

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

**CIV 2011-404-004585
[2013] NZHC 2004**

BETWEEN	ABOUT HEALTH SUPPLEMENTS LTD First Plaintiff
AND	DANIEL FRANKLIN KING Second Plaintiff
AND	ELENA TIRI CHARNLEY First Defendant
AND	HEALTHY INSIGHT LIMITED Second Defendant
AND	LANILOPEZ.COM LIMITED Third Defendant

Hearing: 3 July 2013

Appearances: M D Lloyd for the Plaintiffs
K M Quinn and G Kim for the Defendants

Judgment: 9 August 2013

JUDGMENT OF GILBERT J

*This judgment was delivered by me on 9 August 2013 at 4.00 pm
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar
Date:*

[1] This judgment is mainly concerned with a belated application by the plaintiffs, shortly prior to trial, for orders intended to assure compliance by the defendants with their discovery obligations. The orders sought include an order requiring the defendants to engage an independent forensic computer expert to clone all documents, emails and texts on all computers and mobile phones used by any of them over a period of nearly two years.

Background

[2] The second plaintiff, Mr King, and the first defendant, Ms Lopez, were partners in a business that sold a health supplement called “Res-V Plus”. This was primarily marketed through radio advertising. Following a disagreement between them, Mr King agreed in October 2010 to purchase Ms Lopez’s interest in the business. In terms of this agreement Ms Lopez covenanted not to promote the sale of any product containing resveratrol in any media for four months, or on the radio for six months.

[3] In late April 2011, following expiry of the restraint periods, Ms Lopez commenced a new business with Timothy Giles selling a competitive resveratrol based health supplement called “Pez Rez”. The plaintiffs claim that Ms Lopez induced the sale and purchase agreement by making false representations. They also claim that the defendants have carried on the new business in breach of the agreement and in a manner that is unlawful and infringes their rights.

The proceedings

[4] The plaintiffs pursue seven causes of action:

- (a) breach of the settlement agreement;
- (b) misrepresentation by Ms Lopez inducing the settlement agreement;
- (c) misleading and deceptive conduct in breach of s 9 of the Fair Trading Act 1986;

- (d) passing off;
- (e) breach of ss 89 and 90 of the Trademarks Act 2002;
- (f) unlawful interference with contractual relations between The Radio Network Ltd and About Health Supplements Ltd; and
- (g) breach of confidence and misuse of confidential information.

[5] The plaintiffs seek a permanent injunction restraining the defendants from carrying on the new business in the allegedly unlawful manner; damages to compensate the first plaintiff for lost sales, calculated to be \$4,550,000 for the period from May 2011 to June 2013 and \$86,000 per month thereafter; and \$2,400,000 for alleged diminution in the value of the first plaintiff's business.

[6] The proceeding is set to be heard in the two week period commencing on 7 October 2013.

The present application

[7] The plaintiffs seek the following orders:

- (a) requiring the defendants to answer interrogatories;
- (b) requiring the defendants to provide further and better discovery;
- (c) discharging the confidentiality order made by Wylie J on 11 August 2011 as varied by Lang J on 22 August 2011; and
- (d) discharging the order made by Wylie J on 11 August 2011 sealing the Court file.

[8] After the application was filed, the defendants answered the interrogatories. Order (a) is therefore no longer required.

[9] Shortly before the hearing commenced, the defendants withdrew their opposition and now consent to orders (c) and (d). Those orders can accordingly be made by consent.

[10] The sole remaining substantive issue is the plaintiffs' application for further and better discovery. The defendants have filed three affidavits of documents but the plaintiffs do not accept that they have complied fully with their discovery obligations. The plaintiffs have no confidence that the defendants will comply given that their initial discovery was plainly inadequate and Ms Lopez admits that in August 2011, shortly after this proceeding was filed, she deleted the files on the hard drive of the computer she used at About Health and when preparing to launch her new business in April 2011.

[11] In these circumstances, despite the plaintiffs' application being for an order requiring the defendants to provide further and better discovery under r 8.19 of the High Court Rules, Mr Lloyd advises that the plaintiffs no longer seek any such order. Instead, at the conclusion of the hearing, Mr Lloyd sought to amend the plaintiffs' application so as to seek detailed orders as set out in appendix 1 to a reply affidavit filed by Mr King in connection with the present application. A copy of this appendix is attached to this judgment.

