IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-1921
[2015] NZHC 1455

BETWEEN	JON STEPHENSON Plaintiff
AND	RICHARD RHYS JONES First Defendant
	THE ATTORNEY-GENERAL Second Defendant

Hearing: 24 June 2015

Counsel: D M Salmon and E D Nilsson for Plaintiff
H B Rennie QC and H S Hancock for Defendants

Judgment: 26 June 2015

JUDGMENT OF THE HON JUSTICE KÓS
(Particular discovery and interrogatories)

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[1] Mr Stephenson is a journalist. He has issued defamation proceeding against Lt Gen Jones[1] and the Attorney-General.[2] His claim arises from a media statement issued by Lt Gen Jones. It criticised three articles written by Mr Stephenson about the activities of the Special Air Service[3] in Afghanistan between 2002 and 2010. Mr Stephenson says the statement imputes that he is a liar and a journalist not to be trusted.

[2] Mr Stephenson's claim was filed in 2012. In July 2013 a jury was unable to agree verdicts. The case is due to be retried, now before a Judge alone, commencing 20 July 2015.

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1 Formerly Chief of the New Zealand Defence Force
2 Sued on behalf of the New Zealand Defence Force. Herein "NZDF".
3 Herein "SAS".

[3] In May 2015 Mr Stephenson filed an application for particular discovery. It covers four categories of documents. All concern the relationship between the SAS and the Afghani Ministry of Interior Crisis Response Unit[4] in 2010. The application also seeks certain answers given by the defendants to interrogatories be set aside as insufficient.

[4] Exigency necessitates delivery of this judgment urgently. That is because of the imminence of trial and the implications of an outcome either way. Some compression in reasoning is an inevitable consequence.

Context, claim and pleadings

[5] New Zealand troops were deployed in Afghanistan between December 2001 and April 2013 when the final rotation of the New Zealand Provincial Reconstruction Team left that country. For some of that time the SAS was deployed.[5]

[6] In May 2010 an article by Mr Stephenson appeared in the *Sunday Star-Times*. The heading was "SAS HQ: Walk Right In". It describes an interview between Mr Stephenson and "Col M". He was said to be commander of the CRU. The interview was said to have occurred in his office in the compound in Kabul where the CRU and SAS troops were based. Apart from commenting on the apparently lax security, the article focused on assistance the SAS had given the CRU in April 2010 in arresting a group of suicide bombers as they closed in upon their target.

[7] A second article written by Mr Stephenson appeared in the *Sunday Star-Times* in August 2010. It appeared under the heading "Prisoners being delivered to brutal Afghan secret police". It described the SAS as helping to catch insurgents who were then handed over to the Afghani National Directorate of Security. It also discussed the original topic of the May report, the CRU's arrest of the suicide bombers with the assistance of the SAS. The article quoted NZDF sources saying

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4 Herein "CRU". It is a government paramilitary or police force based in Kabul. The four categories are set out at [35].

5 It is a matter of public record that the SAS were deployed in Afghanistan from 2001 to 2005, and 2009 to 2012.

that SAS members had not themselves arrested or detained anyone, although had been in the vicinity when arrests had been made by Afghani authorities.

[8] The third and most substantial article was published in *Metro* magazine in May 2011. Under the title "Eyes Wide Shut" it traverses the history of the engagement of the SAS in Afghanistan between 2001 and 2011. It again refers to the meeting with Col M at the CRU base in Kabul in April 2010. It refers to what it describes as "the now standard line" that "although SAS troopers had been in the vicinity when the Afghan security forces had detained suspects, no member of the SAS detained or arrested any person in Afghanistan". It refers to two other incidents:

(a) An incident in Wardak province where a Taliban insurgent had been caught by members of the SAS, handed over to the CRU and passed by them to the Afghan National Army. The latter mistreated him so badly that the SAS intervened and insisted the prisoner be returned the CRU. According to Mr Stephenson the prisoner was transported back to Kabul by the CRU and there handed over to the Afghan National Directorate of Security.

(b) A raid said to have been undertaken by the SAS on the office of a company called Tiger International in Kabul on Christmas Eve, 2010. There was an exchange of fire. Two Tiger guards were killed. The article says that the SAS arrested some employees of Tiger and later "handed their prisoners to the NDS, who recognised them, vouched for them, and released them immediately".

[9] Mr Stephenson does not present himself as an eye-witness to either the Wardak incident or the Tiger raid. He is reporting what he has been told by other sources. In the case of the meeting with Col M at the CRU base in April 2010, he is of course asserting that such a meeting took place, and that he was part of it.

