

Reference No. HRRT 024/2016

UNDER THE PRIVACY ACT 1993

BETWEEN YAN GUO

PLAINTIFF

AND PRICEWATERHOUSECOOPERS

DEFENDANT

TRIBUNAL: Rodger Haines ONZM QC, Chairperson

REPRESENTATION:

Ms Y Guo in person assisted by Ms Li Yan (her mother) as *McKenzie* friend

Mr TL Clarke for defendant

Ms HC Stuart for CityMed Medical Centre Ltd (non-party)

DATE OF MINUTE: 22 December 2020

**MINUTE OF CHAIRPERSON
FOLLOWING TELECONFERENCE ON 18 DECEMBER 2020 AT 10AM¹**

[1] As required by the *Minute* dated 30 October 2020 at [20.1] CityMed Medical Centre Ltd (CityMed) has filed a notice of opposition to the application by Ms Guo for non-party discovery against CityMed and to the application for a witness summons addressed to CityMed staff. The notice of opposition is accompanied by an affidavit sworn by Dr SJ Culpan who, prior to his retirement, practised at CityMed.

PRICEWATERHOUSECOOPERS

[2] As mentioned in the earlier *Minute* Ms Guo has filed three interlocutory applications affecting PwC:

[2.1] Application for discovery order.

¹ [This decision is to be cited as *Guo v PwC (Non-Party Discovery – Oral Hearing)* [2020] NZHRRT 51.]

[2.2] Application for search order.

[2.3] Application for a witness summons addressed to PwC staff.

Discovery – PwC

[3] In relation to discovery Ms Guo and PwC are in agreement the application is to be heard on the papers.

Search order – PwC

[4] There was originally agreement the application for a search order was also to be determined on the papers. However, in her memorandum dated 15 December 2020 Ms Guo now says she wants the application postponed until after the discovery process has been completed. She believes only then will she know whether PwC has given discovery which is both full and complete. If it is not she will then pursue the search order application. Mr Clarke, however, responds that one of the primary grounds for opposing the application is that the Tribunal does not have jurisdiction to make a search order. Following discussion today it was agreed the jurisdiction issue is to be determined at the same time as the discovery application.

[5] Ms Guo has indicated she will be relying on the fact that the High Court Rules make provision for a search order. However, in framing her submissions she will need to bear in mind that the Tribunal draws on the High Court Rules only where those rules are relevant to a jurisdiction already possessed by the Tribunal. The Rules cannot confer on the Tribunal a jurisdiction it does not have. Ms Guo will also need to bear in mind that in the *Minute* issued by the Tribunal on 16 June 2017 in the proceedings brought by Ms Guo against Dr Culpan (HRRT025/16: Guo v Culpan) at paras [22] to [24] an earlier application by her for a search order against Dr Culpan was dealt with in the following terms:

The request for a search order

[22] Consequent on Ms Guo's belief Dr Culpan has obstructed the course of justice by allegedly destroying evidence, Ms Li by memorandum dated 15 June 2017 has requested an order authorising computer experts retained by Ms Guo to access and search Dr Culpan's computer records looking for all communications, emails or documentation about Ms Guo for the period 2009 to 2015.

[23] But in civil litigation a search order can only be made under statutory authority and only after safeguards have been observed such as those found in the search order provisions in Part 33 of the High Court Rules.

[24] The Tribunal has no statutory power to issue an order of the kind sought by Ms Guo and as a creature of statute, has no inherent jurisdiction to fill the gap. It is simply not possible for the Tribunal to lawfully grant the application. In these circumstances the making of the order would be a serious inroad into Dr Culpan's right under s 21 of the New Zealand Bill of Rights Act 1990 to be secure against unreasonable search or seizure of his person, property or correspondence or otherwise.

[25] In fairness, once this was explained to Ms Li the application was not pursued today. Ms Li said she would take legal advice.

[6] All of these points will need to be addressed by Ms Guo in her submissions.

