IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2017-419-000055
[2018] NZHC 1273

BETWEEN	ADAM RAPHAEL GREENBAUM Applicant
AND	THE WAIKATO DISTRICT HEALTH BOARD First Defendant
AND	TOM GORDON WATSON Second Defendant

Hearing: 21 March 2018

Appearances: J Long and G Schumacher for Applicant
P White for Respondent
AS Ross QC and N Kusel for Non-party, Southern Cross
J Coates for Non-party, Braemar

Judgment: 5 June 2018

JUDGMENT OF TOOGOOD J

This judgment was delivered by me on 5 June 2018 at 11.30 am
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Introduction

[1] Private hospitals provide facilities and support services for use by medical specialists. To secure the ability to use such facilities and services, a medical practitioner must be "credentialed" or approved as a suitable person.

[2] The applicant, Dr Adam Greenbaum, is advancing a claim for damages for interference by unlawful means against the defendants: the Waikato District Health Board (the WDHB), and its former Chief Medical Officer, Dr Tom Watson. It is the plaintiff's position that the defendants interfered unlawfully with the credentialing process at four private hospitals to which he applied for acceptance but was declined.

[3] This judgment addresses Dr Greenbaum's application for non-party discovery against two of the health service providers at whose hospitals Dr Greenbaum wished to work: Southern Cross Ltd (Southern Cross) and Braemar Hospitals Ltd (Braemar). They are not parties to the proceeding.

Documents sought

[4] Dr Greenbaum wishes to obtain documents in the possession of the non-parties that are said to pertain to the defendants. The specific category of documents is set out in the schedule to the non-party discovery application but includes documents that are broadly within two categories:

(a) comparative documents about other practitioners' applications for credentials; and

(b) confidential evaluative material, including the identities of those who provided it.

[5] The general purpose of the applications is to enable Dr Greenbaum to compare the way in which the WDHB and Dr Watson handled inquiries about his applications for credentials with the way similar applications by other practitioners were handled.

Background circumstances

[6] Dr Greenbaum is a London-based plastic surgeon and a New Zealand citizen who was fully accredited in the United Kingdom and Europe. Dr Greenbaum was in consultant practice and on the specialist register in the UK before his wife, children and he emigrated to New Zealand in 2009. In New Zealand, Dr Greenbaum accepted a position of employment with the WDHB and obtained a provisional registration from the Medical Council of New Zealand (MCNZ). He was employed by the WDHB from 11 January 2010 to 23 February 2011.

[7] A dispute evolved between Dr Greenbaum and the WDHB over whether he had been offered a permanent position with the WDHB at the outset of his employment. The matter was resolved following mediation. A term of the settlement reached was that Dr Greenbaum would remain employed for a further fixed period of time, or until he obtained vocational registration.

[8] Dr Greenbaum required vocational registration because he was not New Zealand qualified. Obtaining the qualification would enable him to commence practice as a private plastic surgeon in New Zealand.

[9] On 23 February 2011, Dr Greenbaum obtained vocational registration despite alleged opposition from WDHB personnel and Dr Watson in 2010. It is alleged they failed or refused to countersign mandatory supervision reports from Dr Greenbaum's supervisor; attempted to force a change of supervisor for Dr Greenbaum; and made direct contact with MCNZ, suggesting a number of times there were competency concerns with Dr Greenbaum and that there was data to substantiate these concerns. When the MCNZ requested that Dr Watson provide formal notification and the relevant data, no such substantiating evidence was provided to it. The defendants deny that they took steps to prevent or impede Dr Greenbaum's vocational registration.

[10] Upon obtaining vocational registration, Dr Greenbaum left the WDHB and sought credentialing from four private hospitals, including Southern Cross and Braemar. It is alleged the WDHB and Dr Watson knew that Dr Greenbaum intended to apply for credentialing at private hospitals in Hamilton. Dr Greenbaum's application for credentials was declined by each of the private hospitals.

[11] It is said that, in May 2011, Dr Greenbaum was informed by the WDHB's solicitor that Dr Watson would be reporting the WDHB's concerns about Dr Greenbaum's competency to the MCNZ under the Health Practitioners Competence Assurance Act 2003. The MCNZ invited the plaintiff's response to the complaint. After hearing from Dr Greenbaum, MCNZ did not proceed with a further investigation.

