IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV-2013-412-000462
[2013] NZHC 2533

UNDER	The Judicature Act 1908
IN THE MATTER OF	impending proceedings under the Defamation Act 1992
BETWEEN	MILES ROGER WISLANG Applicant
AND	THE UNIVERSITY OF OTAGO First Respondent
AND	HARLENE HAYNE Second Respondent
AND	PETER CRAMPTON Third Respondent
AND	JOHN ADAMS Fourth Respondent
AND	IAN MORISON Fifth Respondent
AND	MARK STRINGER Sixth Respondent
AND	HELEN NICHOLSON Seventh Respondent

Hearing: 23 September 2013

Appearances: M R Wislang (Applicant) in person with
J M Wilson as McKenzie Friend
R J M Sim for First and Second Respondents Third to Seventh Respondents not represented (not yet formally served)

Judgment: 27 September 2013

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
on application for pre-commencement discovery

Introduction

[1] Miles Roger Wislang ("Dr Wislang") makes application for an order for pre-commencement discovery.

[2] Dr Wislang is an alumnus of the University of Otago, having graduated in 1965.

[3] He says that he began revisiting the medical school of the University in February 2013. It appears that he had projects which he wished to pursue at the University or in conjunction with members of the University. Some tensions arose over Dr Wislang's presence. In March 2013, Dr Wislang made a request for personal information of the University's Privacy Officer. That request was later expanded in May 2013.

[4] The University's Privacy Officer disclosed numerous documents, principally either emails or incident records, being records or emails of various administrative and academic staff members of the University.

[5] Dr Wislang takes the view that passages in the disclosed material are defamatory. On 30 August 2013 he wrote to the University through the Vice-Chancellor. He asserted that administrative and academic staff members had made seriously defamatory statements about him. He demanded full written apologies and retractions by all the authors and a written general apology by the University.[1]

[6] The Vice-Chancellor responded to Dr Wislang's letter. She rejected the allegation that the disclosed material was actionable in defamation.

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[1] Dr Wislang headed his letter "Without Prejudice" but exhibited it as part of his evidence on this application. Strictly speaking, the letter did not attract privilege as it did not contain an offer of settlement. In any event, the respondents have been content to deal with it without objection to its admissibility.

[7] Dr Wislang then promptly filed this application.

Dr Wislang's application

[8] I heard the application strictly as between Dr Wislang and the first and second respondents. The first respondent is the University of Otago. The second respondent is the Vice-Chancellor (in other words, the senior executive officer of the University). They are named by Dr Wislang upon the basis that they are the person or body who ultimately control the University's records and would be the appropriate recipients of an order for pre-commencement discovery if the Court considers such an order should be made.

[9] The third, fourth, fifth, sixth and seventh respondents had not been formally served with the proceeding when I was able to hear the application. By reason of practical, sensible arrangements agreed to by Mr Sim (appearing for the first and second respondents) and Dr Wislang on his own behalf, the hearing was able to proceed as a means of comprehensively resolving the discovery issue.[2]

The order sought

[10] Dr Wislang seeks an order that requires the respondents to produce:

> Any and all documents, in paper copy and in digital electronic and in audio-recording form, which are in your possession or under your control that refer in any way to me by my name and were required or generated by you in the period between February 2013 and 5 September 2013.

Grounds of application

[11] Dr Wislang sets out five grounds of application which are as follows:

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[2] Although the University as first respondent had also not formally been served with the documents, Mr Sim was able to confirm to the Court that the University could be treated as having been served with the application, so that the outcome of this hearing would bind the first and second respondents. Mr Sim also undertook in relation to all records within the control of the University that if the Court saw fit to order discovery of emails or other correspondence of other respondents in their University capacities, the first and second respondents would themselves meet the terms of such orders. For his part, Dr Wislang accepted that such approach would comprehensively deal with the subject matter of the application without any need for a later hearing if and when other respondents were served.

(1) That the documents exist and bear directly on and augment and aggravate defamatory statements made by the Respondents against me on occasions between February 2013 and 5 September 2013.

