

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

**CIV-2014-404-3240
[2016] NZHC 1069**

BETWEEN MARANATHAN CHARITABLE TRUST
 Plaintiff

AND CAWTHRAY MOTORS LIMITED
 First Defendant

TITUS ELCANA PINTO
Second Defendant

JOHN BARRY MASSAM
Third Defendant

Hearing: 17 May 2016

Appearances: P J Wright and G E Schumacher for the Plaintiff
 A Barker and M C Kilham for the First and Second Defendants
 I C Bassett for the Third Defendant

Judgment: 17 May 2016

**ORAL JUDGMENT NO 1 OF MUIR J
(Recall of Witness)**

Solicitors/Counsel:
P J Wright, Barrister, Auckland
G E Schumacher, Barrister, Auckland
A Barker, Barrister, Auckland
M C Kilham, Anderson Creagh Lai, Auckland
I C Bassett, Malloy Goodwin Harford, Auckland

Background

[1] By memorandum dated 16 May 2016 the plaintiff seeks recall of its witness Mr Hasmukh Magam Ranchhod.

[2] Mr Ranchhod gave evidence on Thursday 12 May 2016 commencing at approximately 3.00 pm. He was the final witness for the plaintiffs. His evidence-in-chief consisted of a one and a half page written statement which he read. In paragraphs 1-8 he described his background with the Maranathan Trust, previous employment with the Challenge weekly Christian newspaper run by Mr Massam and the genesis of his involvement in what he refers to in para [9] as “the present disputes”.

[3] Paragraph [9] was in terms:

My first involvement with El Pinto with respect to the present disputes was when I attended a meeting on 29 January 2014 at the Maranathan offices with Grant and El Pinto....

[4] When Mr Ranchhod came to read this paragraph of his brief of evidence he read the date 29 January 2014 as 29 January 2013. That elicited cross-examination from Mr Barker in terms:¹

Q Mr Ranchhod, just a couple of questions, just at paragraph 9 of your evidence you talk about a meeting on 29 January 2000 (sic) and, well it said 14 in the written one and you changed it to 13. I just wanted to confirm that with you and if you go to the bundle.

A Oh sorry, let's have a look.

Q Is it 2013 you mean there or 2014?

[5] At that point I intervened and reminded Mr Ranchhod that he had indeed read it as 2013. He acknowledged that he had done so. He then stated:²

A But I am actually, can I just your Honour, I just need to clarify it because they are actually, there was the meeting in 2013 when we met El Pinto and also there was the 29 January 2014 when we met

¹ NOE 259/10.

² NOE 259/24-28.

when he and first started talking about getting the donation letters sorted out.

[6] In the event, Mr Ranchhod did not give any evidence in relation to discussions with Mr Pinto in 2013. Nor, although the documentary record indicated email exchanges by Mr Ranchhod with Mr Pinto in 2013, were such documents or the background to them referred to.

[7] At the conclusion of Mr Ranchhod's evidence Mr Wright closed the case for the plaintiffs. Mr Barker then opened. Among the matters emphasised in that opening was that the evidence of Mr Stowers as to any request on Mr Pinto's part for a release of his obligations to the Vision Charitable Trust (VCT) and the Lakes Ranch Charitable Trust (LRCT) was inadequate. Mr Barker also emphasised that there was no evidence from Mr Ranchhod in relation to these issues because events in 2013 had simply not featured in his brief of evidence. At that stage Mr Barker invited me to consider the specific parts of Mr Stowers' evidence which Mr Ranchhod had chosen to affirm in his brief, namely those at paragraphs [89], [90], [91] and [92] – [106] (none of which dealt with the events in 2013) and to infer from that that Mr Ranchhod had quite deliberately and specifically chosen to disassociate himself from Mr Stowers' evidence of events in 2013.

