IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2018] NZHRRT 6**

	Reference No. HRRT 035/2016
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**RODNEY PHILIP HIDE**
	PLAINTIFF
AND	**OFFICIAL ASSIGNEE**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson

REPRESENTATION:
Mr RP Hide in person
Mr SM Kinsler and Ms SK Shaw for defendant
Mr R Jamieson-Smyth and Ms J Foster for Privacy Commissioner

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **8 March 2018**

DECISION OF CHAIRPERSON ON APPLICATION BY PLAINTIFF FOR FURTHER AND BETTER DISCOVERY[1]

[1] These proceedings will be heard at Christchurch on 30 April 2018. Three days have been set aside. Mr Hide has now applied for further and better discovery.

Background

[2] The current pleadings filed by Mr Hide comprise an amended statement of claim dated 19 July 2017 and two statements of evidence. Mr Hide alleges that as a consequence of a breach of information privacy principles 1, 2, 4 and 6 there has been an interference with his privacy by the Official Assignee:

> **[2.1]** Principle 1 provides that personal information is not to be collected unless it is collected for a lawful purpose connected with the function or activity of the collecting agency and that the collection is necessary for that purpose.

[1] [This decision is to be cited as: *Hide v Official Assignee (Discovery)* [2018] NZHRRT 6]

[2.2] Principle 2 provides that the information must be collected directly from the individual concerned unless one of the exceptions in subcl (2) applies.

[2.3] Principle 4 stipulates that personal information must not be collected by unlawful means or by means which are unfair or which intrude to an unreasonable extent upon the personal affairs of the individual concerned.

[2.4] Principle 6 provides for the individual to have access to his or her personal information held by the agency.

[3] At the risk of oversimplifying Mr Hide's case, the gist is that the personal information (about him) collected by the Official Assignee was not collected for a lawful purpose (Principle 1), that collection of Mr Hide's personal information from third parties rather than directly from Mr Hide himself was not permitted by Principle 2(2) and that the information was collected by unlawful or unfair means or intruded to an unreasonable degree upon the personal affairs of Mr Hide, including the medical affairs of his family (Principle 4). More particularly:

[3.1] Personal information about Mr Hide has been collected in the course of the examination of third parties, being examinations under the Insolvency Act 2006, s 165. Mr Hide himself has never been interviewed, questioned or examined by the Official Assignee in relation to the information which has been collected about him (Mr Hide).

[3.2] The s 165 examinations were conducted not by the Official Assignee or by an authorised employee of the Insolvency and Trustee Service, but by a private investigator, being Mr Dennis Parsons with the assistance of Ms Kathryn Kenealy (now deceased).

[3.3] Mr Parsons was not lawfully appointed to conduct the s 165 examinations in which personal information about Mr Hide was collected.

[3.4] The summonses issued to the third parties requiring them to attend the s 165 examinations were issued by Ms Annemarie Foidl, an employee of the Insolvency and Trustee Service.

[3.5] Mr Hide has asked for, but has not been provided with, the reasons why questions were asked about him during the third party examinations. He complains no boundaries were set to the questions which were asked about him during the examinations.

[4] The Official Assignee accepts that personal information about Mr Hide was collected in the course of an investigation under the Insolvency Act.

THE DISCOVERY ISSUE

[5] By *Minute* dated 14 July 2017 the parties were directed to give standard discovery in accordance with Part 8 of the High Court Rules. This step has been completed.

[6] The additional documents sought by Mr Hide in his application for further discovery are particularised in his reply statement of evidence dated 21 December 2017 (filed 14

February 2018) and in his subsequent application dated 30 January 2018 (also filed 14 February 2018). He asks that the Official Assignee:

> **[6.1]** Disclose the documents which instructed Ms Foidl to issue the relevant notices under the Insolvency Act, s 165, the documents making the case for issuing those notices and the documents showing the questions which were to be asked in the examinations.
>
> **[6.2]** Provide a copy of the letter of appointment dated 14 April 2014 issued by the Official Assignee to Mr Parsons authorising him to conduct the s 165 examinations.
>
> **[6.3]** Disclose the relevant parts of the s 165 examination transcripts which contain personal information about Mr Hide and that these transcripts be included in the (open) common bundle.

[7] The Official Assignee has submitted that the documents sought are not relevant to the issues in this proceeding, as defined by the pleadings. He also says that the transcripts of the s 165 examinations have been withheld on the basis that s 169 of the Act prohibits the release of these documents without the permission of the High Court.