Witness summons – PwC

[7] In relation to the application for a witness summons Mr Clarke drew attention to the *Minute* issued on 30 October 2020 which at [14] records the possibility of postponing the application until a hearing date has been allocated. In his submission it would be inappropriate for the application to be postponed as there is no live matter for determination. That is, the application does not name a particular person or date of compulsory attendance. Not until the substantive proceedings have been set down and a specific person identified as the intended witness should the application be filed and heard. It was submitted the present application should be withdrawn in the meantime with Ms Guo reserving her right to apply later. Following discussion of this submission with Ms Guo she agreed to withdraw the witness summons on the basis suggested by Mr Clarke.

[8] At the end of this *Minute* there is a timetable for the filing of submissions by Ms Guo and by PwC in relation to the discovery application and in relation to the question whether the Tribunal has jurisdiction to make the search order sought by Ms Guo.

CITYMED

[9] As mentioned, Ms Guo has applied for non-party discovery against CityMed as well as a witness summons addressed to CityMed staff. Both applications are opposed.

Discovery – CityMed

[10] In relation to the discovery application the notice of opposition dated 13 November 2020 filed by CityMed makes three key points:

[10.1] All correspondence between PwC and Dr Culpan/CityMed has already been discovered to Ms Guo in connection with her claim against Dr Culpan (HRRT025/16: Guo v Culpan). There are no other documents to discover.

[10.2] CityMed/Dr Culpan do not have any objection to the documents previously discovered to Ms Guo being used by her for the purpose of the present proceeding against PwC.

[10.3] The interlocutory applications by Ms Guo against CityMed are therefore unnecessary and disproportionate.

[11] The grounds of opposition are supported by a detailed affidavit sworn by Dr Culpan. After deposing that he is authorised to swear his affidavit on behalf of CityMed in response to the applications by Ms Guo, Dr Culpan sets out the background and addresses the issue of discovery at some length. He provides full justification for the grounds of opposition. His affidavit is, in functional terms, an affidavit of documents:

Guo v Culpan HRRT No. 025/16

5. In May 2016, Ms Guo brought a claim against me in the Human Rights Review Tribunal alleging that I had deliberately delayed providing her with a copy of her medical file in order to harm her relationship with her employer, PwC. She also alleged that I withheld parts of her medical file from her for that same purpose.
6. I understand these are similar allegations to those made by Ms Guo against PwC in the present proceeding.

7. In November 2017, my statement of evidence responding to Ms Guo's allegations against me was filed. This addresses many of the allegations made by Ms Guo in her affidavit of 9 October 2020 in support of her non-party discovery application against CityMed. A copy of the statement of evidence, signed by me on 3 November 2017 is therefore annexed and marked Exhibit "A." I have redacted three paragraphs on the final page which are irrelevant to the matter currently before the Tribunal.
8. I confirm that the contents of that statement are true and correct to the best of my knowledge and belief.

Discovery

9. On 6 November 2017, I provided discovery to Ms Guo through my counsel. The following categories of documents were disclosed:
 - a. The correspondence between myself and staff at PwC in connection with the report completed on 22 December 2009. These documents had been attached to Ms Guo's medical file on MedTech 32, CityMed's practice software;
 - b. Ms Guo's clinical records. These were minimal because Ms Guo had specifically asked me not to write notes during her two appointments on 20 November 2009 and 22 January 2010;
 - c. Emails between me and staff at PwC between 17 January 2011 and 18 April 2011 in which the staff raised further concerns about Ms Guo's mental health. These were not attached to Ms Guo's medical file at the time for various reasons outlined in my statement of evidence. They were thus not provided to Ms Guo in response to her Privacy Act request for her medical file;
 - d. Emails between me, Ms Guo and CityMed reception regarding Ms Guo's request for her medical file in 2015;
 - e. Emails between me and staff at the Office of the Privacy Commissioner regarding Ms Guo's complaints, including an apology letter I wrote to Ms Guo in respect of the delay in providing her medical file; and
 - f. Administrative file notes on Ms Guo's file.
10. The list of documents disclosed is annexed and marked Exhibit "B."
11. In order to fulfil my obligations in respect of discovery, I had searched for all documents required to be discovered, taking the following particular steps:
 - a. I searched my CityMed email, my home email and the CityMed reception email systems for all documents relating to Ms Guo;
 - b. I searched CityMed's practice management software, MedTech 32 for any documents/information relating to Ms Guo; and
 - c. I made enquiry of other staff at CityMed as to whether they had any other documents in their possession that may be relevant to the proceeding. They did not.
12. All correspondence to and from PwC came through me, rather than receptionists or other staff at CityMed. Other than the information in the above referred email systems, and the information which I had attached to Ms Guo's medical file on MedTech 32, there was no other information available.
13. I was not aware of anyone other than myself, and the receptionists referred to in my statement of evidence, who were involved with Ms Guo's matter.
14. At the time of searching for these documents, I was unable to locate a report dated 2 July 2009 which had been sent to PwC. This is referred to in my statement of evidence. The report was a follow-up, to record in writing what had been discussed with Neil Haines, a partner at PwC, over the phone.

