HIGH PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND 96/7 C.A. 179/92

BETWEEN THE ATTORNEY-GENERAL
on behalf of the Serious Fraud Office

1330

Appellant

A N D ALLAN ROBERT HAWKINS
GRANT ADAMS
MAXWELL COLIN TAYLOR
KEVIN JAMES GILLESPIE
IAN LINDSAY GUNTHORP
RUSSELL JOHN CURTAYNE
ROBERT PAUL DARVELL

Respondents

Coram: Cooke P.
Hardie Boys J.
McKay J.

Hearing: 15 July 1992

Counsel: W.D. Baragwanath Q.C. and M.A. Woolford for Appellant
C.R. Carruthers Q.C. for Respondents

Judgment: 15 July 1992

JUDGMENT OF COOKE P.

This is an appeal from a judgment of Williams J. delivered on 8 July 1992 ordering that certain transcripts be supplied by the Crown to the defence in a criminal trial on or before 1 August 1992 and granting conditional leave to the defence to recall witnesses at the trial. The latter part of the order is not in issue on the appeal.

In the trial seven accused are charged with various offences connected with what may broadly be described as money-laundering. The Crown alleges *inter alia* that, through a chain of offshore financial transactions or purported transactions, monies were abstracted from certain Equiticorp companies for the benefit of the accused other than Mr Darvell; the latter is alleged to have been a party to the scheme. The transcripts in question are documents emanating from the National Crime Authority of Australia and are of evidence taken by the Authority from two officers of the Bank of New Zealand in Sydney, Messrs. V.G. Psaltis and M.D.E. Woods. Together with other documents they were sent by the National Crime Authority to the Serious Fraud Office in New Zealand under cover of a letter dated 20 November 1990. The transcripts themselves were taken earlier in that month. The existence of all the documents was disclosed by the New Zealand prosecution to the defence in a letter on the eve of the commencement of the trial, the letter being dated 29 May 1992. The defendants had been arrested as long ago as December 1990. The letter indicated that, because of concern relating to the impeding of the overseas investigation, the Serious Fraud Office did not propose to make the transcripts and some other material available to the defence until on or before 1 August 1992.

Later there was some change of heart for reasons explained by Mr G.H. Livermore, a solicitor in the employ of the National Crime Authority, in an affidavit filed in the High Court and sworn on 6 July 1992:

> 3. **The NCA Enquiry**
>
> I have received by facsimile from the New Zealand Serious Fraud Office a copy of its draft letter of 29 May 1992 to be sent to Mr A.R. Hawkins, a copy of which is annexed hereto marked "A". I am told that this letter was despatched to other accused in the New Zealand proceedings.

I confirm that the material referred to in that letter was supplied by the NCA to the SFO for the purposes of

. informing the SFO of the results of the NCA's enquiry to date

. facilitating the performance by the SFO of its own enquiry.

This information was supplied by me to Mr David Ellis of the SFO under cover of a series of letters over approximately the last two years.

4. Section 51 of The National Crime Authority Act restricts the circumstances in which the Authority discloses information. Section 11(1)(a) of the Act permits the dissemination of information in certain circumstances. Section 17 of the Act permits the co-ordination of the Authority's work with that of overseas authorities.

The information was supplied to the SFO pursuant to Sections 11(1)(a) and 17 of the Act on the basis that so far as possible it would be kept confidential and used by the SFO only for the purpose of facilitating its own enquiries. The NCA was aware that Court proceedings were pending in New Zealand and that the New Zealand Court has the ultimate authority to determination what information is and is not disclosed. The NCA is also aware of the provisions of section 6(b) and (c) of the New Zealand Official Information Act 1982. These factors were taken into account when making the decision to release the information.

5. The NCA is aware that some of the information supplied could be of relevance to the conduct of the defence to the New Zealand charges. For this reason in discussion with Mr Ellis prior to the SFO's final letter of 29 May we discussed the proper balance between the two public interests of withholding information required for the purpose of continuing enquiry, maintaining the confidentiality of such confidential information as instructions to counsel, and the interests of enabling the New Zealand accused and their counsel to have access to material that might be of relevance to the conduct of their case.

