

21/7/82

NZLR

45M

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A 148/82

BETWEEN EDWARD RUSHTON SON &
KENYON (AUSTRALASIA)
PTY LIMITED

Plaintiff

A N D DAVID SMITH

Defendant

No Special
Consideration

Hearing : 8 July 1982

Counsel : Brown for plaintiff
Ellis QC and Chan for defendant

Judgment: 20 July 1982

JUDGMENT OF WHITE J

These proceedings arise out of a dispute as to the ownership and use of certain cost books containing data collated over a period of years by the defendant while employed by the plaintiff as a valuer of plant and machinery. Having resigned the defendant asserts that the cost books and the copyright in them belong to him and that he was entitled to take them with him when he left the defendant's employment. The plaintiff asserts the contrary. There is no doubt that the material contained in the cost books is of importance to both parties and that a decision is required without delay.

The present application by the defendant is for an order rescinding an order made on 18 June 1982 by Jeffries, J on an ex parte motion for a detention

order under R 478 for the detention and preservation of the cost books which are the subject of the action. Leave to apply for further orders was reserved and an order was made for service of all proceedings on the defendant on his return from overseas. The cost books are now by consent exhibits in the custody of the Court. The defendant now seeks an order directing the plaintiff to return seven cost books to the defendant or, alternatively, for an order setting the action down for hearing forthwith.

Preliminary objections to parts of an affidavit filed by the defendant were raised by Mr Brown. These matters were properly raised, in my opinion, but as Mr Brown very fairly conceded there were difficulties owing to the pressure of time in bringing matters before the Court. For that reason and because the matters in question could be treated as useful narrative in understanding the issues I admitted the affidavits. Having regard to the hearsay nature of the evidence, however, Mr Brown's submissions as to its weight were clearly justified. Mr Brown also referred to a passage in a telex exhibited to an affidavit which, it was submitted, should be regarded as in contempt. Again I think the point was properly taken but I accepted Mr Ellis' submission that the words should not be read in that light having regard to the context and the nature of the document and the proceedings.

Mr Ellis also raised what was in the nature of

a preliminary point. He pointed out that the amended statement of claim had omitted the first cause of action in the original statement of claim based upon an alleged breach of a restrictive covenant. This was done because it was accepted that the plaintiff had accepted the defendant's resignation. It was submitted by Mr Ellis that had the position been as at first alleged the order made ex parte was understandable, but that, in light of the withdrawal of the allegation and the fact that the affidavit evidence shows that Mr Rushton did not disclose that the defendant's resignation had been accepted disclosed that "utmost good faith" had not been shown. It was submitted that the different situation following the withdrawal of the original allegation, and the failure to disclose the full facts provided good reasons for rescinding the ex parte order. As Mr Ellis conceded, however, the considerations which affected Mr Brown's preliminary points again applied. In my view it would be unreasonable to attach great weight to the alleged non disclosure of a fact which was well known to the parties. In my view the matter must be considered on the remaining issues.

Having considered the careful submissions of counsel I do not find it necessary or desirable to refer to these matters in detail. In my view important matters of business practice involving ethical questions arise in this case. Ownership of the cost books and copyright are no doubt key issues in the substantive

action but in my view they are not matters on which I should express any opinion in determining the present application. The ethical question of breach of confidence is another matter on which evidence is required, but clearly the existence of such an issue directly involves the cost books. The value of the data noted is not a matter on which I should express any opinion at this stage. On the other hand, the question having been put in issue in this case as a matter of proper practice I have come to the conclusion that a detention order remains appropriate.

The alternative order sought by Mr Ellis can be dealt with at this stage by indicating that in my view the matter should be determined as soon as practicable. If necessary I shall hear counsel further as to the form of any orders or directions. The costs are reserved.



Solicitors for the plaintiff : Bell Gully & Co (Wellington)
Solicitors for the defendant : Salek Turner & Brown
(Wellington)