Unlawful interference

[12] Dr Greenbaum alleges that the WDHB, through Dr Watson and other individuals, involved themselves in the processes of his credentialing. It is the plaintiff's position that, by unlawful means, they caused the non-parties to decline to credential Dr Greenbaum, causing him harm and loss as he is unable to practice privately in his chosen field in Hamilton. The information sought from the non-parties must, it is said, help to prove that what the defendants did amounted to unlawful interference.

Non-party discovery applications

[13] Non-party discovery is governed by r 8.21 of the High Court Rules 2016 which provides for orders for particular discovery against a non-party to be made where it appears that the person may be or have been in control of one or more documents that the person would have had to discover if the person were a party to the proceeding themselves. It is implicit in r 8.21 that the non-party discovery order is necessary, in that other sources of evidence are unlikely to be sufficient because they are materially incomplete or unreliable; and the documents are not merely marginal and will make a real difference.[1]

[14] The rule, by linking to discovery which a party to the proceeding would have had to make, brings into play all considerations applying in the more usual discovery context, including relevance and proportionality to the subject matter of the proceeding.[2]

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[1] *Vector Gas Contracts Ltd v Contact Energy Ltd* [2014] NZHC 3171 at [30].
[2] *Westpac NZ Ltd v Adams Ors* [2013] NZHC 3113 at [26].

Submissions

[15] Documentary material in the control of the non-parties relevant to Dr Greenbaum's own credentialing application and credentialing applications of other health practitioners is sought. The non-parties oppose the discovery application on grounds that fall broadly into three categories:

(a) redundancy

(b) irrelevance; and

(c) confidentiality.

[16] The non-parties say that Dr Greenbaum has obtained all of the information he is permitted to access under the Privacy Act 1993 and, therefore, it has been established that there are valid reasons he has failed to obtain the documents he seeks. Counsel for the non-parties also submit that the documents in the categories sought are irrelevant and confidential. They argue that Dr Greenbaum's private interest in obtaining the information is outweighed by the public interest in ensuring patient and workplace safety at private hospitals. It is submitted that it is essential to obtaining the evaluative material in the credentialing process that the information remain confidential as the sources and quality of evaluative information would be damaged if confidentiality is undermined by granting this application.

[17] For the applicant, Mr Long submits that the Privacy Act 1993 is irrelevant and cannot circumscribe the High Court Rules governing non-party discovery. He also submits that the credentialing process within a private hospital is not essential to preserving patient safety and that the discovery of documents will not undermine the sources or quality of evaluative material which make the credentialing process essential to patient safety. Mr Long argues that there is a public interest in Dr Greenbaum obtaining the documents and in the prevention of the unlawful acts that are alleged to have occurred.

Discussion

Redundancy

[18] This ground of opposition is based on the decision of the Privacy Commissioner on 1 May 2013 who upheld Southern Cross's objections to providing the evaluative material. There's a clear statutory exemption in the Privacy Act for evaluative material,[3] but, although the court's powers ought to be exercised conformably with the Privacy Act,[4] this is an independent application and must be assessed on its own merits.

Relevance

[19] Relevance is a gateway issue for discovery. The applicant must demonstrate that the documents are relevant to a fact in issue being whether the WDHB or Dr Watson unlawfully interfered with Dr Greenbaum's credentialing applications.

Comparative material

[20] In his affidavit, Dr Greenbaum says he wants to "compare the process undertaken for a comparable practitioner" so as to demonstrate the way the defendants caused the "process in respect of my application to go awry". In his oral submissions, Mr Long submitted that the comparative material relating to other practitioners' successful credentialing applications are relevant as it will be used as a comparison to Dr Greenbaum's application to show any differences and commonalities between the handing of the applications by other sources of information and the defendants. He submits that this information will go to the nature of the interference of the defendants because, if the handling of Dr Greenbaum's application was out of the ordinary, it lends weight to the suggestion that there was improper, interfering behaviour by the defendants.

[21] Counsel for the non-parties submit that the comparative data does not tell anything about a fact in issue in this proceeding. Mr Coates, for Braemar, submits that

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3 Privacy Act 1993, s 6.
4 *Tozer v Attorney-General* (2001) 15 PRNZ 642 at [26].

the request is an "excursion on the train of inquiry" which is not to be encouraged in the case of non-party discovery.[5] He argues that the comparative material is not necessary to meet the threshold required under r 8.21 of the High Court Rules and does not "make a real difference" or even a "merely marginal" one.[6] I do not disagree.