[8] In his reply submissions dated 6 March 2018 Mr Hide has now stated that he wishes to withdraw his application for the letter of appointment relating to Mr Parsons, stating that he himself (Mr Hide) will be able to produce the letter in the course of his own evidence. However, for the reasons about to be explained, the production of the document as intended by Mr Hide could prove problematical. I have therefore decided, in accordance with the Human Rights Act 1993, s 105 (incorporated into the Privacy Act 1993 by s 89 of that Act), that it is necessary that the applications as originally made by Mr Hide be addressed on the merits.

[9] Mr Hide has at the same time said he wishes to withdraw his application for discovery of the s 165 examination transcripts. I have decided, however, for similar reasons to address the application nevertheless given the central importance of the transcripts to both parties. Their status in the discovery context must be made clear.

Discussion

[10] The general principles which apply to discovery were recently conveniently summarised in *Minister of Education v H Construction North Island Ltd* [2018] NZHC 20 at [6]:

> **[6]** A party required to make discovery is required to disclose documents only if they are relevant to an issue in the proceeding. The pleadings set the bounds of discovery. In assessing relevance, the case of the party seeking discovery is assumed to be true, not the case of the party required to make discovery. Under standard discovery, documents are to be disclosed if they or the information in them are capable of being used in evidence, either because they support the case of the party making discovery or of any other party, or because they are adverse to the case of the discovering party or any other party. That does not mean that the documents will be bound to be used in the hearing. Under the standard discovery test it is not necessary to disclose documents which are only part of the background nor documents which may lead to a train of inquiry enabling a party to advance his own case or to damage that of his opponent. Generally, documents which are to be used only to attack the credibility of another party's witnesses are not ordered to be disclosed.

[11] It is also helpful to refer to the four-stage approach suggested by Asher J in *Assa Abloy NZ Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760 at [14]:

> **[11.1]** Are the documents sought relevant? And if so, how important will they be?
>
> **[11.2]** Are there grounds for belief that the documents sought exist? This will often be a matter of inference. How strong is that evidence?
>
> **[11.3]** Is discovery proportionate, assessing proportionality in accordance with part 1 of the discovery checklist in the High Court Rules?
>
> **[11.4]** Weighing and balancing these matters, in the court's discretion applying r 8.19, is an order appropriate?

[12] Relevance must not be conflated with admissibility. It is established law that matters of inspection and of discovery are separate from matters of testimony and admissibility. See *M v L* [1999] 1 NZLR 747 (CA) at [759] and *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740 (CA) at [36].

[13] But a party is required to discover a document even if it is inadmissible. A classic example is the discovery of a document which contains legal advice.

[14] These principles will now be applied to the categories of documents sought by Mr Hide. For the purpose of this exercise the pleadings comprise not only the amended statement of claim but also the two written statements of evidence filed by Mr Hide. This broad view is required by s 105 of the Human Rights Act 1993.

Documents relating to the examinations under s 165 of the Insolvency Act

[15] The lawfulness of the s 165 notices has been put in issue by Mr Hide. If they were not lawfully issued by Ms Foidl or not issued for a lawful purpose (which allowed the lawful collection of personal information about Mr Hide) then information privacy principles 1 and 4 will be engaged.

[16] I accordingly direct that this category of documents, as summarised in para [6.1] above must be discovered. The category is small, the documents easily identifiable and no issue of proportionality arises. If the Official Assignee has any valid ground for asserting a claim of privilege or confidentiality in relation to these documents, he is, of course, free to make such claim and to utilise Parts 2 and 3 of the Schedule to the affidavit of documents prescribed by Form G 37.

The letter of appointment in respect of Mr Parsons

[17] The lawful authority of Mr Parsons to collect personal information about Mr Hide in the course of a s 165 examination of a third party is also clearly in issue, particularly given that it is not in dispute that Mr Parsons is a private investigator, not an employee of the Insolvency and Trustee Service. His legal authority to conduct a statutory examination under the Insolvency Act needs to be established in the face of Mr Hide's reliance on information privacy principles 1 and 4.

[18] Mr Hide now suggests that because he believes he has a copy of the document, he himself can produce it in evidence. The circumstances in which the document came into Mr Hide's possession, however, indicate this course may be problematical. Those circumstances are outlined by Mr Hide in his application dated 30 January 2018. There he explains that while he originally thought he had obtained the document under the Official Information Act 1982, he now believes "[the obtaining] may have been in the context of other legal proceedings not involving me".

[19] While it is understandable that Mr Hide, as a lay litigant, may believe that as he has possession of the document he is free to use it in his own proceedings, the law is rightly protective of documents provided to parties in the course of litigation.

[20] The principle is that documents obtained by a party in the course of litigation may be used only for the purposes of those proceedings and may not be used for any other purpose. Originally, the common law implied an undertaking, to the court, not to use a disclosed document for a purpose other than for the purpose of the proceedings in which it was disclosed. Before that undertaking came to be implied, the courts spoke of requiring an express undertaking as a condition of granting an order for production of documents. The High Court Rules, r 8.30(4) presently provides:

> **8.30 Use of documents**
>
> …
> (4) 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).