The evidence

[8] Having considered the memoranda of counsel for the plaintiff and first and second defendants filed yesterday I determined that I should hear from Mr Ranchhod as to the circumstances in which this lacuna in the evidence had arisen. Evidence-in-chief was accordingly led from him on the basis of paragraphs [1] – [11] of an intended further brief of evidence (which explained such background). I have not at this stage considered the balance of that brief of evidence which comprises his proposed substantive evidence if recalled.

[9] As to how this issue had arisen initially, Mr Ranchhod deposed that he had taken the context of paragraph [9] in his witness statement as "concerning Mr El Pinto's commitment to MCT to pay it the donations". He said that the date referred to in paragraph [9] was read "in the context of that sentence being that this was the

first meeting concerning MCT's request for *written confirmation* from El Pinto that he would pay the donations directly to MCT, after MCT had obtained John Massam's releases" (my emphasis). He deposed that in that sense he regarded the date as correct and that the prior meetings involving Mr Pinto were in relation to the donation letters, Mr Pinto confirming that he would pay the donations to MCT and getting the release from Mr Massam. He said further that it was only in January 2014, when Mr Pinto had got back from a trip to India that the plaintiffs concentrated on getting a new commitment in writing from him – that was the first meeting at which he says "we commenced to get Mr Pinto's written commitment to MCT". He said he did not realise this would leave a gap in MCT's evidence.

[10] Under cross-examination by Mr Barker Mr Ranchhod stated that the brief of evidence had been drafted by solicitors and he signed it on the understanding that all he was required to depose to were the attempts from January 2014 to obtain a new written commitment from Mr Pinto. He said that the solicitors for the plaintiff had not discussed with him the prospect of his giving a reply brief of evidence. He acknowledged that subsequent to the plaintiff's opening he had discussed with Mr Stowers the fact that there was a gap in the evidence but denied that there had been a discussion with him about what problems might arise from that.

[11] The conclusions I come to on the facts are these:

[a] The brief of evidence was, in the context of the relevant issues in this case, deficient. It should have addressed discussions and written communications between Mr Ranchhod and Mr Pinto in 2013 for the reason that such evidence is likely to be relevant to the plaintiff's proposition that the commitments made in the original donations letters were novated in favour of the plaintiff.

[b] The brief of evidence was drafted by solicitors/counsel for the plaintiff.

[c] Mr Ranchhod understood from the draft brief prepared for him that his evidence was only required in relation to what he identified at the

time as the “present disputes” being evidence concerning attempts to obtain Mr Pinto’s written commitment to pay the donations, previously directed to the VCT and LRCT, directly to the plaintiff.

[d] Mr Ranchhod did not appreciate at the time he signed his brief of evidence on 10 February 2016 that his evidence may also be necessary in relation to events in 2013 and although he says he appreciated that there was a gap at the commencement of his reading his brief of evidence (which may well explain his confusion over the 2013 and 2014 date when he read it) it wasn’t remedied through additional examination-in-chief.

[e] I am not persuaded that Mr Ranchhod specifically chose to confirm particular paragraphs of Mr Stowers’ brief on the basis that he did not accept other parts of the brief.

[f] I have reached the conclusion that the error has arisen in the briefing process and that the adverse inferences, at least initially advanced by the first and second defendants, are not available. I say at least initially because in his submissions today Mr Barker retreated somewhat from that submission and focused more particularly on the unreliability of any evidence Mr Ranchhod might now give having regard to what he identified as “contamination” through various exchanges between counsel and the Bench.

Jurisdiction

[12] The plaintiff’s application is made pursuant to s 98 of the Evidence Act 2006. That section relevantly provides:

98 Further evidence after closure of case

- (1) In any proceeding, a party may not offer further evidence after closing that party's case, except with the permission of the Judge.

- (2) In a civil proceeding, the Judge may not grant permission under subsection (1) if any unfairness caused to any other party by the granting of permission cannot be remedied by an adjournment or an award of costs, or both.

...

- (5) The Judge may grant permission under subsection (1),—
- (a) if there is a jury, at any time until the jury retires to consider its verdict:
 - (b) in any other proceeding, at any time until judgment is delivered.