[22] The breadth of the information sought involves Dr Greenbaum putting under scrutiny the procedure and decisions made by the non-parties about other practitioners, including inquiries made of potential sources of information other than the defendants. Rather than focusing on the actions of the defendants or other parties responding to requests from the hospitals for information, the proposed discovery focuses on the decision-making process of the non-parties and whether the non-parties may have acted out of the ordinary. That is not relevant to the decisions which the Court must make in Dr Greenbaum's proceeding against the defendants in tort.

[23] I am not satisfied that evidence about the processes adopted by Southern Cross and Braemar generally, and the decisions that they made about other practitioners, will assist the Court to determine Dr Greenbaum's claim that the defendants unlawfully interfered in the credentialing process. The non-parties were entitled to ask for any information they considered relevant to their decisions. The real issue in the proceeding, however, is what *the defendants* did about the requests for information about Dr Greenbaum.

[24] I consider that, for discovery purposes, a more focused inquiry by Dr Greenbaum, narrowed to other occasions on which the WDHB or Dr Watson responded to requests from the non-parties for information regarding credential applications, would be of sufficient arguable relevance to meet the test. Whether such information was considered to be sufficiently relevant to be admissible in the proceeding, however, would be a matter for determination by the trial judge. But the other grounds for opposition must also be considered.

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5 *Vector Gas Contracts Ltd v Contact Energy Ltd* [2014] NZHC 3171 at [29].

6 At [59].

Direct evaluative material

[25] Braemar does not have the direct evaluative material sought by the plaintiff, so the request to receive that type of information relates only to Southern Cross.

[26] Mr Long submits that this material is of primary relevance to the plaintiff's case as it will demonstrate the nature of the interference by personnel of the WDHB, and Dr Watson, and the manner in which the non-party relied on, or was led to rely on that information.

[27] Unless there is some link between the actions of the WDHB and Dr Watson and the communications between Southern Cross and its other informants, it is difficult to see what the other informants have said about practitioners in other cases can be material to Dr Greenbaum's proceeding. Southern Cross, however, does not appear to object to the relevance of these documents insofar as they pertain to Dr Greenbaum, but have opposed their disclosure on the basis that it contains information from third parties which was obtain with a promise of confidentiality.

Confidentiality – Section 69 of the Evidence Act 2006

[28] Section 69 of the Evidence Act 2006 guides the Court in the exercise of its discretion as to confidential information. It provides:

> **69 Overriding discretion as to confidential information**
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> (1) A direction under this section is a direction that any 1 or more of the following not be disclosed in a proceeding:
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> (a) a confidential communication:
>
> (b) any confidential information:
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> (c) any information that would or might reveal a confidential source of information.
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> (2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—

(a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or

(b) preventing harm to—

(i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or

(ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or

(c) maintaining activities that contribute to or rely on the free flow of information.

(3) When considering whether to give a direction under this section, the Judge must have regard to—

(a) the likely extent of harm that may result from the disclosure of the communication or information; and

(b) the nature of the communication or information and its likely importance in the proceeding; and

(c) the nature of the proceeding; and

(d) the availability or possible availability of other means of obtaining evidence of the communication or information; and

(e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and

(f) the sensitivity of the evidence, having regard to—

(i) the time that has elapsed since the communication was made or the information was compiled or prepared; and

(ii) the extent to which the information has already been disclosed to other persons; and

(g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.

(4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.

(5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

[29] It is a prerequisite of the section that the material under scrutiny is confidential. The term is not defined in the Evidence Act, but the test for confidentiality is whether the party claiming that the information is confidential could have a reasonable expectation of confidentiality in the relevant information.[7]

[30] These are relevant background facts:

(a) Private hospitals allow practitioners to apply to use their facilities to provide care privately to patients.

(b) The doctors are essentially mere users of facilities and services; they are not employed by, and are under no supervision by, the private hospitals.

(c) The private hospitals are under no obligation to permit a practitioner to use, or even to apply to use, their facilities.