[12] The newly proposed orders are designed to take the discovery process out of Ms Lopez's hands and require the defendants, at their cost, to facilitate retrieval by an experienced forensic computer expert of all documents on any computer used by them over the period from December 2009 to August 2011 inclusive, including those in Word, Outlook Express, Excel or the Apple Mac equivalents of these. They also seek an order requiring the defendants to provide the expert with access to their Gmail, Facebook and Twitter accounts and mobile phones so that all emails, texts and other communications can be independently reviewed for discovery purposes. The plaintiffs have chosen the commencement date of this date range because they believe that Ms Lopez commenced planning her new business in early 2010. The end date of August 2011 was chosen because that is when orders by way of interim injunction were made by Wylie J by consent of the parties.

[13] Mr Lloyd accepts that the orders he now seeks cannot be made under r 8.19. However, he submits that the Court has jurisdiction to make the orders pursuant to:

- (a) Section 16 of the Judicature Act 1908, which preserves the Court's inherent jurisdiction.
- (b) Rule 8.17, which deals with variations to the terms of a discovery order.
- (c) Rule 1.5(2)(b), which deals with non compliance with the Rules.
- (d) The Court's powers in relation to contempt. This is based on Ms Lopez's admission that she deleted documents on the hard drive of her computer after this proceeding commenced.

[14] In response to Mr Lloyd's application to amend the application, which was not made until the conclusion of the hearing, Mr Quinn noted that the defendants have not had an opportunity to consider the proposed methodology or to assess the associated costs. He also expressed concern about the time the discovery process proposed by the plaintiffs is likely to take, particularly having regard to the short time remaining until the trial. However, he did not seek an opportunity to provide further evidence and invites the Court to deal with the application as amended.

[15] Apart from noting these points, Mr Quinn submits that the Court does not have jurisdiction to make the proposed orders and that, even if it did, the orders should not be made because the further documents sought by the plaintiffs either do not exist or fall into one or more of the following categories:

- (a) They have already been disclosed in the three affidavits of documents that the defendants have filed.
- (b) They are not discoverable because they are not relied on by the defendants, they do not adversely affect either party's case and they do not support the plaintiffs' case.

- (c) They are not in the defendants' control.

Jurisdiction

[16] The Court has inherent jurisdiction to compel observance of Court processes and compliance with Court orders. However, this jurisdiction is largely regulated by the High Court Rules. The plaintiffs would have been entitled to seek an order for further and better discovery under r 8.19, as indeed they did prior to abandoning that application. If an order made under that rule was not complied with, enforcement orders could be made under r 7.48. Disobedience could also be addressed using the powers available under rr 17.84 to 17.87. In my view, the orders sought by the plaintiffs that seek to bypass these rules are neither appropriate nor necessary.

[17] I also reject Mr Lloyd's submission that the orders sought in appendix 1 can be made in exercise of the Court's powers under r 8.17. This rule enables parties to apply for an order varying the terms of a discovery order where compliance or attempted compliance with the order has revealed a need for a variation or there has been a change of circumstances that justifies reconsideration of the original order. This rule deals with variations to the scope of discovery which will be either standard discovery or tailored discovery. In my view, the rule does not contemplate orders of the type sought by the plaintiffs in appendix 1.

[18] Nor does r 1.5(2)(b) assist the plaintiffs. This rule is designed to cure irregularities arising out of non-compliance with the rules. It is not the means by which parties may address non-compliance with discovery obligations.

[19] The final jurisdictional basis suggested by Mr Lloyd for the orders he now seeks is the Court's inherent jurisdiction to deal with a contempt of Court. This is based on Ms Lopez's admission that she deleted documents from the hard drive of her computer in August 2011, after this proceeding was issued. Rule 8.3 affirms the common law duty to preserve documents once litigation is reasonably anticipated. The destruction of discoverable documents when litigation is reasonably contemplated could amount to obstruction or interference with the due course of justice and therefore a contempt of Court. The Court has an inherent jurisdiction to

punish an offender for contempt of Court by way of fine or imprisonment. However, this jurisdiction is sparingly exercised and only in the clearest cases. The orders now sought by the plaintiffs are not those that the Court would make in the exercise of its inherent jurisdiction to punish for contempt.

[20] I conclude that there is no jurisdictional basis for the orders sought by the plaintiffs in appendix 1. Had the plaintiffs wished to obtain further and better discovery, they should have maintained their application under r 8.19 and then sought to enforce any order by the appropriate means if it was not complied with.

[21] Even if there had been jurisdiction, I would not have been prepared to make the orders sought. I now set out my reasons with reference to each category of documents sought by the plaintiffs.

Category 1 - all communications between Ms Lopez and Mr Giles from 1 December 2009 until 31 August 2011

[22] Ms Lopez and Mr Giles had a personal relationship and were living together during this period. Communications between them arising out of this relationship are obviously not relevant or discoverable.

