

**IN THE DISTRICT COURT
AT WESTPORT**

**I TE KŌTI-Ā-ROHE
KI KAWATIRI**

**CIV-2022-086-000007
[2023] NZDC 6058**

BETWEEN

FRANCIS THOMAS DOOLEY
Plaintiff

AND

JAMIE CLEINE
Defendant

Appearances: W Palmer for the Plaintiff
S Macky for the Defendant

Judgment: 31 March 2023
(On the papers)

**RULING OF JUDGE M J CALLAGHAN
[RE Application for non-party discovery]**

Introduction

[1] The plaintiff has made an application for orders to be made in accordance rule 8.21 of the District Court Rules 2014, which relates to non-party discovery.

Background

[2] The plaintiff's claim is under the Defamation Act 1992 and arises from an allegation that he was physically threatening at a meeting hosted by the West Coast Regional Council ("the WCRC") on 21 February 2022.

[3] It is accepted the defendant wrote the plaintiff a letter outlining the plaintiff's behaviour at the meeting which was copied to the Chief Executives of the WCRC and the Buller District Council. The letter was subsequently released to the media,

including the Greymouth Star newspaper. It is also accepted that the defendant made statements to the Westport News about the plaintiff's behaviour at the meeting.

[4] On 7 March 2022, following correspondence with the Chief Executive of the WCRC, Heather Mabin, the plaintiff became aware that a Health & Safety incident report ("Report") was filed within the WCRC. The plaintiff asked to review the Report, but Ms Mabin declined his request on the basis that such reports are confidential.

[5] Counsel for the plaintiff wrote to Ms Mabin on 20 May 2022 and requested, pursuant to the Privacy Act 2020, that the WCRC make available a copy of the Report and any correspondence relating to the incident at the 21 February 2022 meeting. Ms Mabin replied on 20 June 2022, attaching five items of external correspondence but otherwise refusing the request in respect of the Report and four items of internal correspondence that she identified ("the Correspondence") – citing ss 53(b)(i) and 53(c)(i) of the Privacy Act.

[6] Counsel made a request to other staff members of the WCRC on 13 July for the Report and the Correspondence. In that letter, counsel outlined their views as to the application of the sections cited by Ms Mabin. Ultimately, the WCRC did not change its position following this letter and Ms Mabin advised counsel as such on 8 August 2022.

The law

[7] Non-party discovery in civil proceedings is provided for by s 106 of the District Court Act 2016

106 Discovery against non-party after proceeding commenced

- (1) This section applies if it appears to the court, at any stage of a proceeding and in such circumstances as may be prescribed, that a document or class of documents may be or may have been in the possession, custody, or power of a person (C) who is not a party to the proceeding.
- (2) The court may order C—
 - (a) to disclose to the court and to any other prescribed person whether the document or documents are in C's possession, custody, or power; and

- (b) if a document has been but is no longer in C's possession, custody, or power, to disclose to the court and to any other prescribed person when C parted with it and what has become of it; and
- (c) to produce such of those documents as are in C's possession, custody, or power to the court or to any other prescribed person.

[8] The procedure is prescribed by r 8.21 of the District Court Rules:

8.21 Order for particular discovery against non-party after proceeding commenced

- (1) This rule applies if it appears to a Judge that a person who is not a party to a proceeding may be or may have been in the control of 1 or more documents or a group of documents that the person would have had to discover if the person were a party to the proceeding.
- (2) The Judge may, on application, 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 the documents 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 what has become of them; and
 - (b) to serve the affidavit on a party or parties specified in the order; and
 - (c) if the documents are in the control of the person, to make those documents available for inspection, in accordance with rule 8.27, to the party or parties specified in the order.
- (3) An application for an order under subclause (2) must be made on notice to the person and to every other party who has filed an address for service.

[9] The Court's power to make a non-party discovery order is discretionary.¹

[10] In *Mao v Mao*, Smith AJ summarised the principles identified by Kós J in *Vector Gas Contracts Ltd v Contact Energy Ltd*:²

- (1) Under r 8.21 the Court's role is to determine whether the material would be discoverable by the non-party if they were in fact the party to the proceeding. The test is simply the relevant discovery test applicable to a party, based primarily on the adverse documents regime. Excursions on trains of enquiry should be rare where non-parties are being compelled to embark.

¹ *Vector Gas Contracts Ltd v Contact Energy Ltd* [2014] NZHC 3171, [2015] 2 NZLR 670.

² *Mao v Mao* [2020] NZHC 1292 at [32], citing *Vector Gas Contracts Ltd*, above n 1, at [58]-[59].