6. Following receipt of advice from Mr Ellis that the rate of progress in the New Zealand proceedings had been more rapid than expected the NCA reviewed its position and advised him that it did not object to the immediate release of

> the documents recorded at the foot of page 2 and on page 3 of the letter of 29 May but with the exception of the transcripts of V.G. Psaltis and M.D.E. Woods.
>
> 7. The NCA is conscious of the desirability as far as possible to meet confidentiality problems by timing of disclosure rather than blanket withholding of information. It is understood that the New Zealand proceedings are likely to run for approximately 3 further months. The NCA expects that the reasons for seeking to keep the Psaltis and Woods transcripts confidential at this stage will no longer be existing by the end of September 1992.
>
> 8. The details of the reasons for seeking to delay the disclosure of the Psaltis and Woods transcripts are ones which cannot be developed without disclosing the confidence that is sought to be preserved.
>
> 9. I have deposed to those reasons in a separate affidavit which the NCA invites the Court to consider on an *ex parte* basis.

The criminal trial is before Tompkins J. sitting alone. It has been in progress for some six weeks. To avoid any compromise of the position of Tompkins J. as trial Judge, it was arranged that the application by the defence for the immediate supply of the transcripts would be heard by Williams J. For reasons which he gave, Williams J. declined to look at the separate affidavit of Mr Livermore tendered on an *ex parte* basis - that is to say without disclosure of its contents to the defence - and the Judge made an order in effect holding the National Crime Authority to the original date of 1 August 1992. The Judge saw this as an exercise in balancing, saying:

> It is not easy, especially with my limited knowledge of the details of the case, to make a judgment on these competing claims. I have no doubt that with a case of this seriousness for the accused, it is desirable that they be fully informed as to the position with Psaltis and Woods at the earliest practicable moment. However, I do not see that there would be any substantial prejudice to the accused if the release of the transcripts was delayed for a further three weeks so as to allow the NCA to carry out further investigations before the

> transcripts are released. The public interest factors relied upon by the Crown must be regarded as important interests. In spite of the fact that the request for time to make further investigations has materialised at such a late stage this Court must give that request appropriate consideration: see *News Corporation Ltd* v. *National Companies and Securities Commission* (1984) 57 A.L.R. 550. Doubtless the NCA is an organisation with extensive resources. Those resources will need to be galvanised urgently and purposefully to complete the enquiries no later than 1 August. By requiring disclosure on or before that date it seems to me that a fair balance is struck between the needs of the defence to have the transcripts and the requirement of the NCA to carry out its further investigations.

Logically the first question is whether this Court has jurisdiction to entertain an appeal. Mr Carruthers was careful not to put this question in the forefront of his argument, concentrating rather on the merits, but he did raise the question so that it did not pass *sub silentio*. Much turns on whether the High Court judgment should be seen as in a criminal matter or as in a civil matter. If the former, an appeal does not lie under s.66 of the Judicature Act 1908. The issue has not previously arisen and is one on which authorities such as those concerned with *habeas corpus*, bail and costs are not closely in point. Although made initially to the trial Judge and in the course of criminal proceedings, the application was based primarily on the right to personal information conferred by Parliament by s.24 of the Official Information Act 1982. It was countered by the Crown primarily on the ground that good reason for withholding the information exists in terms of s.6(b):

> **6. Conclusive reasons for withholding official information:** - Good reason for withholding official information exists, for the purpose of section 5 of this Act, if the making available of that information would be likely -
> ...
> (b) To prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by -
> (i) The government of any other country or any agency of such a government; or
> (ii) Any international organisation;

The Official Information Act is not criminal discovery legislation. It is an Act conferring in relation to personal information an important civil right. No machinery for enforcing that right in the Courts is laid down in the Act. The legislature has left it to the Courts to adjust their own procedures so as to provide effective mechanisms for giving effect to the right, subject to such protections as are required by the Act, as by s.6. A decision in the exercise of that judicial function appears to me to fall within s.66 of the Judicature Act both as to the language of that section and in the light of its spirit and intent. Section 5(j) of the Acts Interpretation Act 1924 has to be borne in mind. The restriction on the scope of s.66 established by prior judicial decisions need not be applied to a decision concerning the personal right under the Official Information Act. Accordingly I would accept that an appeal lies.

