IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2007-404-003606

BETWEEN	DIANE ROSINA TOWAI DIVETT First Plaintiff
AND	REFOCUSSING TRUST Second Plaintiff
AND	PAULINE SKEATES First Defendant
AND	INSIGHT SERVICES LIMITED Second Defendant

Hearing: 4 February 2010

Counsel: C L Elliott and S McLaughlin for Plaintiffs
A E McDonald for defendants

Judgment: 11 February 2010

RESERVED JUDGMENT OF HUGH WILLIAMS J

This judgment was delivered by
The Hon. Justice Hugh Williams
on
11 February 2010 at 12:30pm
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

A. The plaintiffs' application for leave to cross-examine the first defendant to ascertain whether the Court's order of 20 September 2008 has been breached is granted on the terms set out in this judgment.

B. Costs are to be deal with in accordance with para [38].

Issue

[1] On 18 June 2007 the plaintiffs issued proceedings against the defendants alleging breaches of copyright and moral rights and under the Fair Trading Act 1976 in relation to the plaintiffs' workbooks, manuals and other material concerning the plaintiffs' Refocussing therapy, its "God Spaces and Seven Foci" integration theory and associated matters. Additional causes of action relating to the same matters were based in passing-off, breach of contract, breach of fiduciary duties and misuse of confidential information.

[2] The defendants' response was, put broadly, a general denial.

[3] The substantive hearing was set for 3 November 2008 but, in the lead up to the hearing and after briefs of evidence had been exchanged, the parties settled the claim at mediation on 15 September 2008. The provisions of the settlement agreement relevant to the plaintiffs' present application read:

> 1. [The Defendants] acknowledge[s] that:
>
>   a. Dr Divett is the creator, author, and developer of the original unique counselling theory and modality known as Refocussing/refocusing theory and practice (also known as RF, RFT, RT or simply Refocussing/refocusing) and its unique and original components of the God spaces, Seven Foci, Seven Foci integration theory, the adaptation and integration of Grove's "clean language" and orienting questions to access the foci and unmet needs, and the concept of "focus/refocus" as used in Refocussing theory and practice.
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>   b. Dr Divett is the owner of the intellectual property rights in the Refocussing and GodSpaces/God spaces names and brands as they relate to Refocussing theory and practice including all rights to the use of that name and brands and all rights to disseminate, train and accredit others in Refocussing theory and practice ...
>
> 2. [The Defendants] shall within 28 days of the date of this Deed make no further use whatsoever of the names or indicia Refocussing, refocusing, RF, RT, or RFT, or GodSpaces/God spaces or any name or indicia confusingly similar thereto whether as a trade mark, trading or company name, domain name or otherwise.
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> 3. [The Defendants] shall within 28 days of the date of this Deed take all necessary steps to:

a. transfer any name or indicia referred to in the immediately preceding paragraph whether applied for, registered or reserved in any manner whether as a trade mark, trading or company name, domain name or otherwise, including www.refocussing.dk to [the Plaintiffs];

b. use her best endeavours to procure the transfer [of] any of the names or indicia referred to in the immediately preceding paragraph whether applied for, registered or reserved in any manner whether as a trade mark, trading or company name, domain name or otherwise by a third party.

[4] The defendants also agreed to hand over or destroy materials containing any of the names or indicia referred to and not reproduce or use any substantial part of the plaintiffs' copyright works.

[5] The parties agreed Ms Skeates could use the fact that she was involved in training and supervision in refocusing counselling by Dr Divett for the five years up to 2000 and was a trustee and director of the City Counselling Company in Auckland for the last three of those years.

[6] The deed was expressly in full and final settlement of this claim but without admission of liability and the proceedings were agreed to be stayed with the parties consenting to a Tomlin Order.

[7] On receipt of a consent memorandum from counsel, Venning J made orders by consent on 22 September 2008.

[8] The plaintiffs have, since settlement, reached the view the defendants have breached the Tomlin Order and on 24 August 2009 applied for an order enforcing the Tomlin Order and coupled that, on 16 December 2009, with an application for Ms Skeates to be cross-examined on the affidavits filed by her.

[9] This judgment deals with those applications.

Law

[10] Both applications were based on r 7.48 which gives power to make orders enforcing interlocutory orders in the variety of ways set out in r 7.48(2).

