed programme had been developed, I started to send draft scripts to TVNZ's lawyers for advice. From the file that I have been shown, it appears I first sent a draft of the script for the programme to Simpson Grierson on 19 August 2002.
8. The purpose of the draft scripts from that point was two-fold. From an editorial perspective the script continued to evolve to reflect the various ideas and structure for the programme as it was developing and as further information came to hand. At the same time, another essential purpose of the script was to record the story as it was developing to send to TVNZ's lawyers for them to review and provide us with legal advice. Given the nature of the issues, this was a multi-stage process.
9. The script underwent changes following the legal advice we received. Revised drafts of the script continued to be sent to Simpson Grierson for legal review and advice as the story continued to evolve, up to broadcast.

[19] Mr Galbraith argues that in the hands of Simpson Grierson the various draft transcripts are the subject of legal professional privilege. The rationale underpinning the doctrine of legal professional privilege is long established and well understood. A convenient summary is to be found in the opinion of the Privy Council in *B v Auckland District Law Society* [2004] 1 NZLR 326, in which at [37]-[38] Lord Millett said:

Legal professional privilege

[37] An authoritative exposition of the rationale of legal professional privilege is to be found in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court ex p B* [1996] 1 AC 487 with whom the rest of the House of Lords agreed. Lord Taylor of Gosforth CJ described it in these words at pp 507 and 508:

“The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests. [It] is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider

interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors.”

[38] In explaining the rationale which underpins the doctrine and its consequences, Lord Taylor of Gosforth CJ drew on a long and consistent line of English authority. In *Bolton v Corporation of Liverpool* (1833) 1 My & K 88 the defendant sought inspection of the plaintiff’s instructions to counsel, though not of the advice which counsel gave. Refusing the application Lord Brougham LC said at p 94:

“It seems plain, that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights.”

[20] In order to attract legal professional privilege, communications between solicitor and client must be intended to be confidential in character: *R v Atkinson* [1990] 2 NZLR 513, and made by or to the client for the purpose of obtaining, or giving, legal advice: *Balabel v Air-India* [1988] 2 All ER 246 at 254, where Taylor LJ said:

Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as ‘please advise me what I should do’. But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

[21] The scope of privileged communications is wide. In *Kupe Group Ltd v Seamar Holdings Ltd* [1993] 3 NZLR 209 at 213, Master Kennedy-Grant said:

3. Drafts and working papers

Mr Hansen submitted that drafts and working papers, including file notes, do not attract legal professional privilege. I do not accept that submission. Drafts and other working papers are an essential part of the process of advising and being advised. To deny legal professional privilege to such documents as a category is inconsistent with, and destructive of, the privilege admittedly attaching to the advice. If support is needed for this proposition see *Duraphos International (NZ) Ltd v GE Tregenza Ltd* (Timaru, CP 78/88, 26 June 1989, Tipping J), *Dubai Bank Ltd v Galadari (No 7)* [1992] 1 All ER 658, *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44 and 3(1) Halsbury's Laws of England (4th ed) para 526 (re the privilege attaching to drafts of pleadings). Documents of this category may be privileged. The issue must be considered in relation to individual documents.

[22] In the *Duraphos* case (referred to in the passage set out above) Tipping J rejected the proposition that a draft agreement could be privileged only if it appeared in the letter conveying legal advice to the client. He said:

The letter itself enclosing the draft agreement was undoubtedly a communication. Mr Gresson acknowledged that if the terms of the draft agreement, instead of being set out separately had been incorporated in the letter, then his argument would have been in considerable difficulties. It seems to me to be far too narrow a thread to suggest that simply because the terms of the draft agreement are set out on a separate piece of paper that it should not be regarded as part of the composite communication which the letter and the draft agreement clearly in my judgment constituted.

[23] To the same effect is the judgment of Anderson J in the Supreme Court of Western Australia in *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 6 ACSC 498 at 506.

What is protected, of course, is that which is communicated between solicitor and client. It is the communication that is privileged. But this is not to say that material that is not literally a communication or manifestly the record of a communication is never protected. There are many instances of protection being extended to such material. The examples of the draft letter that never leaves the solicitor's office, the draft agreement and the draft statement of claim have already been referred to. The reason why such material is protected is often stated to be that disclosure of it will, or will tend to, reveal the privileged communication. *A-G (NT) v Maurice* per Dawson J at 496. ... There is much in the cases to support the view that this is the true basis upon which draft agreements, draft letters, draft pleadings and the like have long been accepted as privileged; that it is not so much because they are themselves 'advice' or 'communication' but because they will, if disclosed, reveal, or tend to reveal, the content of privileged communications.