(d) Generally speaking, at least, the persons from whom the private hospitals seek information as part of the credentialing process are not under any duty to provide it.

[31] Credentialing is the formal process used by the hospitals to verify the qualifications, experience, professional standing and other relevant professional attributes of medical specialists, for the purpose of forming a view that the practitioner should be permitted access to the hospital's facilities and services. The hospitals have a legitimate interest in a practitioner's competence, performance and professional suitability to provide safe and high-quality health care services.

[32] In order to be satisfied about the practitioner's suitability for accreditation, the private hospitals obtain information from a variety of sources. They consider that they will obtain the best information if they assure the potential sources of information that what is provided will be treated in the strictest confidence. It is common ground that the applicants for credentials and the potential sources of the information about them

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[7] *R v X CA553/09)* [2009] NZCA 531, [2010] 2 NZLR 181 at [44]-[45].

understand that the credentialing process is confidential. Dr Greenbaum acknowledged at the time the evaluation procedure began that confidential information would be sought.

Public interest

[33] The starting point for the Court's discretion under s 69 is the consideration that the disclosure of relevant communications or information in a proceeding is in the public interest. It is that which promotes access to a fair and just system of adjudication by the courts. For the purposes of this case, the question posed by s 69(2) of the Act is whether that interest is outweighed by the public interest in maintaining an activity that relies on the free flow of information.

[34] Dr Greenbaum argues that the public interest in patient safety is addressed at the Medical Council regulatory level where practitioners are assessed for vocational credentialing and, therefore, that it should not be a significant factor in an application for permission to practise in a particular hospital. However, as Dr Baird, a practising obstetrician and gynaecologist, explains, the clinical competence and qualifications of an applicant are only a starting point in a hospital's consideration of the suitability of an applicant.

[35] An applicant's personality traits – such as collegiality and the ability to work co-operatively – are "soft" factors beyond clinical experience that a private hospital may legitimately regard as being important to the decision whether to grant credentials. Such characteristics are not referred to by the MCNZ when doctors are granted vocational registration information. As Dr Baird notes, information about the personality and character of a practitioner is notoriously difficult to elicit. Opinions on such matters often involve highly subjective evaluations.

[36] Mr Long submits that the fact that information has been communicated from one person to another in confidence is not, of itself, a sufficient ground for protection of disclosure.[8] He argues that disclosure serves the public interest because individuals who use their positions of power irresponsibly or unfairly should be held to account,

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[8] *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 (HL) at 218.

and he contends that the non-parties, as well as Dr Greenbaum, have been the victims of the misinformation and inaccurate references provided by the defendants. Mr Long accepts that, from a patient safety perspective, open and candid comments on colleagues' competence should be encouraged. In his affidavit, Dr Gorman, a professor of medicine, supports this view by stating that all medical practitioners have an ethical obligation to report concerns about their colleagues but, he says, there is no guarantee of confidentiality in such circumstances. As discussed above, however, Dr Greenbaum's clinical competence is not the only relevant consideration in this case.

[37] I accept the submission by Mr Ross QC that the public has an interest in the maintenance of the credentialing process as one in which there is a free flow of information.[9] I consider also that, because the private hospitals are not under any duty to permit every competent medical practitioner to use their facilities, there is a relevant public interest in ensuring that they are able to exercise their freedom of choice on the basis of the best available information. They consider they will get it if they assure their sources of confidentiality. I accept that as a general proposition. I am satisfied that the prospect that the information sought would be disclosed to the candidate would be likely to have an inhibiting effect on the ability of the private hospital to get good quality information.

Proportionality exercise

[38] The Court's role in assessing the mandatory considerations under s 69(3) of the Act and the consequent weight these factors provide to the determination about competing public interests in s 69(2) has been expressed as an assessment of proportionality rather than balancing.[10] The assertion of public interest in and of itself cannot discharge the proportionality assessment; rather, it is a context specific enquiry and it must be established that the public interest is important on the facts of the case.

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9 Evidence Act, s 69(2)(c).

10 *R v X (CA533/2009)* [2009] NZCA 531, [2010] 2 NZLR 181; *Anderson v Hawke* [2016] NZHC 2280, [2016] NZAR 1360 at [51]; *X v Attorney-General* [2017] NZHC 293 at [90].