(2) That evidence adduced in the affidavit filed in support of this application goes strongly to there being documents referring to the Applicant by name which have not yet been supplied to him in response to his requests of 7 March 2013 and 26 May 2013 made to the Registrar of the University of Otago under the Privacy Act 1992, for personal information about him; and

(3) That further documents referring to the Applicant by name have been generated by one or more of the Respondents since the date of supply of the last set of documents supplied to him by the Registrar of the University under his Privacy Act requests of March and May 2013; and

(4) That those further documents contain or are likely to contain statements further damaging to the personal and professional reputation of the Applicant;

(5) That should the documents I am seeking to have produced through this application for pre-litigation discovery not be made available to me by the Respondents, then the proceedings in defamation that I am preparing against them will not be able to justify and comprehensively enough address the damage that my personal and professional reputation has suffered and is still suffering because of the defamatory statements made against me by the Respondents.

The respondent's opposition

[12] The respondents oppose the application.

[13] They rely on three grounds (which I summarise):

(a) There is no evidence establishing that the applicant may be entitled to claim relief against any person in circumstances where it is impossible or impracticable for him to formulate that claim without reference to documents in the control of the Second Respondent;

(b) Dr Wislang's Privacy Act requests have been complied with and any further requests by Dr Wislang (or rulings of the Privacy Commissioner if Dr Wislang complains) will be met in accordance with the requirements of the Privacy Act 1993.

(c) Dr Wislang's application is frivolous and vexatious or otherwise an abuse of the process of the Court.

[14] The respondents further rely on an affidavit of the Vice-Chancellor. She briefly identifies matters of background both of Dr Wislang's visits to the University campus and of his subsequent Privacy Act requests. She observes that some detail of his communications with and visits to University personnel is evident from the material which Dr Wislang attached to his affidavit (which he in turn had obtained on his Privacy Act request). The Vice-Chancellor summarises the way in which the records relating to Dr Wislang had come into being in this way:

> In about February of this year, Dr Wislang began correspondence with me and also initiated a number of contacts with, and made visits to, other staff of the University. I, and other staff, initially sought to be welcoming and accommodating to him – as we aim to with our graduates generally – but his contacts have become increasingly unusual and concerning.

Further particulars of Dr Wislang's allegations of defamation

[15] After the second respondent filed a notice of opposition, Dr Wislang filed a document entitled "applicant's particulars of pleading of defamatory statements". In that document he referred the Court to 14 particular pages from his affidavit exhibit (which had in turn been obtained on his Privacy Act request). He identified those pages as containing –

> The particulars, statements and inferences and innuendos *inter alia* that I shall allege in proceedings of defamation yet to be filed by me.

Pre-commencement discovery – the jurisdiction

[16] The single source of jurisdiction invoked by Dr Wislang lies in r 8.20 High Court Rules, which provides:

> **8.20 Order for particular discovery before proceeding commenced**
>
> (1) This rule applies if it appears to a Judge that—
>
> (a) a person (the intending plaintiff) is or may be entitled to claim in the court relief against another person (the intended defendant) but that it is impossible or impracticable for the intending plaintiff to formulate the intending plaintiff's claim

without reference to 1 or more documents or a group of documents; and

(b) there are grounds to believe that the documents may be or may have been in the control of a person (the person) who may or may not be the intended defendant.

(2) The Judge may, on the application of the intending plaintiff made before any proceeding is brought, order the person—

(a) to file an affidavit stating—

(i) whether the documents are or have been in the person's control; and

(ii) if they have been but are no longer in the person's control, the person's best knowledge and belief as to when the documents ceased to be in the person's control and who now has control of them; and

(b) to serve the affidavit on the intending plaintiff; and

(c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the intending plaintiff.

(3) An application under subclause (2) must be by interlocutory application made on notice—

(a) to the person; and

(b) to the intended defendant.