[24] In *Dalleagles*, the court's concern was that, unless protected by privilege, the draft agreements might disclose the precise character of confidential communications with the solicitor, by reference to handwritten notes, deletions and delineations occurring on the drafts. But where a draft agreement is prepared by a solicitor on the instructions of his or her client, it will be privileged in my opinion, even if it bears no notations, amendments, or corrections. That is because to disclose the draft would be to risk disclosing the instructions: *Lakatoi v Walker* [1999] NSWSC 156 where at [15] it was said:

In my opinion *Dalleagles* confirms the proposition, which is well established, that drafts 'with handwritten observations and cancellations on them are prima facie privileged'. It is not, as I understand it, authority for the proposition that drafts without such notations attract that privilege. However, a further question is whether a draft, without notations, amendments and corrections, which has not been furnished to another party for comment or otherwise in a non-privileged circumstance, nonetheless attracts client legal privilege on the basis that it reflects, one is entitled to infer, the instructions, or the essential nature of them, furnished to the solicitors by the client. Thus a situation may arise where a draft is prepared, on the existing instructions, which, after consideration by the client and before the draft has been furnished to any other party, is the subject of substantial amendment because of a change in instructions. It seems to me that in principle the production of such a draft, even without notations, amendments and corrections, would properly be held to constitute a disclosure of instructions and, in my opinion, for this reason the draft would attract client legal privilege. The situation, however, becomes very different once the draft goes into the public domain, eg by its being sent to the solicitors for the other party for comment in the usual course of drafting and ultimately concluding commercial documentation. Accordingly the statement in sub-paragraph (c) does not necessarily mean that the drafts do or do not attract client legal privilege.

[25] Moreover, privilege will attach to documents prepared by the client for submission to a solicitor in order to obtain legal advice: *Trade Practices Commission v International Technology Holdings Pty Ltd* (1995) 31 IPR 466 at 469, and *Saunders v Commissioner, Australian Federal Police* (1998) 160 ALR 469 at 472, where French J said:

His Honour's remarks were directed to materials brought into existence by the solicitor in the form of drafts and notes. The principle which he applied extends with equal facility to materials brought into existence by the client for the purpose of communication to the solicitor whether or not they are themselves provided to the solicitor. In the case of a client who has a complex array of historical transactions and perhaps little consciousness of notions of relevance and necessity, such notes or drafts may be extensive. Such clients and such notes are within the experience of many who practise in the law. The question for the

purpose of the application of legal professional privilege is whether or not they are to form the basis of confidential communications to the solicitor. It is not whether they lie within the confines of relevance and well ordered thought processes. The present case concerns primarily documents of this character said to have been brought into existence by Saunders for the purpose of communication with legal advisers from time to time.

[26] None of these cases directly considers the situation which arises here, namely the creation of documents with a dual purpose in mind. One such purpose related to the preparation of the Assignment programme itself; the other was concerned with the second defendant's intention to obtain legal advice on each draft script as it was prepared. Counsel did not cite a case touching upon circumstances such as these. My own researches have unearthed only the judgment of Henry J in *AUAG Resources Ltd v Amax Goldmines New Zealand Ltd* HC AK CL59/93 17 June 1994. There, Henry J was required to deal with a challenge to a claim of privilege in draft minutes of joint venture meetings and of certain directors' meetings. Having referred to *Balabel v Air India* Henry J said (at p 8):

Applying that test, communications between the Normandy Poseidon group and its solicitors seeking advice on the content of the draft minutes and the resulting advice does in my view attract privilege. However the draft minutes themselves as originally prepared by the project manager must I believe be in a different category. I do not see how it can properly be said that draft minutes of a meeting are intended to be confidential to the compiler and to be made for the purposes of obtaining legal advice. Such a draft is clearly intended to be a record of the meeting, not generated for the purpose of obtaining legal advice. The fact that advice is also being sought on a particular matter referred to in the draft minutes does not mean that the draft arose from the seeking out of advice, and disclosure in this situation does not indirectly defeat a legitimate privilege. Whether these defendants are in possession only of copies of the draft minutes as returned by the solicitors, which by way of annotation contains their advice or notes of their advice, I am unsure. Such copies would in my opinion be privileged, as would correspondence (whether by way of facsimile cover sheet or otherwise), although the original draft would not.

[27] It will be observed that Henry J drew a distinction between copies of the draft minutes provided to and returned by the solicitors on the one hand, and other copies of the draft minutes, including the original, which would not be privileged. He expressly referred however, only to the notional case of the return by solicitors to their clients of copies of the draft minutes, bearing by way of annotation, notes of the solicitors' advice.

He does not refer to the status of draft minutes returned by the solicitors without annotation.

[28] In my view it is necessary to endeavour to keep in balance the right of the parties to discovery and inspection of all relevant documents on the one hand, and the sanctity of privileged communications on the other. In a case such as the present, that balance is achieved in my opinion, by drawing a distinction between different copies of the transcript. Those copies prepared for the purpose of furtherance of preparation of the programme, will need to be discovered in the usual way. But a copy of the transcript which is handed to the second defendant's solicitors for the purpose of enabling of legal advice to be given and taken, will attract legal professional privilege, because it is "... part of the continuum aimed at keeping both informed, so that advice may be sought and given as required": *Balabel v Air India* p 254.