[10] On 2 May 2011 Lt Gen Jones issued a statement that was emailed to numerous media sources. It states that the *Metro* article was "founded upon a

number of factual inaccuracies". As to the supposed meeting at the CRU base in April 2010, the statement says that "the CRU Commander says that he has never spoken to this journalist". It also says that the journalist "did not enter the SAS HQ, as suggested in the first *Sunday Star-Times* article. It goes on to say "the journalist has provided no evidence that he has ever entered the CRU base. We have evidence that he was denied entry". As to the other two matters:

(a) The SAS had no knowledge of any such event in Wardak province having occurred.

(b) The events of the Tiger raid were different. Although the SAS and the CRU were involved, and the SAS did respond "within the rules of engagement", "no detainees were taken by either the SAS or anybody else".

[11] At least two further clarifications have been given since that statement. The first is that the defendants now accept that Mr Stephenson did enter the CRU base. However they deny that he entered the SAS HQ within that base. Secondly, Mr Rennie QC says the SAS has never engaged with the CRU in Wardak province at all.

[12] The essential defamation pleading is now set out in paragraph 30 of the second amended statement of claim:[6]

> 30 In the natural and ordinary meaning, or by necessary implication, the Statement (including the quoted passages) meant and was understood to mean:
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> (a) The plaintiff was untruthful when asserting in the SST and Metro articles that he had visited the CRU base.
>
> (b) The plaintiff lied in the SST and Metro articles.
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> (c) The plaintiff's journalism in the SST and Metro articles should not be trusted.

[13] Through the first trial, and until 30 April 2014, the pleaded defence to the claim (apart from general denial of the alleged defamation) was an affirmative

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6 Dated 3 April 2014.

defence of qualified privilege. On 30 April 2014 a statement of defence to the second amended statement of claim was filed. For the first time a defence of truth was advanced – at least in relation to the innuendo pleaded at paragraph 30(c) of the claim.

[14] Paragraph 13 of the defence should be set out so far as relevant:

> 13 They admit paragraph 13 of the second amended statement of claim. They further say that the SST Article as regards the nature of NZDF's involvement in Afghanistan was erroneous in that:
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> …
>
> 13.4 The "suicide bombers" detention was not a "joint raid" but a police action by the ISU and the CRU which the SAS attended after the detention had occurred, and no persons were detained by the SAS.
>
> [Emphasis added].

[15] Paragraph 19 of the claim pleaded a passage of the *Metro* article relating to Mr Stephenson's interview with Col M. The defence pleading has evolved slightly. In the defence filed on 30 April 2014 it read:

> 19 They admit paragraph 19 of the second amended statement of claim contains the words used in the Metro Article but say that such article was materially incorrect, including:
>
> 19.1 they deny that the person the plaintiff spoke to said the SAS was "very very involved' as the words "very very involved" do not appear in the plaintiff's handwritten notes he says he made at the time and which are dated 26 April 2010; the SAS's principal role at the CRU was to provide training and mentoring of Afghan CRU personnel and in 2010 the SAS did not detain suspected insurgents; there was no "SAS-CRU mission" as reported; SAS personnel were not present when the suicide bombers were detained nor did they carry out any such detention.
>
> [Emphasis added].

[16] Paragraph 19 was then amended in November 2014. It now reads:

> 19 They admit paragraph 19 of the second amended statement of claim contains the words used in the Metro Article but say that such article was materially incorrect, including:

19.1 they deny that the person the plaintiff spoke to said the SAS was "very very involved" as the words "very very involved" do not appear in the plaintiff's handwritten notes he say he made at the time and which are dated 26 April 2010;

19.2 the SAS's principal role at the CRU was to provide training and mentoring of Afghan CRU personnel and in 2010 the SAS did not detain suspected insurgents;

19.3 there was no "SAS-CRU mission" as reported;

19.4 SAS personnel were not present when the suicide bombers were detained nor did they carry out any such detention.

[Emphasis added].

[17] Secondly, paragraph 33 of the same pleading sets out the truth defence:

33 **BY WAY OF A FURTHER DEFENCE** (Truth of one alleged meaning) the defendants repeat paragraphs 1 to 32 of this statement of defence and say: If (which is denied) the Statement in its natural and ordinary meaning taken in its context had the meaning alleged in paragraph 30(c), then they say that such meaning is true or not materially different from the truth.

Particulars

33.1 They repeat each of the particulars in paragraphs 13.1 to 13.4 of this statement of defence.

33.2 They repeat each of the particulars in paragraphs 19.1 to 19.4 of this statement of defence.

33.3 They refer to paragraph 30 of this statement of defence.

33.4 The plaintiff failed to take adequate steps to verify what he reported and inconsequence published articles which were erroneous (as particularised above).

