IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV 2013-412-000462
[2014] NZHC 2382

BETWEEN	MILES ROGER WISLANG Applicant
AND	THE UNIVERSITY OF OTAGO First Respondent
	HARLENE HAYNE Second Resondent

Hearing: 31 July 2014

Appearances: M R Wislang, Applicant, In Person
R J M Sim for First and Second Respondents

Judgment: 30 September 2014

JUDGMENT OF WHATA J

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[1] Dr Wislang seeks to review a decision of Associate Judge Osborne declining pre-litigation discovery.[1] Dr Wislang sought the following order:

> An order requiring [the University of Otago] to produce any and all documents, in paper copy and in digital electronic and in audio-recording form, which are in [their] possession or under [their] control that refer in any way to [Dr Wislang] by name and were required or generated by [them] in the period between February 2013 and 5 September 2013.

[2] Dr Wislang submitted, in short, that the University holds information supporting his claim to having been defamed by staff at the University.

[3] At the hearing Dr Wislang raised a fresh ground of review, seeking an unredacted version of document 87. He claims that this document includes

[1] *Wislang v University of Otago* [2013] NZHC 2533.

defamatory comments, including a reference to him being a 'nuisance'. He submitted that comments like this, together with other comments said to impugn his reputation have ultimately affected his standing in the University and in other academic circles. He contends that it is necessary to produce an unredacted version of this document, revealing the names of the persons making the allegedly defamatory comments, in order to pursue a claim in defamation.

[4] Mr Sim for the University submits that:

(a) Judge Osborne has not erred in any material way;

(b) The comments are not defamatory; and

(c) The redactions are necessary to maintain the legitimate privacy interests of the relevant person.

[5] In order to make proper sense of the appeal, I propose to address both the pleaded and new grounds of appeal.

Associate Judge Osborne's decision

[6] Associate Judge Osborne considered Mr Wislang's application by reference to the core requirements of r 8.20, namely:[2]

(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

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

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2 High Court Rules, r 8.20(1)(a) and (b).

[7] The Judge observed further:[3]

> 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. McGechan J explained this threshold in *Welgas Holdings Ltd v Petroleum Corporation of New Zealand Ltd*. His Honour's formulation has been adopted by the Court of Appeal in *Hetherington Ltd v Carpenter* – the mere possibility that a document might disclose a claim is insufficient.
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> 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*, the express requirement is that formulation be "impossible" or "impracticable" and not some lower threshold. (Footnotes omitted)

[8] The Judge's formulation of the threshold requirements is not challenged.

[9] The Judge then considered the application in terms of the documents identified by Dr Wislang said to illustrate defamatory comments and support his submission that further documents or other information might exist which ought to be disclosed.

[10] The Judge concluded in relation to those documents:

(a) Dr Wislang did not establish any grounds for a belief that there is a document in existence to be discovered;[4]

(b) There is no proper basis for discovery;[5]

(c) There is no prospect of success based on the material placed before the Court.[6]

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3 *Wislang v University of Otago*, above n 1, at [18]-[19].
4 *Wislang v University of Otago*, above n 1, at [26].
5 At [31].
6 At [36], [37], [40] and [46].

Pleaded grounds of review

[11] In the interlocutory application for review of Associate Judge Osborne's decision the following grounds of review are identified, namely:

(a) That the decision is wrong in fact and in law; and

(b) The Associate Judge erred in finding that there was no likelihood or possibility that the first respondent had not produced all relevant documents to the applicant upon its responding to his repeated requests to it for information under the Privacy Act 1992;

(c) The Associate Judge erred in finding that discovery, including E discovery, by the first and second respondents, upon his granting of this application, would not or could not produce any information as to the identity of potential further defendants to the proceeding in defamation that the applicant is seeking to bring.

[12] Dr Wislang submitted:

(a) The view of the Associate Judge that there is no evidence of the existence of further documentation is erroneous. To the contrary, it can be legitimately inferred that there is considerably more than mere suspicion that there is in fact further documentation that the respondents have withheld upon their staggered response to his Privacy Act requests for subject information held by the University.