[11] Rule 7.28 empowers the Court "in special circumstances" in relation to an interlocutory application to require a deponent to be cross-examined on an affidavit. *McGechan on Procedure* (paras HR7.28.01 and HR7.28.03 p1-819) notes that the phrase "special circumstances" is not defined and that the words "are wide, comprehensive and flexible but indicate something abnormal, uncommon or out of the ordinary but less than extraordinary or unique" to apply. Authorities also state that factual conflicts in interlocutory affidavits seldom amount to "special circumstances". The "special circumstances" requirement for cross-examination on interlocutory affidavits appearing in r 7.28 is to be contrasted with the right to cross-examine deponents on affidavits in substantive proceedings on notice under r 9.74.

[12] In an application such as the present, those criteria should be augmented by a further factor, namely that courts have a strong interest in safeguarding the integrity of their orders and accordingly affidavits filed in relation to applications to enforce Tomlin Orders should start from the standpoint that it is fundamental to the administration of justice that Court orders be respected.

[13] Such authorities as there are which are cited in *McGechan* in support of those propositions are respectively *Kidd v Van Heeren* (1997) 11 PRNZ 422, 423-424 and *Gary Denning Limited v Wright* [1989] 1 NZLR 45, 49 but those cases dealt with applications to cross-examine interlocutory deponents under the precursor to r 7.28, r 254 of the 1986 High Court Rules, in relation to interlocutory applications very different from the present and provide little guidance.

[14] Tomlin Orders and their enforcement only come before the Courts on relatively infrequent occasions and the question of both compromises generally and that form of compromise specifically does not appear to be much discussed in the New Zealand texts on evidence or procedure or in *Laws of New Zealand*. Though an attempt was made to list the requirements in *re James Davern Limited* (1996) 9 PRNZ 142, 145-150, (1996) 9 PRNZ 456 (CA) (noted in *Sims Court Practice* para HCR11.9.8 p 106,110) it may be helpful to set out what is required.

[15] Though by no means the *fons et origo* of the compromise jurisdiction – indeed it is a handy compendium of the then established methods of compromise – it

is helpful to start with the decision in *Green v Rozen* [1955] 2 All ER 797. In that case a money claim had been settled on terms endorsed on counsel's brief but no order of Court was sought. When the compromise was not honoured the plaintiff sought judgment for the compromise sum. Slade J held (at 799-801) that:

> There are various ways in which an action can be disposed of when terms of settlement are arrived at when the action comes on for trial or in the course of the hearing. ... One can, in an appropriate case, as was done in *Re Hearn* (1913) (108 LT 452) ... have the terms of the compromise made a rule of court, provided it appears that one of the terms of the compromise is that the terms shall be made an order of the court. I am dealing, however, with methods of disposing of an action of a less formal character than that. The first one which I have found to be very useful where the terms of compromise consist of an agreement by the defendant to pay a specified sum of money by specified instalments on specified dates is to give judgment for the total amount agreed to be paid coupled with a stay of execution so long as the instalments are paid in accordance with the terms agreed. ...
>
> The second way, which is, no doubt, more appropriate when the terms of settlement are not so straightforward as the mere payment of an agreed sum of money by specified instalments, is to secure an order of the court, made by consent, that the defendant, and, it may be, also the plaintiff, shall do the things which they have respectively engaged themselves to do by the terms of settlement. In such a case the order would take this form. There would be the title and the preamble and then the order would recite, the terms having been agreed between the parties: "It is ordered that (a) the defendant do", etc, "(b) the plaintiff do", etc, making each of the agreed terms an order of the court that it should be carried out.
>
> The third method ... is what has become known as "the TOMLIN form of order", a form of order suggested by Tomlin J and set out as a practice direction: see *Practice Note* ([1927] WN 290). In the ANNUAL PRACTICE, 1955, p 2007 ... it is stated:
>
> > "Where an action is stayed by consent on terms scheduled, the terms cannot be enforced on an application to commit or attach, but an injunction or an order for specific performance must first be obtained."
>
> *Dashwood v Dashwood* ([1927] WN 276) is cited as the authority for that statement of practice. The ANNUAL PRACTICE ... goes on to say:
>
> > "After this decision TOMLIN, J., stated that in future when an action was proposed to be stayed on agreed terms to be scheduled to the order, the order should be as follows: And the plaintiff and defendant having agreed to the terms set forth in the schedule hereto, it is ordered that all further proceedings in this action be stayed except for the purpose of carrying such terms into effect. Liberty to apply as to carrying such terms into effect."
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> That is "the TOMLIN form of order", and the important words are those which follow "action be stayed". ...
>
> The fourth method which I have come across is an order of the court made by consent staying all further proceedings in the action on the terms agreed