33.5 The plaintiff failed to take reasonable steps to verify what he published and in consequence published articles which were erroneous (as particularised above).

33.6 The plaintiff was reckless as to the accuracy of what he published and in consequence published articles which were erroneous (as particularised above).

[18] It will be noted that in paragraph 33, paragraphs 13.4 and 19.2 are repeated as particulars of truth. Paragraphs 13.4 and 19.2 of course are not simply particulars. They are sub-parts of paragraphs 13 and 19. They are therefore pleadings in their

own right. Mr Stephenson was required to traverse them in reply, and did so.[7] He denied them, and so they are facts in issue.

Procedural history

[19] The claim was filed in September 2012. Trial commenced before a jury on 8 July 2013. The jury failed to reach a verdict. It was discharged on 18 July 2013. After that rapid start, but abrupt end, things have slowed down somewhat.

[20] On 3 March 2014 a joint memorandum of counsel was filed. It provided prospectively for the filing of amended pleadings. Further, that "any additional discovery arising out of the amended pleadings" be completed on within a further one calendar month. It was agreed that discovery be in standard form in terms of r 8.7. The standard listing and exchange protocol in part 2 of schedule 9 were to apply.

[21] On 1 July 2014 the Court heard an application by the defendants to strike out paragraph 30(b) of the statement of claim.[8] The application was dismissed by MacKenzie J in a judgment delivered on 9 July 2014.

[22] In September 2014 MacKenzie J directed a directions conference take place before him under s 35 of the Defamation Act 1992.

[23] A joint memorandum of counsel filed in advance of that conference annexes correspondence on the subject of discovery. A letter from Mr Stephenson's solicitors dated 9 September 2014 is important. Paragraph 2 of that letter noted the absence of discovery by the defendants relating to the allegations in paragraph 19.1 of the defence.[9] That allegation has been denied by Mr Stephenson in his replies. It also noted non-discovery of documents relating to the allegations in paragraph 13.4 of the defence.[10]

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7 See *Ayers v LexisNexis NZ Ltd* [2012] NZHC 3055, (2012) 21 PRNZ 313 at [48]–[49].
8 See [12] above.
9 See [15] above. Paragraph 19.1 at that time embraced broadly the individual contents of paragraph 19.1 to 19.4 set out at [16] above.
10 See [14] above.

[24] The same letter sought some pleading clarification. Paragraph 32(c)(ii) of the seconded amended statement of claim alleged the defendants had placed Mr Stephenson "under surveillance and/or were the recipients of surveillance of him from third parties". The defence filed replied that Mr Stephenson "was not under NZDF surveillance". The letter sought clarification whether the defendants denied that they had been in receipt of surveillance information regarding Mr Stephenson from *third parties*.

[25] The response from the defendants' solicitors, on 17 October 2014, was not particularly illuminating. On the first matter concerning documentation relevant to paragraph 19 of the claim it stated that "no documentation exists regarding the stationing of NZSAS personnel at the CRU base". On surveillance it said:

> Contrary to your client's perception of his own significance, he does not and never has been the centre of fascination to NZDF/NZSAS that he sees himself as occupying. Hence no surveillance of him.

It is said that if Mr Stephenson had "real, substantial, credible evidence of the type of surveillance you allege" it should be drawn to the defendants' attention.

[26] The s 35 conference took place on 30 October 2014. On 11 November 2014 MacKenzie J issued a minute. The result of that minute was that it was directed that a CRU officer's evidence be taken in advance of trial in December 2015, before me. I was provisionally allocated responsibility as trial Judge. As to discovery, MacKenzie J directed:

> I consider that the best way of advancing this matter is to direct that the defendant give tailored discovery, disclosing the documents (if any) that are or have been in their control in the categories specified in paragraphs 2, 3 and 9 of the letter from the plaintiff's solicitors dated 9 September 2014. That tailored discovery will necessarily require the defendants to conduct such further investigations and searches as they may consider necessary to meet their discovery obligations, and to file an affidavit of documents listing any further discoverable documents. In the circumstances, if there are no further discoverable documents in any of those categories, the affidavit should state that fact. That affidavit will be conclusive in the usual way, unless a subsequent order for particular discovery under r 8.19 of the High Court Rules is made.

As noted earlier, paragraph 2 of the letter referenced concerned, amongst other things, the allegations set out at paragraph 19 of the defence.

