IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. No. 966/81

No Special Consideration

BETWEEN S. S. C. & B. LINTAS NEW ZEALAND LIMITED a duly incorporated Company having its registered office at 136 The Terrace, Wellington, and carrying on business in New Zealand as Advertising Agents

Plaintiff

A N D DAVID JOHN MURPHY of Old Coach Homestead, Kerns Road, Rama Rama, Advertising Executive

First Defendant

A N D DONALD RICHARD TRUMAN of 292, Victoria Avenue, Remuera, Creative Advertising Director

Second Defendant

Hearing: 19th August, 1982.

Counsel: Nicholson Q.C. and Mapp for Plaintiff.
Henry Q.C. for First and Second Defendants.

Judgment: 15 October 1982

JUDGMENT OF WALLACE, J.

This is an application by the Plaintiff for further and better discovery on the part of the Defendants. Both Defendants have filed an affidavit of documents, but the Plaintiff contends there are proper grounds for seeking discovery of further documents.

There is no dispute between the parties as to the relevant law, which is conveniently summarised in Halsbury, 4th Ed., Vol. 13, para. 47, as follows:-

" Subject to the exceptions mentioned hereafter, the statements in the list of documents, whether verified by affidavit or not, are conclusive with regard to the documents that are or have been in the possession, custody or power of the party giving the discovery, both as to their relevancy, and as to the grounds stated in support of a claim for protection from inspection.

So when inspection is sought, it will only be ordered where the court is reasonably certain from the list of documents itself, or from the nature of the case, or of the documents in question, or from admissions made by the party in his pleadings or in any other affidavit, that he has erroneously represented or misconceived the nature or effect of the documents in question. "

In relation to the above summary of the law Mr. Nicholson for the Plaintiff referred in particular to Smith v. Stewart & Collier (1930) G.L.R. 43 ("practically certain" other documents exist), and British Association of Glass Bottle Manufacturers v. Nettlefold (1912) A.C. 709 (party had "misconceived case" and admissions in other documents), as good examples of two categories of case where the Court will order better discovery. He also referred to Beecham Group Ltd. v. Bristol-Myers Co. (1979) V.L.R. 273, as providing a modern example of the principles and their application ("reasonable ground for being fairly certain" other documents exist).

It is important to bear in mind that the documents, as well as being shown to be in existence, must be established to be relevant. The principles upon which questions of relevance are determined are also well summarised in Halsbury, 4th Ed., Vol. 13, para. 38. It is clear that the test of relevance is whether a document relates to the matters in question in the action in the sense that it contains information which may either directly or indirectly advance a party's own case or damage the case of the adversary. The expression "matter in question" means a question or issue in dispute in the action and relevance must be tested by the pleadings and particulars.

Discovery will not be ordered in respect of an allegation not made in the pleadings: Calvet v. Tomkies & Others (1963) 3 All E.R. 610.

As I have said, the parties do not contest the relevant legal principles. The questions in issue relate to the way in which the principles should be applied to the present case.

Mr. Nicholson contended that in the present case (1) it is practically certain the Defendants have in their possession or power relevant documents which ought to have been disclosed and which they would have disclosed if they had not misconceived the nature of the case, and (2) in respect of one document there is a right to further discovery on the ground that it is clear from another discovered document that a further relevant document is in existence.

It is convenient to deal with each of the above contentions separately.

(1) The Plaintiff's amended Statement of Claim (dated 8th October, 1981) alleges that the First and Second Defendants were in the employment of the Plaintiff at Auckland, and that at approximately 4.30 p.m. on the 22nd day of September, 1981, the First Defendant called a meeting of all the Plaintiff's Auckland employees, save for the accountant, and announced that he had decided to tender his resignation to be effective at 5 p.m. that day. At the meeting the Second Defendant also announced his intention to resign with effect from 5 p.m. that day. It is further alleged that at or shortly after the same meeting seventeen other employees of the Plaintiff signed documents purporting to terminate their contracts of employment, and that these documents were delivered to the Plaintiff on the 23rd September,

1981. It is also alleged that on that day the First and Second Defendants commenced to carry on business as advertising agents under the name of Murphy Truman Advertising. Although it is not stated in the pleadings, I have assumed that all or most of the Plaintiff's employees who resigned commenced working for the new business. The Statement of Claim contains further allegations that the Defendants solicited advertising business of the Plaintiff's clients and removed files and various documents which were allegedly the property of the Plaintiff.

Arising out of the above allegations the Plaintiff pleads a series of causes of action against the Defendants. For convenience I summarise the causes of action as follows:-

(1) Breach of contract of employment.

(2) Breach of directors' fiduciary duty.

(3) Breach of employees' duty of confidence.

(4) Inducing breaches of contract of employees and clients.

(5) Conversion of the Plaintiff's documents.

(6) Wrongful disparagement.

(7) Conspiracy.

