IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-1845
[2016] NZHC 1453

UNDER	the Defamation Act 1992
BETWEEN	JORDAN HENRY WILLIAMS Plaintiff
AND	COLIN GRAEME CRAIG First Defendant
AND	NATHANIEL JOHN HESLOP, KEVIN STITT, ANGELA MARIA STORR Second Defendants

Hearing: 24 May 2016

Appearances: PA McKnight and A Romanos for plaintiff
SJ Mills QC and J McKay for first defendant
H Wilson and L Clark for Ms Rachel MacGregor

Judgment: 29 June 2016

JUDGMENT OF TOOGOOD J
[Non-party Discovery]

This judgment was delivered by me on 29 June 2016 at 4:30 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Introduction

[1] In this proceeding the plaintiff, Mr Jordan Williams, sues the former leader of the Conservative Party of New Zealand, Mr Colin Craig, and other officers of the Party, over allegedly defamatory statements made by Mr Craig in July 2015 following Mr Craig's resignation from the Party leadership. The statements are alleged to have been made by Mr Craig at a media conference and in a leaflet distributed to members of the news media and published on the internet. It is alleged also that between 4 and 8 August 2015 or thereabouts, the leaflet was distributed nationwide to 1,627,402 letterboxes and other mail services using a commercial distribution organisation.

[2] The remarks attributed to Mr Craig in his media conference and the leaflet concerned, in part, allegations of sexual harassment made against Mr Craig by his former press secretary, Ms Rachel MacGregor.

[3] Ms MacGregor is not a party to this case. Mr Craig sought non-party discovery by her of documents in her possession or control which are said to be relevant to the proceeding. All issues about the disclosure of documents by Ms MacGregor have now been resolved, except those concerning a group of handwritten notes made by Ms MacGregor on topics related to her allegations of sexual harassment.

The nature of the documents – confidentiality

[4] On 18 September 2014, the day she resigned from her employment as Mr Craig's press secretary, Ms MacGregor made a claim to the Human Rights Commission, under s 62 of the Human Rights Act 1993 (the HRA), alleging that she had been sexually harassed by Mr Craig. The disputed documents are handwritten notes prepared by Ms MacGregor containing references to matters related to the sexual harassment claim. They form part of a so-called "dossier" of documents which was provided to Mr Williams who, at relevant times, advised Ms MacGregor on matters relating to her resignation and the allegation of sexual harassment. Mr Williams showed the dossier to other members of the Conservative Party (but not

Mr Craig) at a relevant time or relevant times, and it was subsequently returned to Ms MacGregor according to an agreement reached during a meeting between Mr Williams, Ms MacGregor and her solicitors.

[5] Copies of the documents were given to me on a strictly confidential basis so that I could consider them in connection with an application by Ms MacGregor for orders restricting inspection of the documents on the grounds of confidentiality. For convenience I refer to the disputed documents collectively as "document A6", the identifier given to the documents by Ms MacGregor's solicitors.

[6] In a minute dated 12 May 2016, I addressed claims by Ms MacGregor seeking orders protecting the confidentiality of all documents in the dossier, including document A6, by restricting the right of inspection to counsel and solicitors for Mr Williams and Mr Craig; to Mr Williams and Mr Craig while in the presence of a restricted category of legal practitioners; and to other persons under the supervision of senior counsel for Mr Williams and Mr Craig. All persons inspecting the documents are bound by confidentiality obligations and I have ordered that access to the Court file in the proceeding shall be limited to legal practitioners connected with the case, except as otherwise approved by a Judge of the Court. If Ms MacGregor is directed to discover the document A6, it will be subject to the same confidentiality orders.

Disputed documents are relevant to this proceeding

[7] Ms MacGregor initially argued that she should not have to disclose the notes because they are not relevant to this proceeding. It is unnecessary to describe the pleadings in the case in order to establish the relevance of the disputed documents: both Mr Williams and Mr Craig, through counsel, have accepted that the documents are or may be relevant to the matters at issue in the defamation proceeding. Having viewed the documents, I agree. I consider the application on that basis.

The claim to privilege of preparatory materials for proceedings

[8] Ms MacGregor does not claim that that the notes are protected by legal adviser privilege under s 54 of the Evidence Act 2006. Instead, she argues that the notes were prepared for the dominant purpose of enabling her legal adviser or advisers to conduct, or advise regarding, her claim under s 62 of the HRA. She says, therefore, that they are protected from disclosure by the privilege for preparatory materials for proceedings established by s 56 of the Evidence Act.

