

**IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY**

CIV-2009-442-508

BETWEEN	KEVIN LESLIE WADE, CAROLINE MOIRA WADE AND HTT 203 LIMITED AS TRUSTEES OF THE UMIRAC TRUST First Plaintiffs
AND	SADDLE FARMS LIMITED Second Plaintiff
AND	KEVIN LESLIE WADE AND CAROLINE MOIRA WADE Third Plaintiffs
AND	THREE TUIS LIMITED First Defendant
AND	STEPHEN GARNETT Second Defendant

Hearing: 10 December 2009 (by telephone)

Appearances: Mr C R Johnston and Mr E Burrell for plaintiffs
Mr P J Bellamy for defendants (appearing on a Pickwick basis)
Mr P Smith for IAG Insurance Limited

Judgment: 10 December 2009

(ORAL) JUDGMENT OF LANG J
[on without notice application for mandatory injunction]

Solicitors:
Wynn Williams & Co, Christchurch
Duncan Cotterill, Nelson
Copy to:
Mr P Smith, IAG Insurance Ltd

[1] On 27 November 2009 the plaintiffs' property was damaged by a fire that they believe came from a neighbouring property. The defendants are the owners of the neighbouring property.

[2] The plaintiffs have sought indemnity from their insurer in relation to the damage that they have suffered as a result of the fire. Not surprisingly, the plaintiffs' insurer is anxious to determine the cause of the fire. It has appointed expert investigators to assist it in that task.

[3] The investigators wish to be able to go onto the defendants' property in order to examine the remnants of the fire on that property. They believe that this will provide them with considerable assistance in determining whether the fire originated on the defendants' property. This issue is likely to be important, because the insurer will probably seek to recover its losses from the person or persons that it believes was responsible for starting the fire.

[4] The investigators believe that the elements, and particularly wind and rain, are likely to destroy vital evidence. For that reason they wish to gain access to the defendants' property immediately. The defendants initially agreed to grant the investigators access to their property. Subsequently, however, they withdrew their permission on the instructions of their insurer.

[5] This morning Mr Bellamy, who has appeared at short notice on behalf of the defendants, advises me that his clients abide the decision of the Court.

[6] The evidence tendered in support of the application satisfies me that there is good reason to believe that the fire originated on the defendants' property. I am also satisfied that, unless the plaintiffs' agents are granted access to the property in the immediate future, vital evidence is likely to be destroyed by the elements.

[7] I do not consider that the present application fits neatly within any of the High Court Rules. It does not fit within r 9.34 because that rule applies only to an existing proceeding. It provides:

9.34 Order for inspection, etc

- (1) The court may, for the purpose of enabling the proper determination of any matter in question **in a proceeding**, make orders, on terms, for—
 - (a) the inspection of any property:
 - (b) the taking of samples of any property:
 - (c) the observation of any property:
 - (d) the measuring, weighing, or photographing of any property:
 - (e) the conduct of an experiment on or with any property:
 - (f) the observation of a process.
- (2) An order may authorise a person to enter any land or do anything else for the purpose of getting access to the property.
- (3) In this rule, **property** includes any land and any document or other chattel, whether in the control of a party or not.

(Emphasis added)

Other than the present application, there is no proceeding currently in existence.

[8] It does not come within r 7.55 either, because the plaintiffs are not seeking to preserve property. Rather, the plaintiffs are seeking access to the property for the purpose of observing the remnants of the fire.

[9] Rule 33.2 and 33.3 apply to an anticipated proceeding and permit the Court to make an order allowing a party to have access to any land or premises in order to secure or preserve evidence. That is what the plaintiffs seek in the present case. The difficulty with r 33.2, however, is that it is subject to the requirements prescribed by r 33.3. It provides:

33.3 Requirements for grant of search order

The court may make a search order under rule 33.2 only if the court is satisfied that—

- (a) an applicant seeking the order has a strong prima facie case on an accrued cause of action; and
- (b) the potential or actual loss or damage to the applicant will be serious if the search order is not made; and
- (c) there is sufficient evidence in relation to a respondent that—

- (i) the respondent possesses relevant evidentiary material;
and
- (ii) there is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the court.

[10] There is no difficulty in the present case with r 33.3(a), (b) and (c)(i). It is not possible, however, for the Court to be satisfied on the evidence that there is a real possibility that the respondent might destroy material or cause it to be unavailable for use in a proceeding or anticipated proceeding. There is no suggestion in the present case that the defendants are likely to destroy the remnants of the fire. The concern in the present case is that natural elements, in the form of wind and rain, will have that effect

[11] By analogy with r 33.2, however, I consider that I am entitled to rely on the inherent jurisdiction of the Court to grant the order that the plaintiffs seek. The Court must have the ability to fill gaps in the rules using its inherent jurisdiction to control its own procedure.

[12] Following the telephone conference this morning counsel have conferred regarding the appropriate form of the order that I am to make. In essence it will permit the agents of the plaintiffs to have access to the defendants' property on a nominated day within the next seven days. The plaintiffs' agents are to have access to the defendants' property on that day for a period not exceeding six hours between the hours of 8 am and 5 pm.

[13] Counsel have now provided me with a draft order. I am satisfied that the draft order properly records the orders that I made during the telephone conference. The Registrar is therefore directed to seal the order forthwith.

Lang J