[13] The plaintiff also submits that there is further jurisdiction under s 99 for a Judge to recall a witness in certain circumstances and that there is an “enduring inherent jurisdiction” to permit a party to adduce further evidence where it is in the interests of justice outside the Evidence Act framework.

[14] As s 98(2) notes, permission may not be granted in a civil proceeding if any unfairness caused to any other party by the granting of permission cannot be remedied by an adjournment or an award of costs, or both. Mr Wright refers to the Law Commission Evidence Reform Report at paragraph [433] which is noted in Mahoney and Others *The Evidence Act 2006 Act and Analysis*, in terms that:³

Such unfairness might exist if the defendant could no longer call a previously available witness to meet ... new evidence offered by the plaintiff.

[15] He notes that the Law Commission concluded that taking into account the purposes of the Evidence Act in most civil trials a Judge should permit a party to call further evidence under s 98(2).⁴

³ Mahoney and others *The Evidence Act 2006 Act and Analysis* (3rd ed. Thompson Reuters, Wellington, 2014) at [EV 98.02].

⁴ Law Commission *Evidence Law: Codification, Hearsay and Principles for Reform* (NZLC R55, 1999) at [C359]; *Goldsmith v Carter* [2012] NZHC 1693; *Hertli v Herzog* HC Blenheim CIV-2009-404-106, 6 April 2011 at [152]. See further Mahoney and others *The Evidence Act 2006 Act and Analysis* (3rd ed. Thompson Reuters, Wellington, 2014) at [EV98.02(1)], supporting this approach.

Submissions of the parties

[16] Mr Wright submits that there would be a minimal, if any prejudice to the defendants by the recall of Mr Ranchhod because:

[a] the matters about which he will give evidence are not unknown to the defendants; and

[b] his involvement in all the meetings and correspondence about which he will give evidence is either supported by documentary evidence discovered and admitted in this proceeding or already chronicled by Mr Stowers in his evidence.

[17] He submits that the only fresh element in Mr Ranchhod's evidence is the fact of his giving the evidence. He emphasises that no new documentary evidence is sought to be produced and it is not a situation where the defendant could be caught unawares by substantially new evidence or previously unknown occurrences. Indeed, he goes so far as to suggest that the evidence may assist the defendants to the extent that they are at this stage reliant on the inferences referred to in paragraph [7], which such inferences could be substituted for evidence specifically directed to the topic.

[18] I do not regard that particular point as persuasive. Mr Barker advises that he made a considered decision not to cross-examine Mr Ranchhod in relation to meetings in 2013 and to open on the basis that there simply was no evidence of the alleged novation given that, in his submission, Mr Stowers was not privy to the relevant discussions and Mr Ranchhod had not chosen to give evidence about them. He was entitled to do so and the absence of evidence, more so than the inferences referred to, may, on the first and second defendants' case, have been decisive.

[19] Mr Barker's submission rested primarily on the fact that because of exchanges between the Bench and himself during the course of his opening (heard by Mr Ranchhod who was in the back of the court at the time) that any evidence Mr Ranchhod would now give would be tailored to the gap which had been identified.

[20] As a result of a careful note taken by his junior at the time Mr Barker was able to recount to me in some detail the nature of that exchange. It clearly identified the lacuna in the evidence and there was significant discussion about the gaps in Mr Stowers' own evidence. Mr Barker says that because the evidence in this area is a matter of what he calls "emphasis" rather than whether discussions in fact occurred on particular days there is significant danger in allowing Mr Ranchhod to now be recalled.

[21] However, having reviewed the nature of those exchanges between Bench and Bar I am confirmed in my initial assessment that there was no sufficiently detailed discussion of the context to or content of Mr Ranchhod's 2013 correspondences that any evidence he now gave would necessarily be regarded as so contaminated as to be of no probative value.

[22] If Mr Ranchhod is to give additional evidence it is not in a documentary vacuum. The bundle includes an email from him to Mr Stowers and Mr Panckhurst dated 8 August 2013 which sets out in 10 relevant points the content of a meeting which he had with Mr Pinto that day. Paragraph [10] is in terms:

El will be preparing a document for John to sign with respect to the one million dollar donation.