> on counsels' briefs, that is, an order of the court staying all further proceedings. The fifth method, which was followed in the present case, is where there is no order of the court at all, the court merely being told by counsel that the case has been settled on the terms indorsed on counsels' briefs. ...
>
> It will perhaps emphasise which is the easiest method of disposing of an action if consideration is given to the steps which can be taken in each of those cases to enforce the terms, if default is made in compliance with them. The first one seems to be simplicity itself. The court has already given judgment and the stay of execution lasts only so long as the agreed terms are complied with. If there is a failure to comply with them, the party who suffers merely has to proceed to levy execution. In the second case, the court has made an order in the terms which I have indicated, that the plaintiff do certain things, the defendant do certain things, and, if the plaintiff or the defendant, as the case may be, fails to carry out the court's order, it is only necessary for application to be made to the court and the court will enforce the order, the court having clearly ordered, in the order itself, what each party is to do or to refrain from doing. The third case is the Tomlin form of order with which I have already dealt, and, if that form of order is chosen and the terms are not complied with, contentions ... may be raised against the enforcement of the order. The fourth case is where the court, at the request of the parties, has made an absolute and unqualified order for a stay of all further proceedings. ...
>
> The fifth method ... is the one which was adopted in the present case. The court made no order of any kind whatsoever, and ... I arrive at the conclusion that in those circumstances the new agreement between the parties to the action supersedes the original cause of action altogether, that the court has no further jurisdiction in respect of the original cause of action which has been superseded by the new agreement, and that, if the terms of the new agreement are not complied with, then the injured party must seek his remedy on the new agreement. ...

[16] The law on compromises in general and Tomlin Orders in particular has moved on to a significant degree since *Green v Rozen* was decided. Indeed, the helpful – but largely unquoted in New Zealand – text on the topic, Foskett: *The Law and Practice of Compromise*, has grown from a first edition published in 1980 of 191 pages to its current sixth edition published in 2005 and extending to 670 pages.

[17] Basing what follows on that text and such New Zealand authorities as there are, the present requirements for Tomlin orders and their enforcement appear to be as follows:

a) The compromise agreement should expressly provide for the making of a consent order or judgment (Foskett: op.cit para 5-47 p 100,101).

b) The obligations to which the parties submit by way of Court order must be obligations within the jurisdiction of the Court to make. The parties, by a Tomlin Order, cannot confer jurisdiction on the court which it does not otherwise have (Foskett: op.cit para 9-09 p 165) but the court may make a Tomlin order if it has reservations as to its jurisdiction to make orders in terms of the compromise (*re James Davern Limited* in the Court of Appeal 461).

c) Proceedings which are compromised in a claim where a Tomlin Order is made should provide for the proceedings to be stayed on the agreed terms other than for effecting the agreed terms, with the terms conventionally incorporated into the order as a schedule or in a separate document clearly identified in the order (Foskett: para 9-20-33 p 168-175 and Precedent A1-14 p 605). There may be a difference of view as to whether attaching the terms of an agreed compromise to the Court order makes those terms part of the order (*Re James Davern Limited* in the Court of Appeal at 461).

d) If the compromise is incorporated in an order of the Court coupled with a stay, the parties may revive the proceeding to enforce a breach. If not, separate proceedings must be issued based on the agreement itself (*MacPherson v McCaffery* [1968] NZLR 489, 491).

e) The Court retains a discretion as to whether to make the agreement an order of Court *(Kontvanis v O'Brien* [1958] NZLR 502, 505-506, *Burfitt v Johansen* [1958] NZLR 506, 511-512, *Eyre v Wilson & Horton Limited* [1967] NZLR 769, 771-772).

f) It would be prudent for any compromise agreement to state it is an "agreement settling the dispute" so the privilege acknowledged by s 57 of the Evidence Act 2006 will be inapplicable and cannot be invoked in opposition to any action to enforce the compromise.

Terms of compromise of 15 September 2008, Tomlin Order of 22 September 2008 and this application

[18] It is evident that all who participated in the mediation on 15 September 2008 were alive to the requirements of settlements and court orders.

[19] The settlement agreement recounted the terms of the proposed Tomlin Order including a stay of the proceedings on settlement other than for the purpose of enforcing it with any enforcement proceedings able to be taken in this claim without the necessity for issuing a new claim. The consent memorandum filed in Court did not append the compromise agreement but did incorporate a draft court order and Venning J endorsed the consent memorandum "orders as per draft by consent".