(b) In respect of the interpretation and application by the Court of the "mere suspicion" test, in paragraph [13] of her affidavit the second respondent, Ms Harlene Hayne, frankly admitted the likelihood, or at least a reasonable possibility, of the existence of perhaps overlooked subject information, under the control of the respondents, additional to that already supplied to the applicant by the University in response to his information request under the Privacy Act.

(c) In the absence of an E search of the first respondent's electronic databases, which search has evidently not been carried out, it cannot be said that the response of the first respondent to the applicant's request under the Privacy Act was adequate or made with due diligence or in good faith. Hence it can be said that the failure of due diligence in this matter goes to this Court ordering discovery of further information held in at least the electronic databases of the first respondent upon its application.

(d) The resource of further requests by the applicant under the Privacy Act is, in all circumstances of the case, not to be preferred over this application to the Court for discovery before proceedings in defamation against the respondents are commenced.

New ground of appeal

[13] The essential ground now relied upon by Dr Wislang is that certain documents contain improper redactions. These redactions remove the identity of persons who Dr Wislang believes have defamed him. Initially the relevant documents were numbered "81", "83", "85" and "87". Dr Wislang narrowed his focus to document 87 during the hearing. That document records the following (inclusive of redactions):

> At about 10.48 am [ ] called in relation to a Miles Wislang who has previously been a nuisance with Health Science students. [ ] spoke to [ ] who is the [ ] 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.
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> [ ] advises that staff within the department have had enough of Wislang and they will consider having him trespassed from the area / University.
>
> Proctor advised and arrangements put in place for [ ] to speak to the Proctor. [ ] has also emailed other departments whom she knows have been having issues with Wislang. She is hopeful that these departments will advise her of the issues and she will forward details to proctor.

> File Note: Previous Incident recorded in relation to Wislang. Incident 0291.
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> Conversation held with [ ] via phone and advice given. Decisions made by HOD not to issue a trespass order. Admin and other front of house staff to be advised that if they have problems with Wislang then they should call CW and we will ask him to leave that building. If he refuses, then Proctor to be called and Proctor will direct actions from there.

[14] Dr Wislang maintains that the reference to him being a "nuisance" is highly defamatory, directly impacting on his reputation as a professional academic involved in the teaching of students. His primary contention is that comments like this, together with other comments said to impugn his reputation, have cumulatively affected his standing within the university and now beyond in other academic circles. He says that without the names it is impracticable and/or impossible[7] to commence defamation proceedings.

Jurisdiction

[15] This matter comes before me by way of review.[8] Accordingly, the review proceeds as a rehearing.[9] The plaintiff has the burden of persuading the Court that the decision is wrong – that it rested on unsupportable findings of fact and/or applied wrong principles of law.[10] If, as here, the Associate Judge's decision involves an exercise of discretion, the appellant must show the Associate Judge acted on a wrong principle or failed to take into account some relevant matter or took into account some irrelevant matter. The Court will not repeat the weighing exercise unless the Associate Judge gave excessive weight to some factor or patently inadequate weight to another as to be "plainly wrong".[11]

[16] In relation to the new ground, it does not appear that it was directly put to the Judge. I will deal with it separately.

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7 Citing *Hetherington Ltd v Carpenter* [1997] 1 NZLR 699 (CA) as to this threshold test.
8 Judicature Act 1908, s 26P(1).
9 High Court Rules, r 2.3(4).
10 *Midland Metals Overseas Pte Ltd v Christchurch Press Company Ltd* (2002) 16 PRNZ 107 (HC) at [13].
11 *Alex Harvey Industries Ltd v CIR* (2001) 15 PRNZ 361 (CA) at [12]-[15].

Assessment

The pleaded grounds

[17] I am not satisfied that the Judge erred or was plainly wrong. A key passage of his judgment concerns document 100. The Judge's treatment of this document and what might flow from it is helpfully succinct and illustrates the judge's approach to the application overall. The Judge observed:[12]

> Emails 28 February 2013 between two staff members:
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> - The first email includes this:
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> "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 …"
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> - The second email says:
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> "Exactly my impression. Very dodgy."
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> 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.
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> 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).
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> 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.
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> [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.

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12 *Wislang v University of Otago*, above n 1, at [23]-[27].