[9] So far as is relevant, s 56 provides:

> **56 Privilege for preparatory materials for proceedings**
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> (1) Subsection (2) applies to a communication or information only if the communication or information is made, received, compiled, or prepared for **the dominant purpose** of preparing for a proceeding or an apprehended proceeding (the proceeding).
>
> (2) A person (the party) who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of—
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> …
>
> (c) information compiled or prepared by the party or the party's legal adviser ….
>
> (Emphasis added)

[10] In most cases where disclosure is opposed on the grounds of the privilege for preparatory materials under s 56, the sole issue for determination is the dominant purpose for which the material is prepared. That is the key issue here, but there are two unusual aspects to Ms MacGregor's assertion about the notes, either one of which may render the claim to privilege unavailable, whatever her purpose in preparing them.

[11] First, Mr Craig argues that, if the dominant purpose for the preparation of the handwritten notes was "the preparation of [her] claim to the Human Rights Commission",[1] the Human Rights Commission is not a court within the meaning of the Evidence Act and it does not conduct proceedings in respect of which the privilege applies. Part of Ms MacGregor's response to that argument is that she

[1] Affidavit of Rachel Margaret Joy MacGregor dated 6 May 2016 at paragraph 5(a)(ii).

believed that it was probable she would need to file a proceeding in the Human Rights Review Tribunal in order to resolve her sexual harassment claim satisfactorily. The Tribunal is deemed to be a court for the purposes of the Evidence Act.[2] The essence of Ms MacGregor's claim to privilege, therefore, is that her claim to the Commission under the HRA was a necessary step in the process of making an inevitable claim to the Tribunal under that Act. The inevitability is said to have come from Ms MacGregor's belief that, because of Mr Craig's personality, the dispute resolution procedures conducted by the Commission would not resolve the sexual harassment claim to her satisfaction. Thus, she argues, document A6 was prepared for the dominant purpose of an apprehended proceeding conducted by the Tribunal (that is, a "court") and it is accordingly privileged under s 56.

[12] A second issue arises, however. If the s 56 privilege was available in respect of the documents for the purposes of a claim in the Human Rights Commission and before the Tribunal, it is at least arguable that the privilege cannot be maintained in respect of proceedings in this Court in any circumstances or, at least, now that the complaint to the Commission has been settled.[3]

[13] I will return to those matters if required and now address the principal question of the dominant purpose for the preparation of the notes.

Were the notes prepared for a qualifying "dominant purpose"?

The evidence

[14] I have examined the notes comprising document A6. They are six pages of what might best be described as notes or jottings recording incidents in which, or occasions on which, Mr Craig might be said to have behaved in a manner amounting to sexual harassment. None of the notes is dated.

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2 Human Rights Act 1993, s 106(4).

3 *Blank v Canada (Minister of Justice)* 2006 SCC 39, [2006] 2 SCR 319, discussed in *Houghton v Saunders* [2013] NZHC 1824 (with approval) and in *NZH Ltd v Ramspecs Ltd* [2015] NZHC 2396.

[15] In her affidavit of 6 May 2016 in support of her application for confidentiality orders, Ms MacGregor said that from August 2011 until 18 September 2014 she worked under contract to Mr Craig as his Press Secretary. She resigned on 18 September 2014 for two reasons, namely:

(a) she had grown increasingly concerned by what she considered to be inappropriate behaviour by Mr Craig towards her; and

(b) she was in a dispute with Mr Craig over unpaid invoices which, I presume, represented fees payable for her services.

[16] Ms MacGregor said that on the day of her resignation she filed a complaint of sexual harassment against Mr Craig using an electronic form on the website of the Human Rights Commission.

[17] Ms MacGregor did not claim confidentiality with regard to the notes. She refers to them only in her affidavit of documents as "hand-written notes made by me in the preparation of my claim to the Human Rights Commission". In her affidavit in support of the application for confidentiality orders, Ms McGregor said the following about her claim to the Commission:

> 11 During November and December 2014 I spoke to my lawyer, Geoff Bevan, about my claim to the Human Rights Commission and about my financial dispute with Mr Craig. During this time I worked on preparing a detailed claim of sexual harassment against Mr Craig, including organising a chronology of events and collating documents that would assist my case.
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> 12 From the time that I made the complaint against Mr Craig I understood that I may have to appear in proceedings before the Human Rights Review Tribunal (the **Tribunal**). I did not want my disputes with Mr Craig to be played out in a public hearing; my preference was for a mediated settlement. But I had worked for Mr Craig long enough, and I knew him well enough, to know that he would contest my claim vigorously. From the outset, my lawyer prepared me for the likelihood that my claim would go before the Tribunal.