[27] MacKenzie J's minute also provided that there be a new close of pleadings date to be fixed for the retrial. As a result further interlocutory steps could be taken before that new close of pleadings date. That, included the issue of interrogatories.

[28] On 19 November 2014 the defendants filed an amended statement of defence to the second amended statement of claim. In it paragraph 19 first appeared in its present form.[11]

[29] On 2 December 2014 Mr Lucie-Smith, a senior solicitor with the NZDF made an affidavit in intended compliance with MacKenzie J's discovery directions of 11 November 2014. As to paragraph 2(b) of the 9 September 2014 letter (incorporated within those directions) the affidavit states:

> There is no document between the Governments of New Zealand and Afghanistan concerning NZDF presence at the CRU base.

It might be thought that answer really does not meet the full sweep of the defendants' own pleading.

[30] Immediate focus then turned to the pre-trial taking of evidence of the CRU officer. That hearing took place before me on 11 and 12 December 2014.

[31] It is a little unclear what then happened in relation to exchanges on discovery. It may well be that not all the correspondence was exhibited in the present application. The evident deficiency of Mr Lucie-Smith's response does not seem to have been picked up. At least in the material before me.

[32] On 9 March 2015 I made consent directions that any interrogatories be administered no later than 2 April 2015, and answered by 24 April 2015. The consent directions also provided that any further interlocutory applications be filed and served no later than 8 May 2015.

[33] On 1 May 2015 Mr Stephenson's solicitors returned to the discovery fray. In a letter to the defendants' solicitors they noted that paragraph 19.2 of the current

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[11] See [16] above.

defence alleged that Mr Stephenson's *Metro* article was materially incorrect because "the SAS's principal role at the CRU is to provide training and mentoring of Afghan CRU personnel and in 2010 the SAS did not detain suspected insurgents". It noted that the same claim had been made in paragraph 19.1 of the defence dated 30 April 2014. It noted that that positive allegation was denied by Mr Stephenson. The letter went on:

> Whether the allegation is correct is accordingly an issue in dispute in the proceeding, and for the Court to determine. It is a matter of fact. The Court will be required to consider evidence regarding the actual activities of the SAS to determine whether those activities accurately fit the description given to them in the relevant pleaded allegations.

[34] The letter said that the defendants had provided no discovery in relation to this issue, other than limited discovery documents relating to the 8 April 2010 operation – involving the suicide bombers – which had been provided in a redacted form. The letter set out what Mr Stephenson regarded as some evidence that the SAS's involvement went beyond training and mentoring, extending to the detention of personnel. That included the Tiger raid on 24 December 2010.[12] The letter concluded that unless "full discovery" was given of all the documents in the defendants' control relating to operations in 2010 in which the SAS and CRU were involved, the allegation in paragraph 19.2 should be withdrawn. That suggestion might be thought to be as extravagant as Mr Lucie-Smith's response had been niggardly.

Discovery

[35] The present application seeks particular discovery of the following four categories of documents:

> (i) Unredacted copies of all documents relevant to the NZSAS/CRU operation on 8 April 2010 (including the documents annexed marked "A" to the Notices, partially redacted copies of which have been previously provided).
>
> (ii) All documents relating to the NZSAS/CRU operation on 25 April 2010 (referred to at paragraph 5(e) of the Notices).

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12 See [8] above.

(iii) All documents relating to the NZSAS operation at the premises of Tiger International in Kabul on 24 December 2010, including but not limited to the documents referred to at paragraph 11 of the First Defendant's report to Dr Wayne Mapp dated 29 April 2011.

(iv) All documents relating to any and all other operations in Afghanistan in 2010 in which:

- The SAS were providing assistance to the CRU (in any form); and/or

- The SAS had any involvement in and which resulted in the capture, detention, or control of movement of any person (whether or not the SAS contends that the relevant capture, detention or control of movement was in fact effected by non-SAS personnel.

[36] In his application, Mr Stephenson contends that there are grounds to believe that the defendants are or have been in control of documents falling within those categories that should have been discovered. He contends they are relevant because they relate to matters in dispute in the pleadings, and relevant to defences pleaded by the defendant.

[37] In opposing, the defendants contend that further discovery is not required, is burdensome, unreasonable and disproportionate, and that the application is an "eleventh hour fishing expedition":

> It is an attempt to widen the scope of this proceeding both as it stands and potentially on an unlimited basis without the plaintiff having pleaded or relied on the matter now referred to and has previously disclaimed to be an issue in the proceedings.

