

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 36/07
ARC 68/06
ARC 69/06**

IN THE MATTER OF an application for discovery

BETWEEN BANK OF NEW ZEALAND
 Plaintiff

AND JASON TROTTER
 Defendant in ARC 68/06

AND STEPHEN PARKINSON
 Defendant in ARC 69/06

Hearing: 14 June 2007
 (Heard at Auckland)

Appearances: Mr S Langton and Ms A K McLean, counsel for plaintiff
 Mr W J Coyle, counsel for defendants

Judgment: 18 June 2007

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

[1] Mr Trotter and Mr Parkinson commenced claims against Bank of New Zealand before the Employment Relations Authority at Auckland claiming remedies on the grounds of unjustifiable dismissal. In each case the dismissal by the former employer, Bank of New Zealand, was based upon allegations by the bank that Mr Trotter and Mr Parkinson had breached the bank's no-broker policy introduced on 1 June 2003. At that time Mr Trotter was employed as a mobile mortgage manager and he reported to his Area Manager, Mr Parkinson. The bank in reply brought its own claim before the Authority seeking penalties and damages for breaches of the respective employment agreements. All of the claims were heard together.

[2] Mr Trotter and Mr Parkinson were successful in their claims before the Authority and each of them received reasonably substantial remedies. Mr Trotter and Mr Parkinson were found to be not liable in respect of any damages and the bank was unsuccessful in its claim for penalties. Bank of New Zealand has now lodged a challenge against the whole of the Authority's determination and seeks a hearing de novo of the challenge. It seeks a finding of the Court that in each case the dismissal of Mr Trotter and Mr Parkinson was justified and effected in a procedurally fair manner. If the Court finds that the dismissal of the defendants in each case was unjustified then the bank seeks to reduce any remedies on the basis that the defendant's conduct in each case contributed wholly to the circumstances that gave rise to their personal grievance claims. In respect of Mr Trotter the bank also brings a claim seeking an inquiry into damages together with penalties for the breaches of the employment agreement.

[3] The allegations against each of the employees relates to their dealings while they were employed by the bank with a group of companies, referred to in the determination of the Authority as the Alliance Group. Mr Trent Cary was shareholder, either personally or possibly by way of associated companies, in the Companies constituting the Alliance Group.

[4] Three interlocutory applications have now been filed with the Court. The first is for an order consolidating the separate proceedings presently commenced against Mr Trotter and Mr Parkinson. Mr Coyle who appeared as their counsel does not object to such order. There will be an order accordingly, consolidating the two sets of proceedings. From this point any documents filed with the Court may be intitled as one proceeding containing both reference numbers, showing Bank of New Zealand as plaintiff, Jason Trotter as first defendant and Stephen Parkinson as second defendant.

[5] The second application is for orders seeking particular discovery of documents against non-parties, namely the various companies in the Alliance Group specified in an appendix to the application and Mr Trent Cary. I shall return to that application shortly.

[6] The third application is an application made ex parte seeking orders that personal service on Mr Trent Cary be dispensed with and that substituted service be effected on him by serving the applications for particular discovery by non-parties and the affidavit in support on Cleaver & Co Ltd, Chartered Accountants, Level 1, 26 Crummer Road, Grey Lynn, Auckland.

[7] Mr Coyle, on behalf of both Mr Trotter and Mr Parkinson, did not offer any opposition to either the application for particular discovery nor the application for substituted service. He indicated that his clients who are presently unaffected by the applications would simply abide the decision of the Court.

[8] Insofar as the application for substituted service is concerned the affidavits in support show the various attempts to effect personal service on Mr Cary have been unsuccessful. The documents attached to the affidavits in support show that Mr Cary may have resided at an address at 29 Crummer Road, Grey Lynn, Auckland, but has not resided there for some time. Amongst the documents attached is a company extract provided by the Company's Office on 5 June 2007 for the company Brisbane Trustees Limited. Mr Cary is the shareholder. The accountants for that company are described as "*Cleaver & Co* [sic]", Chartered Accountants, Level 1, 26 Crummer Road, Grey Lynn, Auckland. In addition to that Mr Cary is shown as residing at 12-14 Northcroft Street, Takapuna, Auckland 9. Attempts have been made to serve him at that Takapuna address without success.

[9] Mr John Bergseng of a firm of solicitors known as Bergseng & Co, who are located on the same floor of the Crummer Road building in which Cleaver & Co Ltd have their offices, indicated to the process server that his firm had acted for Mr Cary, but that he was no longer a client. The firm was not authorised to accept service on Mr Cary's behalf.

[10] Coincidentally Mr Bergseng has advised the plaintiff's solicitors that he acts for C & C Strategic Limited, which is the liquidator for one or possibly more of the Alliance Group of companies. Service of the applications for non-party discovery and affidavits in support was effected eventually on the companies by delivering the documents to Bergseng & Co. I note however, that prior to that copies of the

documents had been delivered in the normal way to the registered office of the companies, which is the office of Cleaver & Co Ltd, Chartered Accountants, Level 1, 26 Crummer Road, Grey Lynn, Auckland.