As to the approach to this appeal, it turns on partly updating material which Mr Baragwanath, for the Crown, asked the members of the Court to peruse without disclosure at any rate initially to the respondents. That is an unusual course never to be undertaken without strong reason. But on strictly limited occasions it has been found to be the best way of doing justice. In *Guardian Royal Exchange Assurance of New Zealand* v. *Stuart* [1985] 1 N.Z.L.R. 596, 599, I ventured to say:

> As in previous cases in this Court (see *Konia* v. *Morley*, [1976] 1 N.Z.L.R. 455, *Environmental Defence Society Inc.* v. *South Pacific Aluminium Ltd (No. 2)* [1981] 1 N.Z.L.R. 153 and *Fletcher Timber Ltd* v. *Attorney-General* [1984] 1 N.Z.L.R. 290) inspection of the documents by the Judges has proved illuminating. High Court Judges now appear to be adopting this practice quite commonly in disputed privilege claims. Experience suggests that its advantage in being likely to lead to a more just decision outweighs the disadvantage that only the Judge and not the other side sees the documents if the claim to privilege is upheld. Accordingly, in the field of legal professional privilege at least, I think that in general a Judge who is in any real doubt and is asked by one of the parties to inspect should not hesitate to do so.

See also *General Accident Fire & Life Assurance Corporation Ltd* v. *Elite Apparel Ltd* [1987] 1 N.Z.L.R. 129, 133-5.

United States authorities showing a similar approach in the field of freedom of information were cited to us and Williams J. They were *Military Audit Project* v. *Bush* 418 F Supp 876 (DDC 1976); *Vaughn* v. *Rosen* 484 F 2d 820 (DC Cir 1973); *Phillippi* v. *Central Intelligence Agency* 546 F 2d 1009 (DC Cir 1979); *Founding Church of Scientology* v. *Bell* 603 F 2d 945 (DC Cir 1979) and *Carter* v. *US Department of Commerce* 830 F 2nd 338 (DC Cir 1987).

In this case after considering the arguments the Court concluded by a majority that justice would best be served by examining the material and we have done so. Again the result has proved illuminating. As to the transcripts, which were the result of extensive questioning before the National Crime Authority in November 1990, I have not been able to detect in a letter of 2 July 1992 and the affidavits submitted on an *ex parte* footing any compelling reason why they should not be made available to the defence on or before the date originally agreed to by the National Crime Authority, namely 1 August 1992, being the date ordered by Williams J.

As to the letter of 2 July 1992 and the three affidavits (two of Mr Livermore and one of Ms Forbes), whether these have any relevance to the New Zealand proceedings is highly doubtful, but in the interests of fairness to the defence I would order that they be made available to the defence on or before 1 October 1992. There is no ground for inferring that any prejudice falling within s.6 of the Official Information Act will accrue from such an order. I would dismiss the appeal from Williams J. with the additional order concerning the other material.

In the result the Court is unanimous. Accordingly the appeal is dismissed. There will be an order that the material which we have perused in addition to the transcripts be supplied to the defence on or before 1 October 1992, that material being affidavits of Garry Howard Livermore sworn on 6 and 9 July 1992, an affidavit of Leeanne Lorraine Forbes sworn on 14 July 1992, and the letter from the National Crime Authority to the Serious Fraud Office dated 2 July 1992.

Costs should follow the event. There will be an order for costs of the appeal in favour of the respondents in the sum of $3500. The folders of documents delivered to the Court for perusal are now to be returned to counsel for the appellant.

RB Cooke P.

Solicitors:
Meredith Connell & Co., Auckland, for Appellant

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Respondents

Coram Cooke P
Hardie Boys J
McKay J

Hearing 15 July 1992

Counsel W D Baragwanath, Q.C. and M A Woolford for Appellant
C R Carruthers, Q.C. for Respondents

Judgment 15 July 1992

JUDGMENT OF HARDIE BOYS J

I agree that the appeal should be dismissed, for the reasons given by the President.

In view of that conclusion it is strictly unnecessary to consider the jurisdictional challenge raised by Mr Carruthers. However I tend to the view that an application to the Court under the Official Information Act 1982 should be regarded as a

self-contained matter or proceeding, so that even if it occurs in the course of a criminal trial there is an appeal to this Court by virtue of s 66 of the Judicature Act 1908. This approach is I think necessary in order to give the statute practical effect in such a setting. Otherwise, for example, an erroneous ruling in the course of a trial, allowing disclosure, could result in irremediable harm.