Submissions

[38] Mr Salmon submits that the documents are sought simply because the defendants have (since the last trial) pleaded a truth defence putting the nature of the SAS and CRU relationship in issue. No such defence was raised at the first trial, which was confined to events in early April 2010 when the CRU (and the SAS, Mr Stephenson contends) detained the suspected suicide bombers (and Mr Stephenson says he visited the CRU base). Mr Salmon submits that as long as the defendants maintain the allegations at paragraph 19.2,[13] the documents sought

[13] See [16] above.

must be relevant. Paragraph 19.2 involves a positive assertion that the Metro article mischaracterised the relationship between the SAS and the CRU. It is the premise for the truth defence. The assertion can only be tested by the provision of documents and materials "which tend to show what the SAS *in fact* did on relevant operations" – rather than general assertions by the defendants as to the nature of the relationship. Mr Salmon referred to briefs of evidence exchanged by the defendants in which defence witnesses positively assert the absence of detention of suspected insurgents by the SAS.

[39] Mr Salmon submits that there is reason to believe that some documents exist in relation to operations. In particular, redacted reports have already been provided in relation to the 8 April 2010 operation involving the suicide bombers. He submits that similar reports will surely exist in relation to other SAS operations. The discovery requested is said not to be oppressive. There is no evidence from the defendants as to why it is. The request is limited to 2010. They are likely to be easily retrievable and there has been no suggestion to the contrary in the evidence filed by the defendants. The only documents sought are ones in the possession or control of the defendants. Finally, if paragraph 19.2 is not maintained, and paragraph 19 is confined to events in April 2010, then this discovery is not needed.

[40] For the defendants, Mr Rennie maintained the position set out in his clients' notice of opposition. Adequate discovery had been given of the suicide bombers operation in April 2010. There were redactions, made by the International Security Assistance Force, the NATO-led mission with which the NZDF (including the SAS) had been deployed.[14] That was the only form in which those documents were held by the defendants. If the Court required, request could be made for removal of some or all redaction, but that would be a matter that would need to be referred to the ISAF. Relevant documents originating from NZDF had been fully discovered, save there had been redaction of some SAS officers' names. It was acknowledged that there had been detentions by NZDF troops in 2002. Detainees had been handed over to United States forces then. In 2010, however, which is what paragraph 19.2 related to, there had been no detentions by NZDF troops. There was, therefore, nothing to discover.

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[14] Herein, "ISAF".

[41] This was, said Mr Rennie, a "fishing [exercise] pure and simple". Mr Stephenson was seeking to conduct an audit to see if he could produce something to assist his case. It had previously been agreed that the scope of issues at trial would not embrace events other than the suicide bombers operation and Mr Stephenson's CRU base entry (or not) and interview (or not) with the CRU commander that same month. Now this application was brought, too late, and based on a reply which (as Mr Rennie put it) was a simple denial and did not open up the issues it now sought to litigate.

[42] All that being said, however, Mr Rennie readily acknowledged that the Crown is a litigant with particular responsibilities and duties. He readily acknowledged the need for the trial to be fair.

Discussion

[43] I am clear that some degree of discovery of documents relevant to paragraphs 13.4 and 19.2 of the defence must be given.

[44] First, this starting point must not be forgotten: the need for additional discovery arises only because of *the defendants'* own pleading, and for no other reason. It is the defendants who assert (at 13.4) that "no persons were detained by the SAS in the April 2010 suicide bombers operation. It is the defendants who assert (at 19.2) that the *Metro* article was "materially incorrect", inter alia because "in 2010 the SAS did not detain suspected insurgents". These assertions of fact the plaintiff denies. So they become facts in issue for trial. The defendants advanced thus; there is no basis to criticise the plaintiff for replying with a denial. In the circumstances, what else did they think him likely to do? And why should he not do so, and put them to proof of their own assertions? It is also the defendants who rely on these same assertions as particulars of truth in justifying the imputation (if sustained) that the plaintiff's journalism in the articles "should not be trusted". Denial, and an issue of fact, was predictable.

[45] Secondly, these factual assertions are not merely notionally in issue. They are also to be attested to by witnesses to be called by the defendants. Witness statements have been exchanged. Mr Salmon read some sections out to me. Positive

denials of any acts of detention by SAS troops are made. Of course these witnesses may be cross-examined. But in doing so, counsel should be entitled to the normal benefit of relevant discovery, so witnesses' testimony may be tested against the written record. That is an essential component of a fair trial in the common law system. The discovery record referable is no burned blanket. Parties are entitled to due discovery of truly relevant material unless a recognised exception exists.

