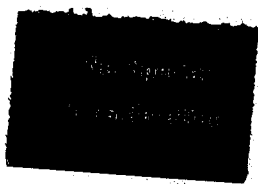


IN THE SUPREME COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1401/73

209

NO.



BETWEEN INDUSTRIAL STEEL AND PLANT LIMITED
a duly incorporated company having
its registered office at Auckland,
Machinery Wholesaler
Plaintiff

A N D BARRY BRANNEN
of Auckland, Boat Builder
First Defendant

A N D ROBERT J.H. SEAL
of Auckland, Chartered Accountant
Second Defendant

Hearing: 21 March 1975

Counsel: W.M.J. Marsh for Second Defendant in Support
P.J. McDonald for Plaintiff to Oppose
M.D. Edwards for First Defendant

Judgment: 6 May 1975

JUDGMENT OF O'REGAN J.

Notice of motion for orders that plaintiff and first defendant file and serve further affidavit of documents.

Mr Edwards did not oppose the making of the order sought in respect of his client. It is ordered that the first defendant file and serve a further or better affidavit of documents within 14 days from the date of service of this order.

The contest between the second defendant and the plaintiff has to do with two written statements made by two directors of the plaintiff. Although nothing such has been alleged in their statement of claim, they apparently have complained to the police that the first defendant has committed a criminal offence. The statements were not taken

by the police in the usual way. They were either prepared by the solicitors for the plaintiff or channelled through them to the police. The solicitors have copies of such statements and the plaintiff contends that they were obtained for the purposes of the action and to form part of counsel's brief.

In essence then, the present application although not presented in that form, is one for an order to produce the two statements for inspection and such is resisted on the grounds that:-

- (1) Their production would be oppressive and in excess of the legitimate requirements of the action.
- (2) They are privileged in that they were obtained and brought into existence for, but not solely for, the purpose of the litigation when it was actual or impending.
- (3) Their production would be contrary to public policy and would hinder the proper administration of justice.

The first ground was advanced before me with but little enthusiasm. It was supported by a citation from Nash v. Layton (1911) 1 Ch.71 - a case having to do with interrogatories. I doubt if this ground is open in New Zealand as an objection to discovery or production of documents. It is, however, a ground of objection to interrogatories. It was formerly, but now is not, a ground of objection to discovery in England.

As to the third ground, I say no more than that in my view it cannot be seriously suggested that the keeping secret of the two documents in question is "necessary for the proper functioning of the public service" - the test laid down by

Lord Simon in Duncan v. Cammell, Laird and Company 1942 A.C. 624, 642 and approved by Lord Reid in Conway v. Rimer 1968 A.C. 910, 952.

The second ground is of greater substance. The statements are stated in the correspondence "to have been made to the police". In fact, the statements were made and later the original or a copy of each was given to the police and copies were either given to or retained by, as the case may be, the solicitors. If the statements were handed to the police and subsequently copies were obtained by the plaintiff's solicitors for the purposes of the action, the facts would be on all fours with those obtaining in Osborne v. Sullivan 1965 N.Z.L.R. 1095. For my part, I do not think that the difference in the chain of events in the present case makes any material difference and I think that the decision in that case and in the cases followed therein, are decisive in this case. Put more simply, the statements given to the solicitors by the directors of the plaintiff, were communications between plaintiff and its legal adviser as regards the conduct of litigation and as such are privileged - Wheeler v. Le Marchant (1881) 17 Ch.675. It is, in my view, immaterial that the same information or data was communicated to the police for other purposes.

I decline to make the order sought. I award the plaintiff 40 dollars costs and disbursements.

Solicitors for Second Defendant
in Support:

Messrs Earl, Kent, Massey,
Palmer and Hamer, Auckland

Solicitors for Plaintiff to
Oppose:

Messrs McElroy, Duncan and
Freddie, Auckland

Solicitors for First Defendant:

Messrs J.F.W. Dickson, Beder
and Edwards, Auckland
