

28 March 2014

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Without prejudice except as to costs

**CIV-2013-488-108 - JZK, Inc & Anor v McCarthy – Settlement Offer**

1. We refer to Mr McCarthy's first amended statement of defence, served on 12 March 2014.
2. That document has helpfully narrowed at least some of the issues in the case. Focussing on the copyright cause of action as an example, Mr McCarthy has now admitted that copyright subsists in our clients' video footage, that he knew the footage originated from our clients, that he copied and posted it online, and that he has threatened to post more of our clients' video footage online. This of course is also supported by the documents provided by the parties on discovery.
3. It follows that the thrust of Mr McCarthy's defence is the affirmative defences pleaded, in respect of which he has the onus of proof.
4. For the reasons outlined briefly below, we consider that Mr McCarthy has little prospect of successfully establishing the affirmative defences pleaded in the copyright or indeed any of the causes of action.
5. **Duress, undue influence and unconscionable bargain:** Both under Washington State law (refer witness statement of Mr Graham) and New Zealand law, there is a high bar to establishing these defences. Even the purported facts pleaded by Mr McCarthy do not reach that threshold, and of course those pleaded facts are contested. In addition, RSE records show that Mr McCarthy signed the 1993 COP during pre-registration for an event starting the next day. In the months prior to signing, Mr McCarthy had very limited attendance at RSE; comprising just 3 separate evenings. In these circumstances, it is difficult to see how Mr McCarthy could have been suffering from "psychological manipulation" or "financial strain" brought about by our clients at the time of signing and he has not produced any corroborative documents in his discovery.
6. **Lawful justification:** This defence is based on an allegation that RSE students were induced by a range of allegedly false representations to sign the 2007 COP and pay fees to the plaintiffs. One of the key elements Mr McCarthy therefore needs to establish is that the person who gave him the material was actually induced by the allegedly false representations. Yet, Mr McCarthy pleads that he received the footage from an anonymous source so proving inducement is simply not conceptually possible.
7. **Public interest:** Assuming for the moment, the iniquity defence is available in respect of a contractual obligation, there is no iniquity at RSE justifying disclosure in the public interest. That Mr McCarthy does not like the findings of regulatory bodies that conclude RSE is meeting its requirements, does not create a public interest in

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disseminating confidential information. We refer for instance to the most recent correspondence from Thurston County in paragraph 101 of Mr Wright's witness statement. In similar fashion, Mr McCarthy's allegations of abuse and psychological manipulation lack foundation or support.

8. **Fair dealing, and public interest:** These defences require the Court to balance respective interests. In this case, there is reproduction and dissemination, and threatened use and dissemination, of very substantial parts of our clients' copyright works. The asserted criticism is not of the works themselves but of our clients' beliefs and what Mr McCarthy, against all evidence to the contrary, believes are our clients' business practices. Even if that asserted criticism could in principle fall within a fair dealing or public interest defence, it cannot justify Mr McCarthy's wholesale copying and dissemination of proprietary and confidential material. Looking at the matter practically, Mr McCarthy, can pursue his "criticism" goals without infringing our clients' rights. That factor is likely decisive in the required balancing exercise.
9. Our clients have consistently accepted that, even though they regard his criticisms as misguided, Mr McCarthy is entitled to express his opinions, provided he does so in a lawful way. Indeed, our clients have engaged with Mr McCarthy on some of those asserted criticisms, and have encouraged Mr McCarthy to address his complaints to the appropriate authorities.
10. All of the causes of action seek the maintenance of the status quo as the primary remedy; in short that Mr McCarthy does not publish or otherwise disseminate copies of our clients' proprietary material, particularly video footage.
11. Damages or an account of profits, and costs, are also sought but it is at once acknowledged that, as a consequence of the take-downs from YouTube and other websites, the monetary sums at stake have been mitigated. Naturally, this would change if the material is re-posted or otherwise distributed publicly or privately.

#### **Without prejudice settlement offer**

12. While our clients do not doubt that they will be successful at trial, they would prefer to avoid the expense of a five day trial. This is particularly so in this case where Mr McCarthy, as a legal aid recipient:
  - (a) has some limited protection to an adverse costs award; and
  - (b) is likely unable to meet a damages award.
13. While our clients expect, on the basis of *Bupa Care Services NZ Limited v Gillibrand*, that they will be able to show exceptional circumstances justifying an award of costs against Mr McCarthy, our clients certainly have no desire to send Mr McCarthy bankrupt in the process of enforcing a damages and/or cost award nor to have him lose his home.
14. Therefore, on a purely pragmatic basis, our clients make the following without prejudice settlement offer to Mr McCarthy:
  - (a) Mr McCarthy agrees to the injunctions and delivery up/destruction orders sought in the pleadings;
  - (b) Mr McCarthy, in particular, agrees that he will not disseminate, publicly or privately, and that he will destroy any copies in his possession, power or control of, any portion of, the video recordings known as:

- (i) Fire, Health and Safety Violations at Ramtha's School of Enlightenment (RSE) Video 1 of 3
  - (ii) Fire Health and Safety Violations at Ramtha's School of Enlightenment RSE part 2 of 3
  - (iii) Sandra Romero speaks at a local Cult
  - (iv) Sandra Romero Seeks Voters from a Cult
  - (v) JZ Knight Behind the Mask 1 of 4
  - (vi) JZ Knight Behind the Mask 2 of 4
  - (vii) JZ Knight talks about Mexicans
- (c) Our clients will not require payment of damages, an account of profits, or costs;
- (d) Each party will otherwise bear their own costs.
15. This settlement offer in no way restrains your client from making criticisms against our clients in a lawful manner.
16. To give your client an opportunity to consider our clients' briefs in conjunction with this offer and to undertake required consultation with the Legal Aid Commissioner, this settlement offer is available for acceptance until **5:00pm, 15 April 2014**. After that date it automatically lapses without further notice to you and is not capable of acceptance.

Yours faithfully  
SIMPSON GRIERSON

  
Earl Gray / Joanne Dickson  
Partner / Senior Associate