[46] Thirdly, given the first two points, I can and do put to one side the defendants' claim that this application is a fishing expedition. It is not. To the contrary, it is completion of an inquiry made by Mr Stephenson's solicitors in paragraph 2 of their letter of 9 September 2014, which was then the subject of a direction by MacKenzie J on 11 November 2014.[15] Whether the SAS had detained suspected insurgents or other persons in 2010, put in issue by paragraph 19 of the defence, was the subject of MacKenzie J's direction. It was not answered by the affidavit of documents merely stating that there were no documents concerning NZDF presence at the CRU base.[16] The fact in issue was none so narrow.

[47] Fourthly, I reject the criticism of Mr Stephenson for not having raised this matter earlier. I accept that it is unfortunate that it was not pursued earlier. As a result it is possible that the trial on 20 July will no longer be able to proceed. However it was the defendants who elected to advance these factual assertions. Even apart from MacKenzie J's direction of 11 November 2014, which the defendants opted to answer perfunctorily, they had a duty of continuing discovery under r 8.18. No meaningful criticism can be made of the plaintiff for not having pursued this point earlier when the default is the defendants'.

[48] Fifthly, as both parties submitted, the general principles relevant to orders for particular discovery under r 8.19 were summarised in my judgment in *Robert v Foxton Equities Ltd*:[17]

> (a) A document should be discovered if it is relevant to matters which will actually be in issue before the Court.

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15 See at [23] and [26].
16 See at [29].
17 *Robert v Foxton Equities Ltd* [2014] NZHC 726 at [8].

(b) Relevance is determined by the pleadings.

(c) On an application for particular discovery under r 8.19, there must be prima facie evidence that the document exists and is in the party's control (although the applicant need not prove that the document actually exists).

(d) The applicant need no longer establish "necessity" for an order (in contrast to former r 300). However, the supposed regulatory relaxation may not be substantial: the order will still only be made in relation to documents that "should have been discovered".

(e) The Court retains an overriding discretion as to whether to make an order.

[49] Applying those five principles in this case, then:

(a) Principle (a) is clearly met to some extent, and the only questions will be scope and existence. The defendants have accepted already the relevance of documents relating to the 8 April 2010 operation involving the suicide bombers.

(b) No comment is needed in relation to principle (b).

(c) As to principle (c), I accept Mr Salmon's submission that there is reason to believe that relevant documents will exist in relation to SAS operations in Afghanistan in 2010. It is inconceivable in this day and age, involving greater and more immediate public scrutiny of military operations, that situation reports and the like, concerning interactions between NZDF troops and foreign civilians, would not exist. Nor is it seriously suggested by the defendants that they do not. And nor could it be. Plainly such records do exist concerning the 8 April 2010 operation involving the suicide bombers. Redacted copies have been produced. It may be these records in total show no detentions by SAS members, as the defendants assert to be the case. So be it. They are no less relevant for the absence of demonstrated detentions, than if instead they establish they have occurred.

(d) I will revert to principle (d) when I review the scope of discovery that should be given.

(e) As to principle (e), while the Court retains an overriding discretion whether to make an order, I am satisfied that in these circumstances, an order should be made. In doing so I am merely reinforcing the order made by MacKenzie J in November 2014, and requiring compliance with it. I do not regard the imminence of trial as justifying variance from normal requirements. In a choice between an unfair trial now and a fair trial later if need be, my choice is clear.

[50] Fifthly, and finally, I consider the scope of discovery required. I do not here deal with the question of whether discovery should be of unredacted copies. That is an inspection issue. The defendants may offer proposals for protection of confidential material (including for security reasons) in their supplementary affidavit of documents under rule 8.15(2)(f). Such proposals conceivably may involve redaction, limited inspection of redacted or unredacted copies, or potentially an assessment by independent counsel or the Court. It is premature to anticipate such matters now.

[51] The four categories for which discovery is sought can be collapsed into a single group. I am satisfied that there is justification for making an order for particular discovery of the following:

> Any documents in the possession or control of the defendants relating to operations in Afghanistan in 2010 in which the SAS was involved and where suspected insurgents were captured or detained (whether by the SAS or otherwise), which refer to such capture or detention.
>
> For the purposes of this order "detained" means held in custody or confinement or prevented from leaving the scene pending further processing.

In my view such documents are properly discoverable after the defendants' affirmative pleadings at paragraphs 13.4 and 19.2 of their current defence.

Conclusion

[52] An order for particular discovery is made in terms set out in [51].