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

[17] Rule 8.20 (and its predecessor, r 2.99) is treated as containing three internal and cumulative requirements, namely:[3]

(a) That the intending plaintiff "is or may be entitled to claim in the Court relief against another person" (the intended defendant); and

(b) It is "impossible or impracticable" for the intending plaintiff to "formulate his claim without reference to a document or class of document"; and

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3 *Malayan Breweries Ltd v Lion Corp Ltd* (1988) 1 PRNZ 629 (HC) at 630-631 per Wylie J; *Welgas Holdings Ltd v Petroleum Corporation of New Zealand Ltd* (1991) 3 PRNZ 33 at 40 per McGechan J.

(c) There are grounds for belief those documents may be or have been in the possession of the person concerned.

[18] The first requirement (that the intending plaintiffs "may be entitled" to leave) requires the intending plaintiff to show at least the real probability of the existence of a claim against someone.[4] McGechan J explained this threshold in *Welgas Holdings Ltd v Petroleum Corporation of New Zealand Ltd.*[5] His Honour's formulation has been adopted by the Court of Appeal in *Hetherington Ltd v Carpenter*[6] – the mere possibility that a document might disclose a claim is insufficient.[7]

[19] Turning to the second requirement (impossible or impracticable formulation) I adopt the distinction drawn in previous cases between mere inconvenience on the other hand and impracticability or impossibility on the other. As Sinclair J observed in *Exchange Commerce Corporation & Grovit v National Companies & Securities Commission,*[8] the express requirement is that formulation be "impossible" or "impracticable" and not some lower threshold.

The statements particularised by Dr Wislang

[20] Dr Wislang (in his own words to the Vice-Chancellor on 30 August 2013) views "certain administrative and academic staff members of the University" as being those who made seriously defamatory statements about him.

[21] The email correspondence and other documents provided by the University's Privacy Officer to Dr Wislang represent communications between such members of the University. Members of the University were communicating in relation to Dr Wislang's attendances on the campus and his interactions with staff, students and possibly others. The Vice-Chancellor described Dr Wislang's interactions as

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4 *Exchange Commerce Corp Ltd v NZ News Ltd* [1987] 2 NZLR 160 (CA) at 164 per Somers J.

5 *Welgas Holdings Ltd v Petroleum Corporation of New Zealand Ltd,* above n 3, at 43 – "The Court was looking for some threshold so as to avoid speculative fishing. A Court is not to be moved unless there is some evidence which points towards a *real* as opposed to a *speculative* claim."

6 *Hetherington Ltd v Carpenter* [1997] 1 NZLR 699 (CA) at 704.

7 At 704.

8 *Exchange Commerce Corporation & Grovit v National Companies & Securities Commission* HC Auckland CP 1515/86, 19 February 1987, adopting observations of Eichelbaum J in *Gray v Trustees of the Crown Superannuation Fund* (1986) 1 PRNZ 239 (HC).

"unusual and concerning". The email correspondence, which is now the subject of Dr Wislang's concerns in his intended litigation, arose in that context.

[22] I turn to consider each of the communications particularised by Dr Wislang and those identified by him as calling for or tending in favour of an order for pre-commencement discovery. (In his submissions, Dr Wislang elected to take me to the documents in reverse number order and I will do the same).

Document 100 – first part of document

[23] Emails 28 February 2013 between two staff members:

- The first email includes this:

  > We have been warned about Miles Wislang being "dodgy" by the PVC's office and Helen has asked me to cancel her meeting with him tomorrow …

- The second email says:

  > Exactly my impression. Very dodgy.

[24] The parties to the email exchange are evident on the face of the document Dr Wislang received. If Dr Wislang intends to sue either correspondent he is in a position to formulate his claim against each without a need for further documents.

[25] In his submissions, Dr Wislang indicated that he wished to obtain further information as to the actual person or persons involved with the "warning" from the PVC's office (PVC being a reference to Pro Vice-Chancellor, which both Dr Wislang and Mr Sim took by its context to be a reference to the Pro Vice-Chancellor of Health Sciences).

[26] Dr Wislang does not establish any grounds for a belief that there is a document in existence concerning the warning given by the PVC's office. There is nothing in the email correspondence itself to indicate that the warning was in writing. The idea that there may be such a document is mere suspicion on Dr Wislang's part. The absence of reasonable grounds for believing there to be a

document is reinforced by the fact that the University's Privacy Officer, in response to Dr Wislang's expanding Privacy Act requests, provided a substantial volume of correspondence. Had there been a written warning as to Dr Wislang sent by the PVC's office, it would have had to be produced by the University or noted as withheld for some reason. But it was not.