[21] The ban on the collateral use of documents is binding on anyone into whose hands the documents might come if that person knows that the documents have been obtained by way of discovery, as confirmed by the commentary on this rule in *McGechan on Procedure*. The drift of authority is that the implied undertaking applies to any material obtained compulsorily in legal proceedings, the requirement for compulsion being one of substance, not form. It has also been confirmed the undertaking applies where discovery is informal. The rationale of the rule, as explained in *Wilson v White* [2005] 3 NZLR 619 (CA) at [20] is twofold:

> **[21.1]** The first is that parties may not comply with discovery obligations unless such restrictions are meaningfully imposed; and
>
> **[21.2]** Secondly, a sense of fairness associated with the privacy expectations of a party who is required to produce documents for one purpose, and is entitled to expect that they will not be used for another.

[22] Given the provenance of the letter of appointment held by Mr Hide it may well be open to the Official Assignee to challenge its admissibility in the present proceedings. It is therefore best that the letter be formally discovered by the Official Assignee in the specific context of the present proceedings. This will forestall any admissibility objection based on the circumstances in which the document was obtained by Mr Hide. It will also protect use of the document outside these proceedings.

[23] I accordingly direct that the letter of appointment of Mr Parsons dated 14 April 2014 be disclosed.

The relevant parts of the s 165 examination transcripts

[24] It is understandable that Mr Hide wants to access those parts of the s 165 examination transcripts in which information is collected about him. There cannot be any real dispute that the relevant parts are discoverable, but this may be of little assistance to Mr Hide as the "discoverability" of the documents will not necessarily mean release to him. They are, after all, documents in respect of which a statutory claim of confidentiality has been made and they would necessarily appear in Part 2 or Part 3 of the Schedule to the affidavit of documents and be included in the closed bundle of documents submitted to the Tribunal for it to determine the reach of the non-publication obligations imposed by the Insolvency Act.

THE CALLING OF ADDITIONAL WITNESSES

[25] The Official Assignee will not be calling Mr Parsons as a witness at the hearing. Mr Hide has asked that the Tribunal direct Mr Parsons be called, along with the employees of the Insolvency and Trustee Service who were present at the s 165 examinations.

[26] But as pointed out in the *Minute* dated 15 February 2018 at [5], the general rule is that a party cannot be compelled to call a particular witness. If the opposing party wants any witness to attend the hearing, a witness summons can be applied for. The process by which this is done is explained in Annexure A "Requesting a Witness Summons". Particular attention is drawn to the need for the Tribunal to be satisfied the intended witness can give material evidence. Ordinarily this means a written application must be made to the Tribunal by the party seeking the summons, together with a signed statement of evidence by the intended witness. If the witness declines to provide a written statement, the party making application must file a "will say" statement of evidence.

[27] Although Mr Hide has withdrawn his application for additional witnesses to be called, it is out of an abundance of caution that I point out that should he change his mind and decide to apply for a witness summons (or summonses), prompt action is required as commencement of the hearing on 30 April 2018 could well be put at risk.

[28] Mr Hide is to note the Official Assignee will have a right to be heard on any application for a witness summons and can be expected to raise the point foreshadowed in his counsel's memorandum dated 28 February 2018 at para [13], namely that there is no utility in having Mr Parsons or any other person present at the s 165 examinations giving evidence. Mr Hide must be prepared to address this objection.

TIMETABLE ISSUES

[29] The filing dates currently required by the case management timetable are 16 March 2018 (Mr Hide), 30 March 2018 (the Official Assignee) and 20 April 2018 (the Privacy Commissioner).

[30] It is not clear what effect, if any, the directions made in this *Minute* will have on the parties' preparation. It is possible only the most minimal amount of additional documentation will be required to be produced to Mr Hide or added to an amended Part 2 or Part 3 affidavit of documents (Form G 37). Any new documents can be introduced into the common bundle (both the open version and the closed version) by the filing of a supplementary bundle or bundles. It will not be necessary for new versions of the two bundles to be filed.

[31] Rather than trying to second guess the needs of the parties (and of the Privacy Commissioner) in the light of the directions which follow, the parties are asked to confer with a view to reaching agreement on any amended timetable that might be necessary. In the event of an impasse being reached, memoranda are to be filed.

[32] The imperative, however, is to maintain the three-day hearing which will commence on 30 April 2018. The Tribunal is overwhelmed with a workload beyond its capacity to deal with. If the hearing does not go ahead as scheduled it is likely any new fixture will be in late 2018 or sometime in 2019.