[53] This order is however suspended for seven days. Parties are to file memoranda by 4 pm on Thursday, 2 July 2015 as to whether they wish this order to

be uplifted. I do this at Mr Rennie's request. As I understood the submissions made to me:

(a) depending on the outcome in this judgment, the defendants may wish to amend their pleadings; and

(b) if the defendants' pleadings are amended to confine paragraph 19 to events in April 2010, and abandon paragraph 19.2 – so that the case reverts to the same factual scope as at the first trial – then Mr Stephenson would not pursue this additional discovery. He would however wish to be heard further on redactions made to the April 2010 discovery.

[54] A telephone conference will be convened on Friday, 3 July 2015.

Interrogatories

[55] The interrogatories said by the plaintiff to have been answered insufficiently by the defendants were as follows:[18]

> **5 (b) Provide specific and detailed responses on:**
>
> **(i) Whether the New Zealand Defence Force has at any point undertaken, participated in, commissioned or otherwise requested (whether by any other New Zealand agency) any form of surveillance of the plaintiff.**
>
> **Answer 5(b)(i):**
>
> No.
>
> …
>
> **5 (b)(iii) Whether the New Zealand Defence Force or any of its personnel or agents has, at any point, been aware of, viewed, given access to, briefed on, received and/or retained information and/or documentation resulting from any form of surveillance, of Mr Stephenson by any entity or person (whether the person responsible for the relevant surveillance being carried out or not), whether such surveillance was requested, instigated and/or commissioned by the New Zealand Defence Force (or any**

[18] The answers are taken from those given by the second defendant, but adopted by Lt Gen Jones.

other New Zealand entity) or otherwise, or anyone employed by or associated with the New Zealand Defence Force or other New Zealand entity.

Answer 5(b)(iii):

No.

…

NZSAS/CRU OPERATION ON 8 APRIL 2010 (REFERRED TO AT PARAGRAPHS 13.3 AND 13.4 OF THE AMENDED STATEMENT OF DEFENCE DATED 19 NOVEMBER 2014).

5(d) Provide details of:

(iv) The names of the detainees.

Answer 5(d)(iv):

The names of persons detained by the CRU are not relevant to matters in issue in this proceeding and the second defendant objects to the interrogatory under HCR 8.40 accordingly.

…

NZSAS/CRU OPERATION ON 25 APRIL 2010

5(e) In relation to the operation which took place on or 25 April 2010 and which involved the CRU and NZSAS and which is referred to as "Op Cargill" in Major G's diary for the dates of 24, 25 and 26 April 2010 (copies annexed marked "B")

(i) The nature of the operation.

Answer 5(e)(i):

The operation was to serve a judicially authorised Government of the Islamic Republic of Afghanistan (GIRoA) Ministry of Interior arrest warrant.

…

(v) The result or outcome of the operation.

Answer 5(e)(v):

The operation was successful.

OTHER NZSAS/CRU OEPRATIONS IN 2010

5(f) In relation to paragraph 19.2 of the amended statement of defence dated 19 November 2014, provide the following details of all CRU operations which took place in 2010 and in which the NZSAS were involved or provided any form of assistance to the CRU or other relevant Afghan organisation:

(i) The nature of all such operations.

(ii) The number of NZSAS or other New Zealand Defence Force personnel involved in and/or assisting the CRU or other Afghan organisation at each such operation.

(iii) The rank and position of each NZSAS or other New Zealand Defence Force personnel involved in each such operation.

(iv) The nature and type of assistance provided by each of those NZSAS or other New Zealand Defence Force personnel to the CRU or other relevant Afghan organisation at each such operation.

(v) The result or outcome of each such operation including but not limited the number of persons detained, if any (whether by the CRU, the NZSAS, or jointly), and the place to which any such detainee(s) was/were transferred.

Answer 5(f)

Paragraph 19.2 of the second amended statement of defence states:

"the SAS's principal role at the CRU was to provide training and mentoring of Afghan CRU personnel and in 2010 the SAS did not detain suspected insurgents."

No further answer than that pleading is required for the purpose of this proceeding and objection is taken on each of the grounds in HCR 8.7(1) accordingly.

[56] Formally, I note no criticism is made of answer 5(e)(i). The answer is included above so that answer 5(e)(v), which is complained about, is in context.

[57] I can be brief.

Answer 5(b) – "surveillance"

[58] Relevance is not in issue. The defendants have answered the interrogatories after a fashion. Mr Salmon says the answers are "inaccurate or incomplete".