[20] This application seeks orders requiring the defendants to comply with the compromise of 15 September 2008 and the Court order of 22 September and specifically that:

> The first and second defendants comply fully with the terms of the Deed of Settlement dated 15 September 2008 between the plaintiffs and the defendants, in particular that the defendants:
>
> "(i) Immediately cease using the names Insight Focused Therapy and IFT in accordance with clause 2 of the Deed of Settlement;
>
> "(ii) Immediately transfer the domain names www.refocussing.dk and www.refocussing.eu and any other names using the words referred to in clause 2 of the Deed of Settlement that were within the control of the defendants on 15 September 2008 in accordance with cl 3(a);
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> "(iii) Use their best endeavours to procure the transfer of any names, domain names and indicia referred to in clause 2 that are in the control of a third party, in accordance with clause 3(b);

"(iv) Deliver up to the plaintiffs any existing materials in the power, possession or control of the defendants that contain any name or indicia referred to in clauses 1-4 of the Deed of Settlement;

"(v) Cease using any of Diane Divett's Copyright Works which includes the components of Refocussing Theory and its practice, and terminology specifically coined or created by Diane Divett, in accordance with clause 7 of the Deed of Settlement;

"(vi) Provide a statutory declaration that the conditions of clauses 7(b) and 8 have been satisfied, including formal withdrawal from all Refocussing seminars throughout the world which the first defendant is providing or is otherwise associated with."

[21] The following must be immediately observed:

a) Order 1 goes beyond cl 2 of the compromise and cannot be granted unless the plaintiffs can demonstrate that the names Insight Focused Therapy and IFT are "confusingly similar" to the indicia listed in that clause. Without that the relief sought cannot be granted in the terms of part of the application.

b) The second domain name sought in Order 2 is not listed in cll 2 and 3(a) of the compromise and accordingly cannot be granted unless the word "including" in cl 3(a) can be extended to it.

c) The declaration sought in Order 6 extends beyond the obligations assumed by the defendants in cll 7(b) and 8 of the compromise.

Some of those points have been picked up by the defendants in the notice of opposition and, in addition, they assert they have complied with the compromise.

[22] The grounds of special circumstances on which leave is sought to cross-examine Ms Skeates include that her evidence and credibility are relevant to the application to enforce the Tomlin Order on which the Court needs to determine the

"good faith of the defendants and their compliance with the settlement agreement and related Court orders". The defendants deny special circumstances exist to warrant cross-examination and assert there is no issue as to good faith.

Evidence

[23] A significant number of affidavits were filed in relation to this application but only brief reference to the factual background is necessary.

[24] Dr Divett and Ms Skeates have been associates since the late 1980s when Ms Skeates joined the Christian City Church where Dr Divett was pastor. Soon afterwards they began developing a counselling service for church members. That ultimately was entitled "Refocussing", a name Dr Divett coined for a therapy emerging out of that work based on the teachings of an overseas psychotherapist. They later incorporated the City Counselling Company Trust. Both taught refocusing therapy and it became the centrepiece of Dr Divett's PhD thesis and Ms Skeates' undergraduate degree. Both lectured and wrote extensively about refocusing.

[25] Dr Divett and Ms Skeates parted company in about 2000 when, according to the former, Ms Skeates resigned from the Christian City Church and, about two years later, from the Refocussing Trust.

[26] For about eight years up until settlement of this claim, Ms Skeates continued in her counselling practice in New Zealand and taught refocusing therapy to Christian groups in Europe. She asserts she believed she had Dr Divett's consent to that work whereas Dr Divett points to material Ms Skeates produced and of which she, Dr Divett, owned copyright.

[27] According to Ms Skeates, Dr Divett left the City Counselling Company Trust in 2006 and, thereafter finding herself without a church, an income and an audience, interested herself in Ms Skeates' overseas activities. Her analysis, particularly analysis of Internet material, resulted in this claim being commenced.

[28] This judgment, of course, does no more than briefly record those assertions without making any observations on their correctness or otherwise.

[29] In this application, Dr Divett asserts that Ms Skeates, in changing the name of what she offers to "Insight Focused Therapy" was attempting to disguise her continued use of refocusing. She asserts that what is currently offered is only minimally different from what the defendants' offered prior to the compromise and points to websites expressly saying that Insight Focused Therapy was "formerly Refocussing". She also points to a number of other Refocussing websites, including that named in the compromise, which provide links to the defendants' website and suggests the defendants have control and influence over them.

[30] Dr Devitt is supported in her assertion by the lecturer in counselling to the effect that "Insight Focused Theory" is "little more than a new label on an old bottle".

[31] Dr Divett asserts that materials used by the defendants are essentially similar to those used for Refocussing Therapy and asserts that websites which she alleges are controlled by Ms Skeates, have not been changed as required by the compromise and that, again in breach of the compromise, Ms Skeates is undertaking training programmes teaching refocusing in Europe.