[29] Although the draft scripts necessarily played a part in the preparation of the Assignment programme over time, the copies of the script forwarded to Simpson Grierson were furnished to that firm in order that the first defendant might obtain legal advice. That being so, they formed the basis of confidential communications between solicitor and client, and to require their production would, in my view, tend to reveal the content of privileged communications between them. Accordingly, the copies of the draft transcripts held by Simpson Grierson are the subject of legal professional privilege. Technically they ought to be discovered by the first defendant, but that party has no obligation to produce them for inspection.

[30] I therefore decline to make the order in the form sought by the plaintiffs, but the drafts ought to be formally discovered if that has not already occurred.

Illegible documents

[31] Pursuant to r 312(2) the plaintiffs apply for orders in respect of documents numbered 245-250 in the list of documents of the second defendant. The documents

concerned comprise handwritten notes. I was told from the bar that the notes are those of a journalist, formerly, but not now, associated with the second defendant. Portions of the notes are legible but a substantial part is said to be illegible.

[32] Rule 312(2) provides:

(2) On the application of a party to whom a document is produced for inspection under rule 309 or rule 310, the Court may order the person who has control of the document to furnish the applicant with a legible copy.

[33] The plaintiffs complain that they are unable fully to make sense of documents 245-250, without a typed transcript. They claim that it is appropriate that the second defendant be required to provide a typed transcript of the notes, unless the author is unavailable. It is important to note that the plaintiffs' complaint is not as to the quality of the copies furnished to them. Rather, they say they are unable to decipher the handwriting of the author of the document, and therefore require typewritten versions.

[34] The application is unsupported either by affidavit evidence or authority. The only case to which I have been referred is that of Associate Judge Lang (as he then was) in *Siemer v Fardell* HC AK CIV 2003-404-5782 4 June 2004. In that proceeding Mr Siemer had sued his former legal adviser. He complained he was unable to read Mr Fardell's handwritten file notes. As to that the Judge said at [7]:

It is regrettable that Mr Siemer cannot read Mr Fardell's writing, but this is an issue which arises often in discovery. A party is not automatically required to provide a translation of its documents, even if they are in a foreign language. I am therefore not prepared to make an order requiring the defendant to provide translations or transcriptions as sought by Mr Siemer.

[35] The Judge went on to note that counsel for Mr Fardell had indicated that there might be a possibility that Mr Fardell would be prepared to provide transcriptions of a relatively few documents on a voluntary basis.

[36] Mr Miles says that r 312(2) may not have been raised in *Siemer*. There is no reference to it in the judgment. He argues that r 312(2) confers a wide jurisdiction on the

Court to ensure that a party is not prejudiced by reason of the illegibility of an opposing party's document.

[37] For the second defendant Mr Gray says that the Court has no jurisdiction to make the orders sought. Moreover, he argues, the plaintiffs ought to do what other litigants do in similar circumstances – namely do their best to work out what the documents mean, and wait for the relevant witness's evidence of what the notes say, cross-examining the witness if necessary.

[38] I am satisfied that neither r 312(2) nor r 310 confer jurisdiction on the Court to make the order sought. In my view r 312(2) is aimed at the commonly encountered predicament arising where copied documents are too faint to read, or have not been copied squarely, or have lines missing at the top or bottom of the page, or have portions of the copy obscured, or for some other reason are not legible copies of the original document. An example is to be found in *Clear Communications Ltd v Telecom Corp of New Zealand Ltd* (1998) 11 PRNZ 675, which involved a large volume of discovered documents over-printed with the words "Copy for the purpose of inspection only commercially sensitive and counsel only". Fisher J ordered that the warning be printed so as not to obscure any text.

[39] *Fitzroy Engineering Group Ltd v ABC Power Generation Ltd* (1999) 14 PRNZ 1, referred to by the plaintiffs, does not cover the point which arises here. It was concerned with the question of whether a discovering party could itself be compelled by the Court to undertake a copying exercise likely to take at least two weeks.

[40] The cases in the analogous situation of documents in a foreign language, tend also to support the view that the plaintiffs cannot obtain the order sought. There is no obligation on a party making discovery of documents in a foreign language to provide translations of those documents: *Amaltal Corp Ltd v Maruha Corp* (2003) 16 PRNZ 968 at [28]-[29].

[41] Mr Gray suggested that if the Court makes the orders sought, there will be significant ramifications for all future litigants. In effect he set up a floodgates argument. There is some substance in what he says. I understand the documents in issue here run to some 50 pages. If an order is made directing that they be transcribed and converted into typewritten form, then it is difficult to see why any party in any proceeding might not in future be entitled to a similar order.

[42] I am satisfied it is not appropriate to grant the plaintiffs' application, which is accordingly dismissed.

Result

[43] While technically the plaintiffs are entitled to discovery of the draft scripts held by the first defendant's solicitors, they are not entitled to production of those documents for inspection. The plaintiffs' application for typewritten versions of documents 245-250 in the second defendant's list of documents is dismissed.

[44] The first and second defendants are each entitled to costs on their successful defences of the plaintiffs' applications against them. Counsel may file memoranda if they are unable to agree as to quantum.

C J Allan J