IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-001122
[2019] NZHC 242

BETWEEN	THE RIGHT HONOURABLE WINSTON RAYMOND PETERS Plaintiff
AND	PAULA LEE BENNETT First Defendant
	PETER HUGHES Second Defendant
	ANNE MERILYN TOLLEY Third Defendant
	THE ATTORNEY GENERAL sued on behalf of the MINISTRY OF SOCIAL DEVELOPMENT Fourth Defendant
	BRENDAN BOYLE Fifth Defendant

Teleconference:	21 February 2019
Appearances:	B Henry for Plaintiffs G Richards and P T Kiely for First and Third Defendants T Fisher and T Witten-Sage for Second, Fourth and Fifth Defendants
Judgment:	22 February 2019

COSTS JUDGMENT OF VENNING J ON APPLICATION FOR FURTHER AND BETTER DISCOVERY

This judgment was delivered by me on 22 February 2019 at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors:	Clifton Killip Lyon, Auckland Kiely Thompson Caisley, Auckland Crown Law, Wellington
Counsel:	B Henry/C Foster G Richards, Wellington

[1] The plaintiff's application for further and better discovery was before the Court at a telephone conference review on 21 February 2019. As confirmed in the minute issued following that conference Mr Henry advised that a fixture was not required on the application. The application will formally be dismissed once the outstanding issues referred to in that minute are addressed. The only issue left is the issue of costs.

[2] The application did not formally seek costs against the defendants. The second and fourth and fifth defendants' opposition to the application did not seek costs either. The first defendant did seek costs in her notice of opposition.

[3] The first defendant and second, fourth and fifth defendants all take the view that the application for further discovery by the plaintiff was unnecessary. Counsel say the issues the plaintiff raised in the application could have been addressed directly by counsel in the course of correspondence.

[4] There is force in the point counsel for the defendants makes, particularly in relation to discovery. Rule 8.2 confirms the obligation on counsel to co-operate in relation to the discovery exercise. The Court expects that counsel will not make unnecessary applications which could be resolved between counsel.

[5] Against that I do note that Mr Henry set out his concerns regarding the defendants' failure to make full and adequate discovery in his memorandum of 11 December 2018, albeit in a general way. In response Mr Kiely noted that the memorandum did not address the issue of the first or third defendants' discovery. Counsel for the second, fourth and fifth defendants suggested they were willing to consider the plaintiff's request for further information given sufficient information, otherwise the appropriate course of action was for the plaintiff to file the relevant anticipated application.

[6] Apparently counsel did not engage in any further correspondence directly or communicate directly about the matter. That is unfortunate.

[7] The application for further and better discovery followed and included an application in relation to the first defendant. The plaintiff says she failed to identify when text messages, which were no longer held by her, had been deleted.

[8] The first defendant could reasonably have expected the application for further and better discovery would not have been directed at her as it was not referred to in Mr Henry's memorandum. However, her initial affidavit document was defective in that it failed to address the requirement under HCR 8.16 and advise when the texts ceased to be under her control. As the first defendant accepted her email communications with Mr Wayne Eagleson were relevant, the texts would also have been relevant. Accepting the texts have been deleted, the date they have been deleted could be a relevant matter in the proceeding and should be disclosed if it is at all possible. That has been accepted to the extent the first defendant is to make a further brief supplementary affidavit dealing with that point.

[9] In the circumstances I am satisfied that both parties have some merit in their position as reflected in the outcome. The appropriate course is for the costs of the application to lie where they fall as regards the plaintiff and first defendant. The plaintiff will bear the costs of his application and memoranda for and attendance at the telephone conference, and the first defendant can bear her costs of the opposition and memoranda and attendance at the telephone conference.

[10] The second, fourth and fifth defendants have filed substantive affidavits in response to the application for further discovery. Those affidavits have clarified the initial affidavit of documents. I agree with Mr Fisher that aspects could have been dealt with by way of correspondence, for instance, the matters involving Ms Trotman's private information and the duplication of documents. On the other hand further information has been disclosed in the affidavit filed in response to the application. In a claim of this nature I also accept Mr Henry's point a degree of formality is required around the discovery process. Also the second and fourth and fifth defendants effectively invited the application for discovery in their memorandum.

[11] In the circumstances again I am satisfied the appropriate result given the outcome of the application is for the parties to bear their own costs associated with the application.

Result/orders

[12] There is no order for costs against any party in relation to the plaintiff's application for further and better discovery and the oppositions to it. Each of the parties is to bear their own costs in relation to the applications and oppositions, including preparation for and attendance at the telephone conference.

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Venning J