The only other question for our consideration on the appeal was whether the time for disclosure of the transcript of the two witnesses before the Australian National Crime Authority should be deferred to the end of September 1992. The material concerned was supplied to the Serious Fraud Office in New Zealand in full recognition that the Court might order disclosure, and indeed the need for disclosure has been fully accepted by the authorities both in Australia and New Zealand. It is only the timing that is in issue.

The reasons given in Mr Livermore's affidavit of 6 July 1991 for deferring disclosure past the original date of 1 August 1992 were not stated with particularity, or indeed with persuasiveness. However I concluded that the assertion of this officer of the Authority, a solicitor, reinforced as it was by the assurance of Mr Baragwanath, to the effect that fuller reasons could not be given publicly, should be taken at face value as a responsible statement, and that we should therefore look at the explanatory material on a confidential basis, rather than make assumptions or come to a judgment without a proper appreciation of the position.

It will not be often that the Court would consider it proper to have regard on a confidential basis to such explanatory material, but I was satisfied that this is an appropriate case for that to be done. Having read the explanatory material and considered albeit briefly the transcripts, which do not of themselves bear particularly on the question of timing, I am not persuaded that there is a compelling reason to withhold the transcripts past the date originally proposed, and accepted by the Judge,

1 August. Given that the transcripts are relevant and ought to be produced, in my opinion the balance between the competing interests of confidentiality and preservation of the free flow of information, on the one hand, and a fair trial on the other, tilts clearly on the side of their production earlier rather than later.

As the transcripts will themselves be released, the confidential explanatory material is really no longer relevant. However the Court may perhaps not be the best judge of that, and in case this material does have some relevance I favour its disclosure. But for the reasons apparent from it, I too would defer that until 1 October. I do not consider that a longer period of confidentiality in respect of this material can in any way prejudice the defence case at the trial. Indeed the only reason which prompts me to direct disclosure at all is to ensure that justice is seen to be done openly.

I therefore concur with the orders proposed by the President.

Solicitors

Meredith Connell & Co, Auckland, for appellant

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Hearing: 15 July 1992

Counsel: W D Baragwanath QC and M A Woolford for Appellant
C R Carruthers QC for Respondents

Judgment: 15 July 1992

JUDGMENT OF McKAY J

This issue raises issues as to the release to persons accused in criminal proceedings of relevant information which is in the possession of the prosecution. Those issues include the right of individuals to personal information under the Official Information Act 1982, and the general duty of disclosure which rests on the prosecution in the interests of securing a fair trial.

The information in question is in the form of transcripts of evidence obtained by the National Crime Authority of Australia. These transcripts along with other information were made available to the New Zealand Serious Fraud Office as long ago as 20 November 1990. The existence of all this information was not disclosed to the accused until 29 May 1992, the last working day before the commencement of their trial, which is currently expected to continue until December. The accused sought copies of the documents whose existence was disclosed, and with the exception of the transcripts in issue, these were made available on 3 July.

It is clear from the affidavit of Mr Livermore, to which the President has referred, that the National Crime Authority disclosed the information to the Serious Fraud Office to assist the latter in its own investigations, and with the knowledge that the information might well be required to be disclosed in the Court proceedings in New Zealand. The accused in this case were in fact arrested in December 1990 shortly after the information was received by the Serious Fraud Office.

When the other documents were made available by the Crown on 3 July, the Crown was willing to disclose the transcripts by 1 August, this being a date which had been agreed between the Serious Fraud Office and the National Crime Authority. Subsequently the Crown sought to prolong this date to the end of September. The matter came before Williams J, who is not the trial Judge, in the circumstances described by the President. For the reasons given in his judgment Williams J declined to look at the transcripts, or to look at the further affidavits which he was asked to receive on the basis that they be not disclosed to the accused or their counsel. He directed that disclosure of the transcripts be made, not forthwith, but by the date originally suggested of 1 August.