15. The report had been sent from a personal email address which I discontinued in 2012. I was unable to access any data from that account. Although I did copy myself in on my CityMed email address, I expect this did not come up in my searches as the correspondence did not name Ms Guo. At the time of giving my advice in 2009, I was not aware of her identity. The report therefore would not have been made available through a search of Ms Guo's name.
16. The report was later provided to me through my counsel, who had received it from counsel for PwC. This was sent to Ms Guo on 22 December 2017 by my lawyer, with an email saying: "By way of further discovery, please find attached Dr Culpan's report to PwC from July 2009. This was only recently forwarded to me by the lawyers for PwC. As you know, Dr Culpan had been unable to locate a copy."
17. A true copy of that email is annexed and marked Exhibit "C."

Response to Ms Guo's affidavit sworn 9 October 2020

18. There is no other correspondence between CityMed staff or PwC held on CityMed's practice software or email systems.
19. Further, contrary to the particular allegations made in Ms Guo's affidavit sworn 9 October 2020:
 - a. I did not, at any stage, mislead the investigator for the Office of the Privacy Commissioner during his investigation in December 2015 (see Ms Guo's paragraph 8).
 - b. I have not sought to "cover up" what Ms Guo characterises as "deficient medical notes" (see Ms Guo's paragraphs 13).
 - c. In paragraph 16, Ms Guo refers to a note that was present in the version of the notes printed on 29 September 2015 which was not present on the version printed on 30 September 2015. I am unable to explain how or why this happened.
 - d. In paragraph 18 Ms Guo alleges that her medical information was released to PwC on 31 August 2015. It was not.

Use of documents

20. Neither I nor CityMed oppose Ms Guo having access to the documents that were provided to her by way of discovery in her claim against me, for the purposes of her claim against PwC.

Application by Ms Guo for an oral hearing

[12] By email dated 19 November 2020 Ms Guo gave notice she wishes to cross-examine Dr Culpan and for that reason applies to have her discovery application against CityMed determined at an oral hearing.

[13] In her oral submissions today Ms Guo said it is her intention at that hearing to prove that what Dr Culpan says about providing the personal information requested by her is incorrect. She believes he has withheld information but has no way of proving this other than by cross-examination. However, after hearing Ms Guo's submissions I advised her application for an oral hearing would be dismissed. My reasons now follow.

[14] The law is clear:

[14.1] The discovery process starts with a process of self-assessment by litigants and that assessment will not be disturbed without reason being shown. See *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] 1 NZLR 598 at [28] (CA).

[14.2] On an application for particular discovery under High Court Rules, r 8.19 the starting point is a presumption that the affidavit of documents already filed is conclusive. The party seeking further discovery has to establish that the existing affidavit of documents is incomplete. See *McCullagh v Robt Jones Holdings Ltd* [2015] NZHC 1462, (2015) 22 PRNZ 615 at [7].

