IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV 2008-488-000379

BETWEEN	L JONES Plaintiff
AND	M G J VAN MELLAERTS Defendant

Hearing: 4 June 2009

Appearances: P A Fuscic for Plaintiff
J W Watson for Defendant

Judgment: 17 June 2009

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 17 June 2009 at 2 pm,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date…….

Solicitors/Counsel: Hammonds, PO Box 16, Dargaville
McVeagh Fleming, PO Box 4099, Auckland
J Watson, Barrister, PO Box 502, Whangarei

[1] The plaintiff applies for orders requiring the defendant to answer interrogatories and for further and better discovery. Initially the plaintiff served a notice on the defendant listing in excess of 88 interrogatories to be answered. The defendant then applied for an order limiting the number of interrogatories on the grounds that the request was oppressive and placed an unreasonable burden on the defendant. Further, some of the interrogatories were objectionable on the grounds that they related to matters of privilege, had as their sole object the ascertainment of names of witnesses, or effectively sought further discovery.

[2] When the defendant's application came before me for hearing on 28 April 2008, some of the interrogatories had been answered by the defendant and some had been withdrawn by the plaintiff. As a result, some 25 interrogatories remained unanswered. A significant number of the outstanding interrogatories sought details of specific documents that the plaintiff believed were in the defendant's possession but which had not been discovered by the defendant. The defendant objected to answering those interrogatories relying on the commentary in *McGechan on Procedure* at paragaraph HR 8.1.11(4), p 908 to the effect that interrogatories asking whether a document is in the possession of a party to a proceeding are unacceptable. For reasons more particularly set forth in my judgment delivered on 24 November 2008, I concluded that in the circumstances of this case interrogatories seeking details of specific documents in the possession of the defendant were not objectionable and had to be answered.

[3] The plaintiff had not supplied a separate schedule of the interrogatories that remained to be answered by the defendant. Consequently, I deferred making orders that the defendant answer specific interrogatories until the plaintiff had filed and served a separate application listing the interrogatories which the plaintiff sought to be answered. The application by the defendant to limit interrogatories was dismissed.

[4] Counsel for the plaintiff at the hearing before me decided not to proceed with the application for further discovery on the basis that such an order would not be necessary if the defendant answered the interrogatories. Consequently, at the plaintiff's request the application for further discovery has been adjourned pending

the outcome of the plaintiff's application for the defendant to answer further interrogatories.

[5] In objecting to answering a number of the interrogatories, counsel for the defendant pointed out that such interrogatories usurped the discovery process insofar as the interrogatories sought disclosure of documents. I have already ruled that in the circumstances of this case, the interrogatories concerned are proper and must be answered.

[6] The first three interrogatories relate to documents in the defendant's possession or power relating to a website referred to in the statement of claim. The plaintiff's claim is based on representations made on the website which the plaintiff claims were made by the defendant. The plaintiff has been unable to identify documents discovered by the defendant relating to that website. In his amended statement of defence, the defendant admits that his company maintained the internet website. The website is electronically recorded or stored information which comes within the definition of a document under 1.3 of the High Court Rules. Consequently, the defendant, if he has at any time had possession of electronically stored information forming the website referred to in the statement of claim, was under an obligation to discover that document.

[7] Counsel for the defendant submitted that if the defendant had destroyed the computer disk containing electronic record of the website or had obliterated that record from the disk there was no longer any obligation on the defendant to discover such "document". In support of that submission counsel for the defendant relied upon 8.21(d). That rule provides that the defendant is required to identify and list documents:

> That have been, but are no longer, in the control of the party giving discovery, stating when the documents ceased to be in that control and the person who now has control of them.

It was submitted that because the document had been destroyed and was not in the possession of any other party the defendant was not under any obligation to discover the document. I am satisfied that such a submission cannot be correct. A party cannot evade obligations for discovery by destroying documents.