The authenticity of that document is not in issue.

[23] I accept that this record is ambivalent in terms of who sought the document but it does identify that Mr Pinto will be the one preparing it.

[24] Relevant also is an email from a Mr Ranchhod to Mr Pinto dated 5 December 2013 already in evidence and in respect of which authenticity is again not in issue. It is in terms:

Hi El, attached are the two releases that you requested.

John Massam has signed the release from making donations to Vision Charitable Trust.

Robyn McCracken has signed the release from making a donation to Lakes Ranch Charitable Trust.

[25] This therefore supports any intended evidence to the effect that Mr Pinto required releases from VCT and LRCT in exchange for a commitment to make the relevant payments direct to the plaintiff.

[26] Relevant also is the fact that throughout Mr Pinto's cross-examination Mr Ranchhod voluntarily excused himself from the Court so as to further limit opportunities to "infill" his evidence.

[27] Although I cannot rule out some element of contamination of Mr Ranchhod's intended further evidence, what weight I ultimately give to it must be influenced by the contemporaneous record. I do not regard it as so inherently unreliable that I should decline to admit it and any element of prejudice from such contamination can appropriately be dealt with by submission as to weight.

[28] There is no question that the error that has occurred in this case has made for a less than ideal situation. But in my view, confirmed by the observations of the Law Commission, the exercise I must undertake is one ultimately informed by the justice between the parties. I consider it would be a significant injustice to the plaintiff to deny it the opportunity to advance what may be important evidence relating to Mr Ranchhod's 2013 exchanges with Mr Pinto on account of what I consider to be a briefing error by the plaintiff's solicitors or counsel. Nor do I regard there as being any prejudice to the defendants which cannot be met by:

- [a] careful assessment of reliability and weight in light of all the relevant background; and

- [b] giving the opportunity (if necessary) for Mr Pinto to himself be recalled to give additional evidence-in-chief.

- [c] an award as to costs.

How this is to be dealt with procedurally

[29] In his memorandum Mr Wright suggests that Mr Pinto be stood down from his cross-examination and Mr Ranchhod's further evidence interpolated now. I do

not regard that as appropriate. Mr Ranchhod's cross-examination should be completed with Mr Wright raising with him any matters, in light of Mr Ranchhod's intended further evidence, that are appropriately put. Mr Barker will have an opportunity to re-examine in that context.

[30] The first and second defendants are to be given a further opportunity at the conclusion of Mr Ranchhod's evidence to reflect on whether Mr Pinto should himself be recalled. If Mr Barker requires an adjournment to consider that issue and to discuss matters with Mr Pinto then it will be allowed.

[31] In addition, if Mr Barker considers that, as a result of Mr Ranchhod's new evidence, Mr Stowers is likewise appropriately recalled, I can consider an application at that time.

[32] As indicated, I have not yet read the intended evidence of Mr Ranchhod, apart from that given this morning in support of the application for recall. Mr Barker raises a number of potential issues of admissibility. I emphasise that the additional evidence which I am allowing Mr Ranchhod to give must be strictly limited to the discussions and/or correspondence with Mr Pinto in 2013 which I have referred to.

[33] In allowing him to be recalled I have granted the plaintiff something of an indulgence. The limits of that indulgence are to be respected.

Costs

[34] This is a case where I believe an award of costs is appropriate in favour of the defendants. I allow costs in favour of both the first, second and third defendants because Mr Bassett has necessarily been occupied for the two and a quarter hours that this issue has taken us this morning. He also made brief submissions supportive of the first and second defendants' position. In my view costs of one thousand dollars to the first and second defendants (combined) and \$750 to the third defendant are appropriate.

[35] Such costs are payable immediately irrespective of the ultimate outcome in the proceedings.

Result

[36] I grant leave for Mr Ranchhod to be recalled at the conclusion of Mr Pinto's evidence.

[37] I award costs as set out in [35] above.

Muir J