[15] While the High Court Rules do not apply to the Tribunal, they are drawn on by the Tribunal to provide guidance when the Tribunal exercises its jurisdiction to require discovery or disclosure of information. Application of the Rules is, however, subject to the proviso they are to be appropriately modified and adapted to the Tribunal's distinctive jurisdiction. See *Boyce v Westpac New Zealand Ltd (Non-Party Discovery)* [2015] NZHRRT 31 at [9] to [12].

[16] In the present case Dr Culpan has stated on oath he provided full discovery to Ms Guo on 6 November 2017 and there is no other correspondence between CityMed staff or PwC held on CityMed's practice software or email systems.

[17] In seeking to cross-examine Dr Culpan on this evidence Ms Guo is hoping that somehow he will be shown to be wrong. But apart from sincerely believing Dr Culpan to be mistaken, Ms Guo has provided no basis to challenge his evidence that discovery has been complete. Ms Guo's mother told me today that she and her daughter believe Dr Culpan has withheld information but they have no way of proving that his evidence is untrue.

[18] In my view an oral hearing to facilitate a cross-examination for which no foundation has been established would be both disproportionate and wrong in principle. It will also most likely involve a collateral re-hearing of Ms Guo's complaint under the Privacy Act in which she alleged Dr Culpan failed to make full disclosure when responding to her IPP 6 request. Those proceedings were dismissed by the Tribunal in *Guo v Culpan* [2018] NZHRRT 25 (19 June 2018) and Ms Guo's appeals to the senior courts have been unsuccessful. See the decisions collected in the *Minute* dated 30 October 2020 at [3]. In these circumstances grant of the application will not be consistent with the duty of the Tribunal to ensure that proceedings be determined fairly, efficiently, simply, and speedily as is consistent with justice. See the Human Rights Review Tribunal Regulations 2002, reg 16(1):

16 Conduct of proceedings: power to give directions, etc

- (1) Subject to decisions of the Tribunal, the Chairperson or a Deputy Chairperson may give any directions and do any other things—
 - (a) that are necessary or desirable for the proceedings to be heard, determined, or otherwise dealt with, as fairly, efficiently, simply, and speedily as is consistent with justice

[19] An unsubstantiated belief that cross-examination will somehow result in something turning up to vindicate the assertion that Dr Culpan's discovery has been incomplete is no more than a fishing expedition. That is why earlier reference has been made to the fundamental principles that:

[19.1] The discovery process starts with a process of self-assessment by litigants and that assessment will not be disturbed without reason being shown.

[19.2] On an application for particular discovery under High Court Rules, r 8.19 the starting point is a presumption that the affidavit of documents already filed is conclusive. The party seeking further discovery has to establish that the existing affidavit of documents is incomplete.

[20] Ms Guo has not provided reason to believe Dr Culpan's disclosure of documents has been incomplete. In these circumstances her application to cross-examine Dr Culpan is dismissed. The application for discovery against CityMed is therefore to be determined on the papers. Timetable directions for the filing of submissions follow.

Witness summons – CityMed staff

[21] Ms Guo has also applied for a witness summons addressed to CityMed staff. However today, as in the case of the similar application affecting PwC staff, Ms Guo withdrew her application.

TIMETABLE DIRECTIONS

[22] The timetable directions agreed to by Ms Guo, PwC and CityMed are as follows:

[22.1] By 4pm on Friday 15 January 2021 Ms Guo is to file and serve her submissions in relation to:

[22.1.1] Her application for a discovery order against PwC.

[22.1.2] The jurisdiction of the Tribunal to issue a search order against PwC.

[22.1.3] Her application for non-party discovery against CityMed.

[22.2] By 4pm on Friday 29 January 2021 PwC and CityMed are to file their submissions in opposition.

[22.3] By 4pm on Friday 12 February 2021 Ms Guo is to file her submissions in reply.

[23] Leave is reserved to both parties and to the non-party to make further application should the need arise.

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Mr RPG Haines ONZM QC
Chairperson