[8] If a document has been destroyed, then an interrogatory may be administered as to the contents if secondary evidence of that document would be admissible at the trial see *Ramsey v Ramsey* [1956] 1 WLR 542 at 545 and Simpson, Bailey & Evans, *Discovery and Interrogatories* (2ed 1990) at 169. Consequently, if the document relating to the website has been lost, further interrogatories could be permitted to determine the contents of the website as clearly such evidence would be admissible at the hearing. For the reasons I have given I am satisfied that the defendant must answer the first three interrogatories relating to the website.

[9] For the reasons set forth in my decision delivered on 24 November 2008 the defendant's objection to answering the remaining interrogatories on the ground that such interrogatories relate to discovery of documents cannot succeed.

[10] The defendant pointed out that in answering some of the interrogatories he would be required to disclose the name and location of witnesses. Under 8.7(1)(d) the defendant is entitled to object to answering an interrogatory the sole objective of which is to ascertain the names of witnesses. That does not mean that the defendant may object to answering an interrogatory that involves disclosure of a witness. In this respect I adopt the reasoning of the Chief Justice in *Bellambi Coal Co Ltd v Barry* (1904) 4 SR (NSW) 748 at 750 where he said:

> I think some interrogatory should be allowed on the footing of asking for further particulars. The defendant alleges knowledge in a fictitious person, which has no mind of its own: it is necessary, therefore, that such knowledge should be based on the knowledge of some officer of the corporation. I do not think it would be any hardship on the defendant to be obliged to disclose the channel through which he alleges the knowledge in question reached the plaintiff corporation. The mere fact that some of the persons in question may incidentally happen to be witnesses for the defence does not, to my mind, disentitle the plaintiff company to have the information to which they are otherwise entitled. I do not think it is necessary for the defendant to disclose the names of the persons in question, but he must state the positions or offices of the persons in question with sufficient detail to enable the plaintiff company to identify them.

[11] The rationale for the rule preventing an interrogatory the objective of which is to ascertain the names of witnesses goes back to the decision of *Benbow v Low* (1880) 16 Ch D 93 at page 95 where Jessel MR states:

> If you give one side the opportunity of knowing the particulars of the evidence that is to be brought against him, then you give a rogue an enormous advantage. He then may be able, although he has no evidence in support of his own case, to shape his case and his evidence altogether in such a way as to defeat entirely the ends of justice.

[12] In the context of the present case, interrogatories seeking the name and location of the Wasabi plant systems which the plaintiff claims the defendant represented in the website as having been operated successfully are entirely appropriate and, in circumstances where the plaintiff resides in Sweden, are extremely unlikely to be used in such a way as to defeat the ends of justice. Similarly, I am satisfied that an interrogatory which includes a request for the name or names of owners of Wasabi growing systems provided by the defendant's company that have been successful should also be answered.

[13] I am also satisfied that an interrogatory seeking the name and address of the defendant's company's accountants who prepared any of the company's accounts should be discovered. The usual practice is for the name of the accountant to appear on the accounts. Consequently, if the accounts were discovered and were made available for inspection the identity of the accountant would be disclosed.

[14] I am therefore satisfied that there are no valid grounds advanced by the defendant to justify his objection to answering the interrogatories. There will therefore be an order requiring the defendant to answer the interrogatories which are listed in schedule A to the application filed by the plaintiff.

[15] The plaintiff sought a direction for such interrogatories to be answered within seven days. Having regard to the nature of the interrogatories and the information which must be gathered by the defendant I consider seven days to be inadequate. Consequently, there will be an order that such interrogatories be answered in thirty days from the date of delivery of this judgment. There will be orders in terms of paragraphs 2 and 3 of the plaintiff's application.

[16] If either counsel wish to be heard on the question of costs, then they must, within fourteen days, advise the registrar and the registrar should arrange a further fixture before me for one hour to hear further submissions from counsel on the

question of costs. In default of any application by counsel to be heard on the question of costs there will be an order that the defendant pay the plaintiff's costs assessed on a 2B basis with disbursements as fixed by the registrar.

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Associate Judge Robinson