[18] Dr Wislang says, as his submission sets out, that the evidence of Ms Hayne suggests that there may be other information available that might assist in the formulation of a statement of claim. Ms Hayne states at [13]:

> 13. As is evident from Dr Wislang's affidavit, he has requested material from the University under the Privacy Act on more than one occasion. Such requests have been responded to by the University's Registrar and Secretary to Council, who is also the University's Privacy Officer. To the best of my knowledge and belief, she has provided all of the documents held by the University and its staff as requested. In an institution the size of the University it is always possible to inadvertently fail to locate items which are covered by a Privacy request, particularly where an individual's connections with the University have been unofficial and diverse. If Dr Wislang had reason to believe that had occurred and raised that with the University, it would consider the matter and supply any additional documents that could be located and which should be supplied under the Privacy Act.

[19] With respect to Mr Wislang's submission, it was clearly available to the Associate Judge to conclude on this evidence that the existence of other relevant material was speculative. It was also available to him to conclude that Privacy Act processes can be relied upon to uncover relevant documents. I also agree with his conclusions about this. The request for still further discovery is, as Mr Sim submits, a fishing exercise.

New ground

[20] As to the new ground of review, I am advised that as this was not argued before Judge Osborne. It can hardly provide a proper basis for a review of his decision in any orthodox sense. Moreover, the claim is not now one for further discovery, but for the production of unredacted version of document 87.

[21] I think there are two major hurdles against exercising the discretion to grant pre-litigation discovery in relation to this new ground. First, I consider that a claim of defamation based on the statement that Dr Wislang has previously been a 'nuisance' and that staff have 'had enough of Mr Wislang' has little obvious prospect of success. On its face 'nuisance' connotes annoying or irksome. That does not stand out as something that is harmful to Dr Wislang's reputation in any actionable sense. Indeed, the language of 'nuisance' is opaque and diffuse, and inherently a matter of subjective opinion and readily capable of reasonable justification.

[22] Second, the privacy interests of students and staff is a legitimate matter to be considered in this context. Students in particular ought to be able to make complaints of this nature in confidence and without fear of a disproportionate response. Indeed, the University may be subject to express or implied undertakings or obligations of confidence. Pre-litigation discovery of the unredacted documents is invasive and could cause the University to breach such undertakings. This brings the availability of the Privacy Act processes into focus. These processes provide a purpose built vehicle for the weighing of competing considerations, including the right to access to and protection of personal information and privacy interests more broadly, including any rights to confidentiality. Moreover, with such processes, it cannot be said that the commencement of proceedings is "impossible or impracticable" without pre litigation discovery, as that may not be the case following the completion of those processes.

[23] Having said all of that, while the defamation claim against the unidentified persons may appear fanciful, the totality of the information might reveal a proper basis for the claim. It seems to me, therefore, that I must proceed with some caution before excluding altogether the potential for pre-litigation discovery in terms of the identities of the persons who made the statements for privacy related reasons. It is something, I think, that needs to be determined on evidence rather than on submission.

[24] I consider that the proper approach to this aspect of the claim is for Mr Wislang to recast his application for pre-litigation discovery by specifically relating it to document 87 and the reasons that the identities of the persons making the alleged defamatory statements should be revealed. The application should detail the basis for the alleged claim in defamation by reference to authority. There then should then be a proper response by way of a notice of opposition together with supporting affidavits. The supporting affidavits should clearly specify the reasons for the redactions and the specific privacy interests engaged. If necessary the Court can receive the affidavits with identifying features on a confidential basis to the Judge. Only then will the Court be in a proper position to resolve whether the Privacy Act processes are properly engaged and if so, whether the processes under that Act should be completed first.

Result

[25] The application for review on the pleaded grounds is declined.

[26] If Dr Wislang wishes to pursue his fresh ground in terms of document 87, then he must relodge his application in accordance with my directions at [25] above.

[27] There shall be costs in favour of the second respondent on a 2B basis together with disbursements as fixed by the registrar. I make no award in favour of the first respondent because no notice of opposition was filed on behalf of that respondent. This did not affect their standing to support the second respondent, as they were a named party. But the plaintiff was entitled to assume for cost purposes that he would be liable only to the second respondent.

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