[59] There is little a Court will do ahead of trial in relation to an interrogatory answer asserted to be inaccurate, in the sense of being untruthful.[19] Sufficiency, as opposed to veracity, will be examined pre-trial. Veracity is normally a matter for

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[19] *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1 (CA) at 21; *Crusader Meats New Zealand Ltd v New Zealand Meat Board* HC Wellington CIV 2004-485-2147, 13 May 2008 at [33].

cross-examination at trial. Although there is provision for ordering oral examination ahead of trial in an appropriate case, it is a rare practice.[20] It is significant that rule 8.43 provides for correction of an incorrect answer by a deponent. But the rule does not invite hostile application.

[60] A perfunctory answer may, on the other hand, be insufficient for the purposes of rule 8.42.[21] The answers to interrogatory 5(b) may or may not be perfunctory. If there has been no surveillance of Mr Stephenson then the answers quite properly are "no", and are not perfunctory.

[61] It all rather depends on what "surveillance" means. The plaintiff has chosen to ask an interrogatory open to differing shades of meaning. Mr Salmon says "surveillance" means observation, communication interception and any form of related data monitoring or capture including meta data. I agree that that is the most appropriate meaning of the expression, but it would have been helpful if the interrogatory had made this clear in the first place.

[62] All I am prepared to do is this. The defendants are directed to refer the meaning adopted in the preceding paragraph to the deponents of the answers (Lt Gen Jones and Cdre Smith). If in light of the definition given their answers to interrogatory 5(b) are incorrect, they are to be corrected in accordance with rule 8.43, by 4 pm on Thursday 3 July 2015. If they *may* be incorrect, but cannot be corrected in time, the potential need to do so must be advised instead, by the same date and time.

Answer 5(d)(iv) – names of detainees

[63] The defendants now acknowledge the relevance of this information to trial. Mr Stephenson dictated a note of detainee names after his visit to the CRU base. The information sought may assist corroborate his account of his visit. The name of one detainee was identified by Mr Rennie in the December hearing.

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[20] Rule 8.42(b); *Litchfield v Jones* (1884) 54 LJ Ch 207 (Ch).

[21] Beck (ed) *McGechan on Procedure* (online looseleaf ed, Thomson Reuters, Wellington) at [HR8.42.02]; *Whitehouse v Wellington City Council* HC Wellington CIV-2004-485-1415, 16 December 2005.

[64] The defendants are directed to answer this interrogatory, so far as they can, by 4 pm on Thursday 3 July 2015.

Answer 5(e)(v) – 25 April 2010 operation.

[65] Mr Salmon complains this answer is evasive and inadequate, and tells the plaintiff nothing.

[66] I disagree. The scope of the operation is set out in answer 5(e)(i), which I included in [55] above. No complaint is made about that answer. Given the answer to the first question, no complaint may be made about the answer to the second.

Answer 5(f) – SAS/CRU operations in 2010

[67] The scatter-gun answer to this interrogatory is plainly unsatisfactory. The reference in the answer to rule 8.7(1) is curious. If reference was intended instead to rule 8.40(1), then it seems unlikely that each and every basis for objection there is engaged by the interrogatory.

[68] But one basis for objection plainly is engaged. The unsatisfactory nature of the answer cannot be allowed to obscure the fact that the interrogatory is grossly oppressive. It is unreasonably burdensome to a remarkable degree. It would in effect require the defendants to commit to paper a short (or not so short) history of the SAS in Afghanistan in the year 2010. It goes well beyond what might be justified as a result of the defendants' pleadings in paragraphs 13 and 19 of the defence.

[69] An interrogatory confined in the manner of the discovery order made earlier might have served. Indeed that order may be expected to provide the same essential information as a permissible interrogatory. Interrogatories are essentially party-autonomous instruments. Whereas a Court will modify an over-ambitious discovery request, it will not readily engage in redrafting deficient or oppressive

interrogatories.[22] The normal response is simply to uphold the objection. I uphold the objection to interrogatory 5(b).

Result

[70] As to discovery, an order for particular discovery is made in terms set out in [51] above, subject however to the provision made in [53].

[71] As to interrogatories, the defendants are directed to:

(a) reconsider the answer to interrogatory 5(b) in accordance with [62] above; and

(b) answer interrogatory 5(d)(iv), so far as they can, by 4 pm on Thursday 3 July 2015.

[72] A telephone conference is to be convened by the registrar on Friday, 3 July 2015, at 10.00 am, to consider the responses given and the trial fixture still scheduled to commence on Monday, 20 July.

[73] Costs are reserved.

Stephen Kós J

Solicitors:
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Crown Law, Wellington for Defendants

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22 *Tak & Co Inc v AEL Corporation Ltd* (1994) 7 PRNZ 432 (HC) at 434.