We were similarly asked to look at the transcript and at the affidavits, including a further affidavit. This Court undoubtedly has the power in its discretion to look at documents which are the subject of dispute as to availability on such grounds as privilege, or in circumstances such as the present. I agree with Williams J in the High Court that it is a power to be exercised with caution. Where Crown privilege is invoked, the Court will normally accept the Minister's certificate. In those cases where the Court finds it necessary to go further and look at the document itself without the document being disclosed to the other side, the Court's action in so doing will, if it has any effect at all, assist the other party. In the present case, we were asked by the Crown to look at the transcripts and to receive affidavits that would not be disclosed to the defence in order to support the Crown's desire to delay disclosure.

The request that the Court receive not only the disputed transcripts, but also evidence on affidavit which would not be disclosed to the defence is an unusual feature in the present case. The argument submitted by Mr Baragwanath was that the reasons for seeking to delay the disclosure of the transcripts would not be apparent from perusing the transcripts themselves. If the Court was to understand and appreciate those reasons, it would be necessary for additional information to be available to the Court, which of its nature the Crown was unwilling to make available to the defence.

The only authorities as to the power of the Court to receive evidence on such a basis that was cited to us were the American authorities to which the President has referred, notably ***Phillippi v Central Intelligence Agency*** 546 f 2d 1009 (DC Cir 1976). That case appears to be a rather different one, in that the Agency in that case declined to say whether it had any relevant documents or not, so that there were no documents available for examination, and the issue could only be decided if other evidence could be received. No Commonwealth authority was cited for the

proposition that confidential affidavits such as are proposed in this case can be received.

I did not find it necessary to decide whether, in a limited class of class, the Court the Court can properly receive evidence in this way, as in my view the evidence properly placed before the Court did not reach the threshold of establishing a justification for our looking at the material proposed. On this issue, I agree with the decision of Williams J, and with his reasoning.

The majority of the Court being of a contrary view, I have with the other members of the Court looked at the confidential affidavits and transcripts. It is inappropriate to comment on the content of that material, but insofar as it bears on the issue of the timing of disclosure, I do not find anything that would persuade me that it would be proper to extend the time from 1 August to 30 September.

One of the matters urged on us by Mr Baragwanath was that disclosure of information in the present circumstances might prejudice the flow of information between the National Crime Authority and the Serious Fraud Office. Having regard to the way in which this information was made available to the Serious Fraud Office in 1990 for the purpose of its own use in the investigation of serious fraud and in contemplation of the present proceedings, and having regard to the acknowledged awareness of the National Crime Authority that the information might well have to be disclosed as a result of criminal proceedings, I do not find anything to suggest that disclosure pursuant to the order made in the High Court will in any way prejudice the relationship of the two authorities, or the flow of information between them.

In the material included in the case on appeal there is no real evidence as to why the agreed date of 1 August is now desired to be put back to the end of

September, the only statement in an affidavit being that the National Crime Authority expects the reasons for seeking to keep the transcripts confidential at this stage "will no longer be existing by the end of September 1992." No further light is cast on that by the additional material we have seen on a confidential basis.

I mention briefly the point as to jurisdiction. In view of the conclusion that I have come to, it is unnecessary for me to reach any concluded view on that issue, and for my part I have some reservations as to whether in this case this Court has jurisdiction to deal with the matter by way of appeal from the judgment of Williams J. I would prefer to leave that issue to be decided in some other case when it can be given more detailed consideration.

For the above reasons, I concur in the conclusion reached by the President, and in the order which he proposed.

Solicitors
Meredith Connell & Co, Auckland, for Appellant.

[illegible]

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Respondents

Coram: Cooke P
Hardie Boys J
McKay J

Hearing: 15 July 1992

Counsel: W D Baragwanath QC and M A Woolford for Appellant
C R Carruthers QC for Respondents

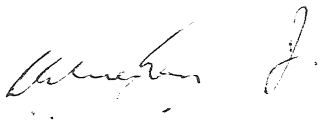
Date of Minute:: 23 July 1992

MINUTE

My attention has been drawn to two errors in the record of my oral judgment given on this appeal on 15 July 1992.

The first sentence commences "This issue raises issues ...". It should read "This appeal raises issues ....".

The first sentence to commence on page 4 has been recorded "I did not find it necessary to decide whether, in a limited class of class, the Court the Court can properly receive evidence in this way, ...". This should read "I did not find it necessary to decide whether, in a limited class of case, the Court can properly receive evidence in this way, ...".



Solicitors
Meredith Connell & Co, Auckland, for Appellant.