[32] Ms Skeates denies all of that and asserts the defendants have complied with the compromise. She says Insight Focused Therapy is entirely different from Refocussing Therapy. She asserts that the websites on which Dr Devitt relies are not controlled by her but that she has, nonetheless, requested those controlling those websites to alter them so as to comply with the compromise and delete any reference to Refocussing, an assertion which was supported by a number of affidavits. Essentially, she says that other persons make all arrangements for the lectures she delivers in Europe and meet all costs, and she simply arrives, performs her contractual obligations and is paid a fee.

Submissions

[33] The submissions of both counsel are largely encapsulated in other parts of this judgment but Mr Elliott, leading counsel for the plaintiffs, made the additional points:

a) That a factor tending in favour of an order for cross-examination is that it will finally determine the rights of the parties to the proceeding (*Foundation Securities (NZ) Ltd v Direct Labour Services Ltd (in liq)* HC Auckland CIV-2006-404-4391, 16 March 2007 at [21] Winkelmann J) as it will here.

b) A court should not disbelieve a deponent unless that person's evidence has been subject to challenge, and here issues of credibility and veracity are directly in point.

c) Ms Skeates is the only person in New Zealand in possession of information which may demonstrate a breach of the compromise and the Tomlin Order, particularly as none of her supporting deponents are compellable witnesses.

d) The parties have agreed on further discovery in this case and it may turn out to be the position that any grant of leave to cross-examine will not be taken up once that further discovery is provided.

[34] Ms McDonald, for the defendant, submitted the application as phrased was far too wide, based on nothing more than speculation following a trawl of the Internet, and sought to rely on material which was historic and long antedated the compromise. That meant, Ms McDonald submitted, that the plaintiffs had inadequately defined the scope of their cross-examination.

Discussion and decision

[35] During exchanges between Bench and Bar, it was accepted that, if cross-examination of Ms Skeates is permitted, it is essential it centre on compliance or

otherwise with the compromise agreement and this Court's order. Unless that is maintained securely in mind, any cross-examination would risk becoming re-litigation of the issues pleaded in the claim which the parties have settled. Given that, the defendants' acknowledgement of the plaintiffs' rights as listed in cl 1 of the compromise would seem to render irrelevant in any permitted cross-examination, any differences between "Insight Focused Therapy" and what is accepted as being the plaintiffs' property except, perhaps, as part of a demonstration of any breach of the Tomlin Order.

[36] Further, as again largely accepted by counsel during the exchanges, the hearing of this application would have been better defined (or, perhaps, obviated) had the agreed further discovery been completed and if, possibly, the plaintiffs had also administered interrogatories and served a Notice to Admit Facts before bringing this application on for hearing. Those measures would have been likely to result in significant additional focus being brought to what is plainly a wide-ranging application.

[37] However, as earlier remarked, courts must be alert to ensuring compliance with their orders. Possible breaches of court orders require to be viewed seriously. The need for the plaintiffs to demonstrate "special circumstances" needs to be seen in that light.

[38] Having regard to that approach, seen in the light of all the evidence it must at least be arguable that the defendants have not complied with the compromise and this Court's order. That amounts to "special circumstances" in this case. Cross-examination of Ms Skeates should therefore be permitted to ascertain which version of the facts is correct.

[39] That said, comments have earlier been made that the current phrasing of the application seeks to enforce the consent order in a manner which goes significantly beyond the terms of the compromise, and, having regard to the necessarily limited object of the cross-examination, it is essential that it be confined to the sole issues now relevant, namely whether the compromise agreement, properly construed, has

been complied with and accordingly whether this Court's order has or has not been breached.

Result

[40] In the result the plaintiffs' application to cross-examine the first defendant is granted with the cross-examination to be confined as appearing in this judgment.

[41] Mr Elliott suggested – and Ms McDonald did not demur – that half a day would be required for cross-examination and argument as to whether this Court's order had been breached, and said that whatever the result of the cross-examination might be, and whatever information was elicited, the plaintiffs would not seek to call evidence to rebut Ms Skeates' evidence.

[42] The registry is accordingly requested to allocate a half day fixture for the cross-examination by the plaintiffs of the first defendant, that fixture to be after the date for completion of further discovery as set out in the consent order to that effect made on 4 February 2010. Any Judge can hear the cross-examination.

[43] Counsel are to endeavour to agree on the costs of this application which are to be paid by the defendants to the plaintiffs. In the event of disagreement, memoranda may be filed (maximum five pages) with the plaintiffs leading off and with counsel certifying, if they consider it appropriate, that the Court can determine all questions of costs on the papers.

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HUGH WILLIAMS J.

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