[39] When considering the likely extent of harm that may result from the disclosure of the information,[11] there are two risks to be considered. The first is that disclosure of confidential information could erode the credentialing process.[12] The second risk is the likely extent of harm to the non-parties and those who submitted confidential information relating to the credentialing applications of Dr Greenbaum and others.[13]

[40] The record-keeping is essentially Southern Cross's means of ensuring that its procedures are robust. I have held Southern Cross is entitled to take the view that confidentiality is a critical element of the procedure. It assists to maintain the integrity of the private hospital credentialing process and is fundamental to the flow of information on which the process relies.

[41] What is sought is the disclosure of confidential information about persons – the applicants for credentials in other cases – who have no interest in the proceeding between Dr Greenbaum and the defendants. Williams J maintained in *Tozer*[14] that this is a powerful factor militating against the making of the order sought. I respectfully agree. Moreover, the information sought is confidential information provided by or about people who have no ability to decide whether they should consent to the disclosure of information about them provided under an assurance of confidentiality. The expectation that the information would remain confidential is particularly relevant.

[42] The concerns expressed by the medical witnesses for the third parties should not be lightly set aside. Where the experts differ is in whether sources of information would be impaired if the people who gave statements about Dr Greenbaum in his credentialing application were disclosed to him. It is Professor Gorman's argument that doctors can be relied upon to tell the full, unvarnished truth about any concerns they have about their colleagues, even if they had to do it in the open. As I have said, that may be true so far as evidence of competence is concerned but I am not persuaded it is as true for more subjective opinions about "soft" factors such as personality. Importantly, the process of credentialing has a confidentiality requirement recognised

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11 Evidence Act 2006, s 69(3)(a).
12 Section 69(2)(c).
13 Section 69(4).
14 *Tozer v Attorney-General* (2001) 15 PRNZ 642 at [31].

by both applicants and referees, and third parties are entitled to insist that confidentiality be maintained.

[43] Mr Long submits that the identity of the candidates in other cases is not critical and that confidentiality can be preserved, subject to the disclosure of identifying features needed to enable a meaningful comparison. The chief executive officer of Braemar Hospital in Hamilton, Mr Bennett, notes concern about disclosure if the identifying features of informants and candidates remain because the community of medical professionals in New Zealand, particularly in the Waikato region, is small and tight-knit. Therefore, disclosing identifiable information such as dates at university, speciality and referees that would be needed to provide a meaningful comparison might nevertheless disclose the identity of third parties.

[44] Furthermore, I regard as significant the acknowledgement of Dr Greenbaum that confidential information would be sought as a significant consideration. It was not a condition of his consent to confidential inquiries being made that confidentiality would not apply to unfavourable information or opinions. On the contrary, the purpose of confidentiality is to encourage full disclosure of facts and opinions, especially those that may be unfavourable. In my view, Dr Greenbaum's prior consent to the making of confidential inquiries weighs heavily under s 69(4) in favour of preserving confidentiality.

[45] The privacy principles under the Privacy Act 1993, while also not binding, are similarly relevant to the exercise of discretion under s 69.[15]

[46] When looking at the nature of the information sought and its likely importance in the proceeding, I am not satisfied that unreasonable or unfair harm will be done to the plaintiff if confidentiality is maintained in these evaluative materials.[16]

Conclusion

[47] I am not satisfied that the comparative material involving other health practitioners' credentialing applications meets the relevance threshold under r 8.21.

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[15] *Tozer v Attorney-General* (2001) 15 PRNZ 642 at [26].
[16] Evidence Act 2006, ss 69(3)(a), (b) and (c).

Even if the inquiry was narrowed to other occasions on which the WDHB or Dr Watson responded to requests from the non-parties, disclosure would be outweighed by the public interest in maintaining confidentiality in an activity that relies on the free flow of information.

[48] In assessing the proportionality inquiry regarding the evaluative material sought, I consider that the general public interest in disclosure in court proceedings must give way to the public interest in maintaining the confidentiality of the credentialing process.

[49] For these reasons, I dismiss the application.

Costs

[50] Unless the parties can agree, any application for costs shall be by memorandum filed and served no later than 5pm on 22 June 2018. Any costs memorandum in reply shall be filed and served no later than 5pm on 13 July 2018. Costs shall then be determined on the papers unless the Court directs otherwise.

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Toogood J