[23] However, Mr King believes that Ms Lopez and Mr Giles conspired to establish a business in competition with About Health from early 2010 while Ms Lopez was still working at About Health and that communications between them regarding this will exist and be discoverable. The plaintiffs previously pursued four causes of action arising out of this alleged conspiracy but these were all struck out by Sargisson AJ on 21 May 2013 on the basis that these claims were precluded by the sale agreement.¹ This agreement fully and finally settled all claims relating to the parties' former business relationship through About Health and the development, sale or promotion of any health supplement product by Ms Lopez.

[24] Whether or not Ms Lopez and Mr Giles were planning to compete prior to the agreement in October 2010 is not relevant because any claims arising out of any

¹ *About Health Supplements Ltd & Anor v Charnley & Ors* [2013] NZHC 1168.

such planning have been fully and finally settled. The settlement contemplated that the parties would compete and it did not restrict them from planning to do so. The only restriction in the agreement was that Ms Lopez could not promote the sale of any product containing resveratrol in the specified media for the agreed periods.

[25] Despite this, Mr Lloyd submitted that documents in this category relating to planning the new business will assist the Court in determining all causes of action other than the second, being the misrepresentation claim. Mr Lloyd elaborated that the planning documents may assist in proving what the defendants' intentions were. However, none of the claims require proof of intention with the possible exception of the claim that the defendants induced a breach of the contract between About Health and The Radio Network. Even then, the relevant requirement is knowledge of the contract. The contract is admitted and there does not appear to be a substantial dispute about its essential terms. In these circumstances, any undiscovered documents in this category are likely to have peripheral relevance at best.

[26] Ms Lopez has sworn an affidavit saying that planning for her new business did not commence until December 2010. She deposes that all emails passing between her and Mr Giles relating to the new business have already been discovered. Even if the plaintiffs had been able to point to any documents or other evidence showing that Ms Lopez's sworn statement is not correct, the appropriate response would be an order under r 8.19, which specifically deals with this type of situation, rather than the extremely wide-ranging and unfocused orders belatedly sought by them as set out in appendix 1 to Mr King's reply affidavit. In my view, the plaintiffs have not provided sufficient justification for the Court to make such orders at this stage, whether or not there is jurisdiction to do so.

Category 2 – all communications, including on Facebook and Twitter, between members of the public and the defendants or their agents since 14 October 2010

[27] Ms Lopez deposes that all relevant email communications in this category have been disclosed. Her Twitter account is open for public viewing and her tweets dating back to 24 April 2011 can be viewed by any Internet user. She says that she

has also disclosed all discoverable posts on the Facebook page established for her new business which has been active since 27 April 2011.

[28] The plaintiffs have not been able to demonstrate that Ms Lopez's sworn statements regarding this are incorrect. Mr Lloyd acknowledges that there may not be any further documents in this category that have not already been discovered. He could take it no further than to say that the plaintiffs do not trust Ms Lopez and are suspicious about whether further documents in this category exist. The plaintiffs' suspicion is not sufficient to justify the exceptional orders they now seek.

Category 3 – all communications passing between the defendants and their product supplier

[29] Mr Lloyd explains that these communications are relevant to the third cause of action which alleges misleading and deceptive conduct in breach of s 9 of the Fair Trading Act. This cause of action is based on the defendants' claims on the Internet and in radio advertising that the resveratrol used in Pez Rez was "dynamised". The plaintiffs claim that this implies that the resveratrol used in Pez Rez is superior to that used in other supplements.

[30] The defendants admit that the resveratrol used in Pez Rez is the same as that contained in all resveratrol based products. They allege that the term 'dynamised' refers to "the operation of two different potencies of resveratrol within the formula that works simultaneously together with other ingredients/constituents to enhance and 'dynamise' a person's absorption of the formula".² Documents tending to disprove these claims by the defendants will therefore be relevant and discoverable.

[31] Mr Quinn accepts this. Ms Lopez states in her affidavit that she has disclosed all documents within the defendants' control relating to communications with their supplier. The plaintiffs are entitled to proceed on the basis that the defendants have no documents beyond those already discovered to support their "dynamised" claim. The particular orders sought by the plaintiffs to assure compliance by the defendants

² Statement of defence to third amended statement of claim at [26](a)(ii).

with their discovery obligations in relation to this category of documents are not justified at this late stage of the proceeding.

Category 4 – all documents relating to product development and trials prior to their launch in late April 2011

[32] These documents are sought for the same reason as the documents in category 3. The defendants' response is the same. They accept that these documents are relevant and discoverable but claim that they have already been disclosed. Again, the particular orders sought by the plaintiffs are not justified.