[18] According to a letter from Ms MacGregor's solicitors to the solicitors for Mr Craig, Ms MacGregor's best recollection is that the notes were written between November 2014 and February 2015. She cannot recall whether they were written in

a single or multiple sittings. It is apparent from an emailed letter sent by Ms MacGregor to Mr Craig on 29 January 2015, however, that Ms MacGregor was not immediately committed to pursuing her sexual harassment claim when she lodged it and that it was only after "thinking carefully and taking advice … and after much reflection" that she decided in late January 2015 to take the claim forward. Ms MacGregor's email of 29 January to Mr Craig was directed primarily at a request for payment of her fees for services rendered to Mr Craig between June and September 2014.

Discussion

[19] It is important to recall that Ms MacGregor does not claim that document A6 represents a confidential communication with her legal adviser which should be protected from disclosure for all purposes under s 54 of the Act. It is also important to bear in mind that litigation in New Zealand is conducted in an environment in which the procedural rules require an open exchange of relevant information between the parties, as a matter of public policy. In order for justice to be done, a party to litigation is entitled to access to all relevant material, except in limited circumstances where other policy considerations apply and a claim to privilege may be maintained. Since the Court of Appeal decided the *Guardian Royal Exchange Assurance* case in 1985,[4] it has been clear in New Zealand that a dominant purpose test should be applied where a third party seeks to withhold material prepared for consideration by a solicitor for the purposes of apprehended litigation. Since 2006, the test has been expressed in s 56. It is to be applied "with some rigour."[5]

[20] Ms MacGregor has said only that the handwritten notes in document A6 were prepared "in preparation of her claim to the Human Rights Commission". But she did not commit herself to pursuing the claim until January 2015, and it appears likely from the sworn answers to interrogatories filed by Mr Williams that the notes were included in the dossier of material when Ms MacGregor gave it to him at a meeting on 19 November 2014. I hold that view because, on 26 November 2014, Ms MacGregor's solicitor, Mr Bevan, had a conversation with Mr Williams about

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4 *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 (CA).
5 *Beckham v R* [2015] NZSC 98 at [84].

preserving the confidentiality of the information and the documents Ms MacGregor had given him at their 19 November meeting. There is no evidence that Mr Williams received any other documents from her prior to returning the dossier to her solicitors in June 2015.

[21] At the time of the 19 November meeting, Ms MacGregor was uncertain what she should do about Mr Craig's treatment of her. Mr Williams said in his answers to interrogatories that Ms MacGregor was "was considering, in particular, the merits of telling the Conservative Party's board [about the sexual harassment], with a view to ask them to help her recover the money she was owed from Mr Craig."

[22] In the absence of evidence from Ms MacGregor stating when the notes were prepared and why, I am unable to infer on the balance of probabilities what actual purpose or purposes she had in making them. I am much less able to conclude that the dominant purpose was to communicate that information to her legal advisers and then to the Human Rights Commission and the Tribunal. It is not enough that Ms MacGregor may have had the possibility of pursuing her claim before the Commission in the back of her mind, or that she understood she may have had to issue a proceeding in the Human Rights Review Tribunal to resolve her claim. To meet the dominant purpose test, Ms MacGregor is required to satisfy the Court that she apprehended that a qualifying proceeding in a court was probably going to occur.[6] The proceeding would have had to be a real likelihood, rather than a mere possibility.[7]

[23] It follows, therefore, that Ms MacGregor's claim to privilege under s 56 of the Evidence in respect of document A6 must fail without any need to consider the ancillary issues.

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6 *Commerce Commission v Caltex New Zealand Ltd* HC Auckland CL33/97, 10 December 1998 at 3, *NZX Ltd v Ralec Commodities Pty Ltd* [2015] NZHC 241 at [85].

7 *Pernod Ricard New Zealand Ltd v Lion - Beer, Spirits and Wine (NZ) Ltd* [2012] NZHC 2801 at [30], *Financial Markets Authority v Hotchin* [2014] NZHC 2732 at [46] and *NZX Ltd v Ralec Commodities Pty Ltd,* above n 7, at [85].

Orders

[24] In the circumstances, I order that:

(a) the notes comprising document A6 must be disclosed by Ms MacGregor to Mr Williams, Mr Craig and the second defendants for the limited purpose of enabling them to prepare, respectively, their claims and defences in this proceeding; and

(b) the confidentiality orders made in my telephone conference minute of 12 May 2016 (No. 13) shall apply also to document A6.

[25] I reserve questions of costs for the exchange of memoranda. Any party wishing to apply shall file and serve a memorandum as to costs on a Category 2B basis by 4:00 pm on 22 July 2016. Any memorandum in reply shall be filed and served by 4:00 pm on 19 August 2016. Costs shall be determined on the papers.

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Toogood J