[27] Dr Wislang has not established the threshold requirements for an order in relation to what is at most a document which he suspects may exist.

Document 100 – second part of document

[28] The document identified as document 100 contains in its top half a printout of the email exchange to which I have referred.[9]

[29] On the bottom half of document 100, as supplied by the University's Privacy Officer, someone has written the words:

> Information withheld
>
> Not relevant.

[30] As I understood Dr Wislang's submission in relation to this notation, he suspects that what may have been withheld is something about him and that it may have been defamatory.

[31] Dr Wislang's suspicions again fail to meet the basic threshold requirements for an order of pre-commencement discovery. There is no disclosed basis for believing that the University's Privacy Officer, responsible for providing to Dr Wislang the personal information held about him, has in relation to this item chosen to enter a notation which incorrectly records a document as having been "irrelevant". All documents relating to Dr Wislang personally would have been relevant.

Document 87

[32] Document 87 is an Incident File report. It is recorded as having been created on 24 April 2013 (in relation to an incident occurring that day). The report is

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9 Above at [23].

recorded as having been modified on 26 April 2013. The document was released by the University's Privacy Officer to Dr Wislang in redacted form, the Privacy Officer having redacted the names of persons who had supplied information to the University's Proctor prior to the Incident Report being completed. The general nature of the document is reflected by entries relating to "Details of incident" where the following entries are made:

> Offence Type : Suspicious Person
>
> Incident Status : Closed
>
> Synopsis : Alumni student overstayed/exceeded his welcome within Health Science Department

[33] The report concludes with a note that the Head of Department had decided not to issue a Trespass Order. The report notes that administration and other front of house staff were to be advised that if they had problems with [Dr] Wislang then they should call Campus Watch and Campus Watch would ask Dr Wislang to leave that building. If Dr Wislang refused, then the Proctor was to be called and the Proctor would direct actions from there.

[34] Dr Wislang submitted in relation to Document 87 that there were two aspects of the detail of the document which should lead to the making of a discovery order. I will deal with them in turn.

First (redacted) quotation

[35] The first quotation identified by Dr Wislang reads:

> At about 10.48 am [redacted] called in relation to a Miles Wislang who has previously been a nuisance with Health Science students. [redacted] spoke to [redacted] who is the [redacted] within the Health Science Department.
>
> Wislang has been hanging around the Health Science's area over recent weeks. Staff welcomed him and gave him assistance. Unfortunately Wislang has overstayed his welcome and also taken it to a further stage where he was able to book a room and hold a lecture of some sort. This annoyed staff but they decided it was easier to allow the lecture to proceed than to cancel it.

[36] Nothing in this passage indicates that Dr Wislang is or may be entitled to sue the person who made the call to the Proctor's office. Nothing in the recorded report

suggests that there is any real probability of a successful defamation claim against the person doing the reporting. A report was apparently made by someone on campus to the Proctor's Office, which carries the responsibility for dealing with incidents of concern on campus.

Second (redacted) quotation

[37] The second quotation identified by Dr Wislang (also containing redacted names) advises that staff within the department had had enough of "Wislang" and they will consider having him trespassed from the area/University. I make the same finding in relation to this quotation. There is no real probability of a claim. A report of an incident was made to the Proctor's Office which had the responsibility for dealing with incidents of "concern".

Document 81-82

[38] The first page of document 81/82 is an Incident File Report completed on 2 March and 6 March 2013 in the same format as the Incident File Report at Document 87.