- (2) The approach taken by the Court should be broadly consistent with that taken to the issue of subpoenas to produce documents at trial.
- (3) A non-party discovery order will only be made if it is necessary, in that other sources of evidence are unlikely to be sufficient because they are materially incomplete or unreliable and also that the documents sought may make a real difference and are not merely marginal.

Orders sought

[11] While the request to the WCRC on 13 July 2022 was specific in nature, the plaintiff seeks an order that WCRC discover all documents that WCRC may be or may have been in control of the WCRC would have had to discover if WCRC were a party to the proceeding, that WCRC has not already provided to the plaintiff, including the “Report” and the “Correspondence”.

[12] The scope of r 8.21 and s 106 appears to be limited to specific documents. References are made to “the documents” in r 8.21 and “a document or class of documents” in s 106. A judge has to be satisfied that documents are in control of a non-party, and without those documents being identified that criteria cannot be met. For that reason, I consider the scope of the order sought is too wide. Any order will be limited to the “Report” and the “Correspondence”.

[13] The plaintiff suggests the documents be provided on an informal basis, foregoing the need for an affidavit to be provided pursuant to r 8.21(2)(a), unless any issues arise with informal discovery.

[14] The plaintiff is willing to pay the fair and reasonable costs of the WCRC in complying the discovery order. Such an order can be made pursuant to r 8.22(3):

If an order is made under rule 8.20(2) or 8.21(2), the Judge may, if the Judge thinks it just, order the applicant to pay to the person from whom discovery is sought the whole or part of that person's expenses (including solicitor and client costs) incurred in relation to the application and in complying with any order made on the application.

[15] The defendant does not oppose the application.

[16] WCRC has been served with the application, as required.³

Discussion

[17] Only relevant documents must be discovered, and this is to be assessed having regard to the pleaded claim.⁴

[18] Counsel for the plaintiff submits that the documents are relevant to the issues in the proceeding, which will focus on what occurred at the 21 February 2022 meeting.

[19] I have reviewed the pleadings. It is clear that one of the issues in the proceeding will be whether the defendant's accounts of the plaintiff's behaviour at the meeting in his letter and in his statement are true. The documents sought from the WCRC are likely to be relevant to that issue. They may provide perspectives from other persons who were at the meeting or show what the defendant's account of the meeting was internally. Both would go to the defendant's credibility which will be a relevant consideration when it comes to determining whether his or the plaintiff's version of the truth is correct.

[20] Counsel for the plaintiff submits that the documents would have had to be discovered by WCRC if it were a party to the proceeding.

[21] If WCRC were a party to the proceeding, and a broad order for standard discovery was made, it would need to disclose:⁵

- (a) documents on which it relies; and
- (b) documents that adversely its own case; and
- (c) documents that adversely affect another party's case; and
- (d) documents that support its case.

[22] If this claim was a dispute between the plaintiff and the WCRC about what happened at the 21 February 2022 meeting, the Report and the Correspondence would fall into these categories of documents.

³ *Deliu v Auckland Standards Committee I* [2015] NZHC 2199 at [29].

⁴ *Westpac New Zealand Ltd v Adams* [2013] NZHC 3113.

⁵ District Court Rules 2014, r 8.7.

[23] Counsel notes that the order is necessary as the WCRC has refused to provide the documents. I agree.

[24] I am satisfied that the documents are in the control of the WCRC as confirmed by Ms Mabin.

Privacy and confidentiality

[25] This would not normally be a relevant consideration for discovery, however in non-party disclosure cases it can be relevant in terms of the judge's discretion. Non-party disclosure orders can be made in the face of privacy concerns where the discovery is necessary.⁶ I have found that the discovery is necessary and consider that any privacy concerns can be alleviated by the usual controls imposed by r 8.30(4) of the District Court Rules:

A party who obtains a document by way of inspection or who makes a copy of a document under this rule—

- (a) may use that document or copy only for the purposes of the proceeding; and
- (b) except for the purposes of the proceeding, must not make it available to any other person (unless it has been read out in open court).

Orders

[26] I make an order pursuant to r 8.21(2)(c) that the Westland Regional Council make available the Health and Safety Report referred to in correspondence with the plaintiff on 7 March 2022 as well as any internal correspondence addressing the meeting of 21 February 2022, including the four items of correspondence identified in the letter dated 20 June 2022.

[27] The documents should be made available via informal discovery as proposed at paragraph 11 of the memorandum of counsel for the plaintiff dated 22 December 2022.

⁶ *R and L Valks Ltd v Bank of New Zealand Officer's Provident Association* HC Wellington CP30/94, 8 November 1995.

[28] The plaintiff is to pay WCRC's fair and reasonable costs of compliance with the discovery order.

Judge M J Callaghan
District Court Judge