DIRECTIONS

[33] The outcome of Mr Hide's several applications is that the following directions are made:

[33.1] The Official Assignee is to give discovery of:

[33.1.1] The documents which instructed Annemarie Foidl to issue the relevant s 165 notices, the documents making the case for issuing those notices, and documents showing the questions which were to be asked in the examinations.

[33.1.2] The letter of appointment dated 14 April 2014 issued by the Official Assignee to Mr Dennis Parsons authorising him to conduct the s 165 examinations.

[33.1.3] The relevant parts of the s 165 examination transcripts which contain personal information about Mr Hide.

[33.2] Should Mr Hide intend calling Mr Dennis Parsons or any other person as a witness at the hearing, Mr Hide is to follow the procedure prescribed by the document attached to this *Minute*, being Annexure A "Requesting a Witness Summons".

.....
Mr RPG Haines QC
Chairperson

Annexure A

21 November 2017

HUMAN RIGHTS REVIEW TRIBUNAL

REQUESTING A WITNESS SUMMONS

Application required

[1] Under s 109 of the Human Rights Act 1993 the Tribunal or Chairperson (or any officer of the Tribunal purporting to act by the direction or with the authority of the Tribunal or a Chairperson), on the application of any party to the proceedings, may issue a witness summons to any person requiring that person to attend before the Tribunal to give evidence at the hearing of the proceedings:

> **109 Witness summons**
>
> (1) The Tribunal may, if it considers it necessary, of its own motion, or on the application of any party to the proceedings, issue a witness summons to any person requiring that person to attend before the Tribunal to give evidence at the hearing of the proceedings.
> (2) The witness summons shall state—
> (a) the place where the person is to attend; and
> (b) the date and time when the person is to attend; and
> (c) the papers, documents, records, or things which that person is required to bring and produce to the Tribunal; and
> (d) the entitlement to be tendered or paid a sum in respect of allowances and travelling expenses; and
> (e) the penalty for failing to attend.
> (3) The power to issue a witness summons may be exercised by the Tribunal or a Chairperson, or by any officer of the Tribunal purporting to act by the direction or with the authority of the Tribunal or a Chairperson.

[2] Before issuing a witness summons the Tribunal needs to be satisfied that the intended witness can give material evidence. For that reason a written application by the party requesting the summons must be filed together with a signed statement of evidence by the intended witness. If the witness has declined to provide a written statement, the party making application must file a "will say" statement of evidence. A "will say" statement is to be drafted in good faith and must accurately record what the witness will actually say in evidence rather than what the party applying would like the witness to say. Whether supported by a signed statement or by a "will say" statement, the application must establish proper grounds for the Tribunal to issue a summons.

Service of witness summons

[3] The party applying for the summons is responsible for its service once it has been issued by the Tribunal.

[4] As to how a witness summons may be served reference is to be made to s 110 of the Human Rights Act. A summons may be served:

> **[4.1]** By delivering it personally to the person summoned. Such service must take place at least 24 hours before the attendance of the witness is required.
>
> **[4.2]** By posting it by registered letter addressed to the person summoned at that person's usual place of residence. Such service must occur at least 10 days before the date on which the attendance of the witness is required.

Payment of witnesses' allowances

[5] It is to be noted that s 111 of the Human Rights Act provides that every witness attending before the Tribunal to give evidence pursuant to a summons is entitled to be paid witnesses' fees, allowances and travelling expenses and when issuing a summons under s 109(1) the Tribunal is required to fix the amount which, on the service of the summons, must be paid or tendered to the witness. Payment is to be made by the party applying for the witness summons. The payments a witness is entitled to are those set out in the Schedule to the Witnesses and Interpreters Fees Regulations 1974. Both these Regulations and the Human Rights Act itself can be accessed on the New Zealand legislation website www.legislation.govt.nz.

Power to issue a witness summons to produce documents

[6] Section 109(2)(c) requires the witness summons to state (inter alia) the papers, documents, records, or things which the witness is required to bring and produce to the Tribunal. A summons to produce documents is commonly referred to as a witness summons duces tecum or as a subpoena duces tecum.

[7] For a summary of the considerations which must be taken into account when application is made for a witness summons to produce documents, see *Boyce v Westpac New Zealand Ltd (Non-Party Discovery)* [2015] NZHRRT 31 and *MacGregor v Craig (Application for Witness Summonses)* [2015] NZHRRT 51 which are available on the Decisions page of the Tribunal website http://www.justice.govt.nz/tribunals/human-rights/.

Non-attendance or refusal to co-operate

[8] A witness who, after being summoned to attend to give evidence before the Tribunal or who fails to produce any papers, documents, records, or things without sufficient cause, commits an offence and is liable to a fine of $1,500. See s 113 of the Human Rights Act.

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