Category 5 – all documents relating to the “dynamised” process

[33] Mr Lloyd advises that the plaintiffs no longer pursue discovery of further documents in this category.

Category 6 – copies of all communications and documents, including texts, emails, letters and advertising scripts, passing between the defendants or their agents and The Radio Network Ltd from 1 December 2009 to 31 August 2011

[34] The plaintiffs claim that over the years from 2006 to 2009, a contract for advertising “evolved” between About Health and The Radio Network. They allege that it was a term of this contract that The Radio Network would not broadcast live advertising for any competitor product at any time and would not broadcast any pre-recorded advertisements for competitor products 30 minutes before or one hour after any live advertising by About Health. In their sixth cause of action, the plaintiffs claim that Ms Lopez unlawfully interfered with this contract by advertising her products live on The Radio Network.

[35] As noted, the defendants admit the contract between About Health and The Radio Network and there does not appear to be any substantial dispute about the material terms of that contract. The defendants also admit advertising their new products on and after 27 April 2011 but deny that this was in breach of the contract

between About Health and The Radio Network. It therefore appears that any discoverable documents relating to this cause of action will be narrow in scope.

[36] Ms Lopez deposes that the defendants do not have in their control any further correspondence or documentation in this category that has not already been disclosed. I am not prepared to make the orders sought by the plaintiffs in relation to this category of documents.

Category 7 – copies of all testimonials and related communications that appeared on the defendant’s website on or about late April 2011

[37] Mr Lloyd advises that the plaintiffs no longer pursue discovery of further documents in this category.

Category 8 – copies of all communications between the defendants and third parties involved in the development and establishment of their business and product

[38] Mr Lloyd advises that this category has now been refined to communications with Telelink, Sandfield, Logic Design and Messrs Irving and de Silva.

[39] The plaintiffs say that the defendants engaged Telelink to deal with calls from customers. The plaintiffs seek documents showing the instructions given to Telelink because they contend that these will be relevant to whether the defendants sought to cause confusion in the market and capitalise on About Health’s brand and reputation. Mr King also expects that Telelink will have records regarding “confused” callers including emails and letters that he claims will have been passed on to the defendants.

[40] Sandfield Associates built the defendants’ website. Mr King says that Logic Design was engaged by the defendants to develop their brand, look and image. He says that Mr Irving was a business mentor and Mr de Silva a business advisor for Ms Lopez. Mr King believes that the defendants have not disclosed all documents relating to communications with these parties. He says that these documents will be

relevant in showing what the defendants' intentions were for their new business, and particularly whether they intended to trade on the reputation and goodwill of About Health.

[41] Some documents in this category may have been deleted by Ms Lopez when she erased files from the hard drive of her computer in August 2011. However, she has discovered the emails on her Gmail account because these were stored in the cloud and able to be retrieved. She has also discovered documents created on her mobile phone. She says that in April 2012 she sent the hard drive that had been deleted to a computer forensics company in Auckland to see whether any files could be recovered. She deposes that this was partially successful and that all discoverable documents retrieved in this process have been disclosed. She also approached Sandfield who provided electronic copies of 677 emails and 162 documents dating back to March 2011. Mr Quinn advises that all discoverable documents in the defendants' control in this category have now been disclosed.

[42] In these circumstances, the plaintiffs have not justified the further orders now sought in relation to this category of documents.

Category 9 – copies of documents from the defendants' shipping broker and shipping agent

[43] Mr Lloyd advises that the plaintiffs no longer pursue discovery of further documents in this category.

Category 10 – material relating to ASA complaints

[44] Mr Lloyd advises that the plaintiffs no longer pursue discovery of further documents in this category.

Category 11 – copies of bank statements and bank records for all accounts operated by the defendants and all tax and GST returns

[45] Mr Lloyd advises that the plaintiffs no longer pursue discovery of further documents in this category.

Result

[46] The plaintiffs' application for an order requiring the defendants to answer interrogatories is not pursued and is accordingly dismissed. Costs shall lie where they fall in relation to this application.

[47] By consent, the confidentiality order made by Wylie J on 11 August 2011 and varied by Lang J on 22 August 2011 is discharged. Also by consent, the order made by Wylie J on 11 August 2011 sealing the Court file is discharged. The plaintiffs are entitled to costs on a 2B basis in respect of their application for these orders.

[48] The plaintiffs' application for orders for further and better discovery in terms of appendix 1 is dismissed. The defendants are entitled to costs on a 2B basis in relation to this application.

[49] If there is any dispute about the quantification of costs consequent upon this judgment, I reserve leave to apply.

M A Gilbert J