[11] Having regard to these matters I am satisfied that in circumstances where Mr Cary cannot be served personally with the documents, the application against him for non-party discovery and the affidavits in support are likely to be brought to his notice by delivering them to the offices of Cleaver & Co Ltd at Level 1, 26 Crummer Road, Grey Lynn, Auckland. I make orders for substituted services, accordingly, in terms of the application. In addition and to give further assurance as to the likelihood the documents will be brought to his notice, I also make an order that copies of the documents be forwarded to Mr Cary by ordinary post to 12-14 Northcroft Street, Takapuna, Auckland 9. In addition, while Mr Bergseng indicated that he is no longer acting for Mr Cary, I nevertheless make an order that copies of the documents be delivered to Mr John Bergseng at the offices of Bergseng & Co, Solicitors, Level 1, 26 Crummer Road, Grey Lynn, Auckland or whatever address that firm of solicitors currently occupies. In that regard Mr Langton referred me to the decision of *Arwin Trading Ltd v Pendarves Export Ltd and Ors* (unreported, High Court Auckland, Keane J, 18 October 2006, CIV 2006-404-1792). That decision upheld a similar order made in the District Court where the solicitor involved indicated that he lacked instructions to accept service. That case might involve a slightly different situation from the present in that the solicitor clearly remained instructed. Accordingly, there was a strong prospect if service was effected on the solicitor that notice of the proceedings would be brought to the client. Nevertheless, in the present case I am of the view that Mr Bergseng may be aware of Mr Cary's current address especially in a situation where he is acting as the solicitor for the liquidator of the group of companies in which Mr Cary remains a shareholder. The purpose of orders such as this is simply to bring the application to the notice of Mr Cary. I am of the view that the orders I have made are likely to do that.

[12] I now turn to the third application for particular discovery against non-parties. While the application has been served on the liquidator and the various companies under the Alliance Group, no steps have been taken by the liquidator or any other person to oppose the applications. Mr Blair Vernon, the general manager

of Bank of New Zealand at Auckland, has sworn an affidavit in support of the applications. Annexed to that affidavit is Exhibit BV-M, which is a copy of a letter from Bergseng & Co Lawyers, dated 6 March 2007. That letter was written to the solicitors for the bank following a letter being sent to the liquidator for Alliance Strategic Property Investment Ltd requesting the documents, which are now sought in the filed application. In response Mr John Bergseng wrote advising that the liquidator was in receipt of the correspondence. There was no indication that the documents would be provided, but Mr Bergseng stated that if there was an order of the Employment Court for non-party disclosure against Alliance Strategic Property Investments Ltd (in liquidation) then the liquidator would consider such orders. It seems to me that in the light of that correspondence and the failure by any representative to take steps, the position now taken by the liquidator of Alliance Strategic Property Investment Ltd and the representatives of the other specified companies is that they do not consent to the orders sought, but do not oppose them and will abide the decision of the Court.

[13] In those circumstances it seems appropriate that there should be orders as sought. This Court has jurisdiction to make such orders by virtue of clause 13 of schedule 3 of the Employment Relations Act 2000 and pursuant to Rule 302 of the High Court Rules. Mr Langton in support of the application referred me to the decisions of *F & L Valks Ltd v Bank of New Zealand Officers' Provident Association* [1996] 1 NZLR 735 and *Siemer v Fardell* (unreported, High Court Auckland, Williams J, 12 December 2006, CIV-2003-404-5782). Those authorities set out and discuss the principles the High Court applies in respect of such applications. Such principles were succinctly set out by Jaine J in *F & L Valks Ltd* as follows. First, the Court would not allow such an application if the applicant was doing no more than fishing or where the orders might be unreasonably oppressive. Secondly, there must be grounds for belief that the documents exist. Thirdly, the documents must then be shown to relate to a matter in question in the proceedings. Jaine J then referred, in applying that test, to *Compagnie v Financiere Du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, a well known decision in this area of discovery of documents. This held that information falls within the test of relevance if it directly or indirectly enables the party requiring the documents either to advance his own case or to damage the case of his adversary. Jaine J also referred to the decision of *Clear*

Communications v Telecom Corporation of New Zealand Ltd (unreported, High Court Wellington, McGechan J, 30 March 1993, M119/93), which held that in respect of the similar jurisdiction in the High Court there was a requirement that the order be reasonably necessary.

[14] Applying those principles to the present case it is clear that this is not a fishing expedition. The documents clearly exist. No unreasonable oppression will be involved if the orders are made. Mr Langton has persuaded me that the documents, which are well particularised in the application, are relevant not only to the challenge but also the claim for damages. He submitted that while the documents may not have been available to the bank at the time of the dismissal, they become relevant under principles of employment law in respect of the pleading against the defendants alleging contributing behaviour. I accept those submissions from Mr Langton. I am of the view that it is reasonably necessary for the orders to be made on the basis of the matters set out in Mr Vernon's affidavit. The documents are clearly relevant to the present proceedings. Mr Vernon has stated in his affidavit that, while a lot of the material contained in the documents sought may already be in the possession of the bank, it is impossible to locate those documents having regard to the enormous number of transactions the bank has to conduct. Obtaining the documents from the non-party will provide information to then enable the bank to go back through its own records. This will enable it to more easily locate the information, which it is currently holding in respect of the matters relevant to these proceedings. In view of the fact that the written request for the documents directed to the liquidator and subsequently dealt with by the solicitors did not result in the documents being provided voluntarily there is now an added necessity for the orders.

[15] In addition to the principles already discussed, Mr Langton submitted that the attitude of the non-parties is not one of opposition in view of the correspondence to which I have referred. In addition no prejudice will be suffered by them in view of the fact that the bank has indicated, indeed the orders sought confirm, that the plaintiff bank will meet all of the non-parties' reasonable costs in complying with the orders.

[16] Accordingly, there will be orders for particular discovery by non-parties in terms of the applications filed except that such discovery shall be made within 21 days from the date the orders are served. Such orders are made against the companies specified in the appendix to the application. The application against Mr Trent Cary will need to await the outcome of the orders I have made for substituted service.

[17] There need be no order for costs in respect of any of the three applications that I have dealt with. However, in case any complications arise in respect of the particular discovery, leave is reserved to any party, including the companies against which the orders have been made, to apply back to the Court for further orders or directions.

M E Perkins
Judge

Judgment signed at 4.30pm on Monday 18 June 2007