[39] The general nature of the 81/82 report is reflected in the following details of incident:

> Offence Type : Suspicious Person
>
> Incident Status : Closed
>
> Synopsis : Older male taking photos of flats on Clyde Street

[40] The Incident File Report details a report apparently made at 12.41 pm on 2 March 2013 as to Miles Wislang explaining to the female occupants of a flat in Clyde Street that he was taking photos of it as he used to live at the flat. The report records the female occupants as having appeared "uncomfortable with his presence". There are attributed in the report to the female occupants no statements at all, let alone any statements which might be arguably defamatory. The report goes on to record Dr Wislang's activities after he left the vicinity of the flat in Clyde Street. It

records that he had been requested to go to see the Proctor but that Dr Wislang stated that he was flying to Auckland that day.

[41] The report concludes with this sentence:

> Wislang had a long, disjointed conversation with [redacted] who advised he has now finally walked off along Clyde St.

[42] Dr Wislang did not develop any submissions in relation to this final sentence. To the extent that the unidentified staff member was reporting to the Proctor's office on a conversation held by Dr Wislang, the report does not approach the level of a statement giving rise to a real probability of a claim in defamation.

[43] The second page of the document (document 82) is an insignificant dispatch record. It contains nothing which could be relevant to a possible defamation claim.

Document 79

[44] Document 79 is an Incident File Report dated 1 March 2013 adopting the same form of Incident File Report as those relating to the 24 April 2013 and the 2 March 2013 incidents.

[45] This Incident File Report records that a staff member from "LFB" had requested Campus Watch to the ground floor of LFB for assistance. The staff member's name has been redacted from the Privacy Act copy made available to Dr Wislang. The report records that Dr Wislang had been "causing concern". The staff member informed the Campus Watch officer that the man was "Miles Wislang" who "is known to the people at the Medical School". The report adds:

> Miles does not appear to pose any threat to staff but at well over 6 foot his mere size is intimidating and he is very demanding as to what he wants to do and where he wants to go within the Medical School and stands over the staff in an attempt to get is [sic] way.

[46] Nothing in what the report records as to the unnamed staff member's comments to the Proctor's office gives rise to the real probability of a defamation claim against the staff member. Once again the report has been made to the appropriate office within the University (the Proctor's office).

Remaining documents (76, 61, 58, 57, 55, 33, 30, 22 and 1)

[47] The remaining documents (76, 61, 58, 57, 55, 33, 30, 22 and 1) were not addressed by Dr Wislang in his submissions on this application. That is understandable as none of them appears to point to another document or another person who may be able to provide another document. Almost all these documents are items of email correspondence between members of the University which contain material concerning Dr Wislang. I take it from his inclusion of these documents in his "particulars of pleadings of defamatory statements" that they represent quite simply the documents (or some of the documents) which Dr Wislang intends to impugn in any defamation claim.

[48] I have for completeness carefully perused each of these documents. I find nothing in them which points to the existence of other documents which would qualify for discovery in terms of the threshold requirements under r 8.20.

Outcome

[49] Dr Wislang has failed to satisfy the Court that the documents he seeks meet the cumulative requirements of r 8.20. The application must therefore be dismissed.

[50] Dr Wislang accepted that, in the event the Court dismisses his application, there would be an order that costs follow the event and that such costs would appropriately be on a 2B basis.

[51] In the notice of opposition filed for the second respondent (and adopted by the first respondent), Mr Sim had included an application for costs on a solicitor/client basis. Mr Sim responsibly indicated that he would not press for costs on such a basis if the Court were minded to grant 2B costs in the event the respondents were successful. I consider a 2B award to be appropriate.

Orders

[52] I order:

(a) The application herein dated 9 September 2013 is dismissed;

(b) The applicant is to pay the costs of the first and second respondents on a 2B basis together with disbursements to be fixed by the Registrar. I certify the hearing as a half-day hearing (having regard to its first call in the morning, but its resumption as a hearing in the afternoon).

(c) So far as the proceeding remains extant, as against the third, fourth, fifth, sixth and seventh respondents, I enlarge the proceeding for mention at a telephone conference at 12.00 noon, 12 November 2013 (Associate Judge Osborne). Such hearing will be vacated if Dr Wislang earlier files a formal Notice of Withdrawal of the remaining application.

Associate Judge Osborne

Solicitors/Parties:

Gallaway Cook Allan, Dunedin
Dr M R Wislang, Auckland, in person