The relief sought by the Plaintiff in the Amended Statement of Claim is by way of injunction, damages and account of profits. There are also claims for exemplary and aggravated damages. Initially an interlocutory injunction was granted ex parte. Following a Motion to Set Aside, the injunction was continued (with some amendments) and then further continued following a contested hearing. The period of the injunction ran until 22nd December, 1981. Although the interlocutory injunction has now expired the Plaintiff is proceeding against the Defendants for the other relief claimed in the Statement of Claim.

In support of the Plaintiff's application an affidavit was filed by Mr. O'Sullivan, a director of the Plaintiff Company, claiming that the Defendants' affidavits of documents made no reference to documents relating to the following matters:-

" (a) The creation and incorporation of Murphy Truman Group Limited by or on behalf of the Defendants.

(b) The acquisition and furnishings of the premises at Anzac Avenue by or on behalf of the Defendants or Murphy Truman Group Limited.

(c) The acquisition of motor vehicles by or on behalf of the Defendants or Murphy Truman Group Limited.

(d) The installation of telephones at the premises at Anzac Avenue by or on behalf of the Defendants or Murphy Truman Group Limited.

(e) The printing of stationery for Murphy Truman Group Limited and for the Defendants.

(f) The steps taken to obtain the accreditation of the advertising agency of the First and Second Defendants known as Murphy Truman Advertising.

(g) The acquisition of material used in a presentation made to Butland Industries Limited on or about the 5th day of October 1981.

(h) The transfer of the Defendants interests in Murphy Truman Group Limited after the 14th day of October 1981 to Bob Wardlaw Admarketing Limited.

(i) Invoices, cheque butts, books of account and other accounting records of Murphy Truman Group Limited and the First and Second Defendants during the period 23rd September 1981 to the present.

(j) The conduct of the business of Murphy Truman Group Limited between the date of incorporation to the present. "

In relation to all the above documents Mr. Nicholson contended it is practically certain the Defendants misconceived the causes of action because the establishment and running of a competing advertising agency formed, he said, the basis of the Plaintiff's case with the consequence that all the abovementioned documents are relevant. Mr. Nicholson said that the Plaintiff wishes to know when the Defendants set up in business, and he

contended that the documents are relevant whether or not the Defendants set up business before or after their resignation on the 22nd September.

In his submissions Mr. Nicholson made reference to the causes of action and suggested that the documents were clearly relevant in relation to the first, second and third causes of action. In order to avoid any suggestion that the further discovery was oppressive, Mr. Nicholson suggested it should not extend beyond 22nd December, 1981 (the date of termination of the interlocutory injunction). Particularly in relation to the first cause of action (breach of contract of employment) Mr. Nicholson indicated he did not accept the provisional finding of Holland, J. in the interlocutory injunction proceedings that the Defendants' contracts of service probably terminated on or before the 1st October. Mr. Nicholson suggested that the date was much later than this. That is not a matter which I can resolve on the pleadings, but in a discovery application I would treat the question of date as being in issue and therefore a matter relevant to discovery. Mr. Nicholson further indicated that he placed equal reliance on the second and third causes of action (breach of fiduciary duty as a director and breach of employees' duty of confidence). In general terms his contention was that there is a clear inference confidential information acquired by the Defendants when servicing the Plaintiff's clients before the Defendants resigned was used subsequently in the Defendants' own business.

In relation to the remaining causes of action Mr. Nicholson conceded that there would not be any documentary material in relation to the sixth (wrongful disparagement) and that in the case of the other three (including breaches of contract, conversion and conspiracy) he could not go behind the

Defendants' denial that they had no documents which are relevant. I do not therefore refer further to these causes of action.

In response to Mr. Nicholson's contentions Mr. Henry on behalf of the Defendants submitted in relation to the third cause of action that there was nothing before the Court to indicate the use of confidential information. For the Purpose of the discovery hearing Mr. Henry was prepared to accept that there was an obligation not to use confidential information. He submitted, however, that running an advertising business does not point to the use of any such information even though it may involve doing business for former clients of the Plaintiff. He suggested that Mr. Nicholson's submission amounted to saying that because the Defendants did business for former customers of the Plaintiff, the Defendants must have used confidential information. Mr. Henry submitted there is nothing which compels the Court to any such inference.

On reflection I have come to the conclusion that submission must be upheld. The Plaintiff from all the circumstances plainly entertains a strong suspicion that confidential information was used by the Defendants. I do not, however, consider there is any necessary implication that undiscovered documents relevant to this are in the Defendants' possession or power. The Defendants have sworn on oath that they have no documents (other than those disclosed in their affidavits) which are relevant to the claim that confidential information was used by them. In these circumstances on the ordinary and well established principles relating to the conclusivity of the affidavits, I do not consider that the Court can order further discovery. Indeed it is difficult to see what documents the Court could be "fairly certain" the Defendants have which they should be ordered to discover, and I note that (apart from the one document to which I later refer

when dealing with the Plaintiff's second ground for seeking better discovery) Mr. Nicholson did not suggest to me any specific document or categories of document which the Defendants could be said to be fairly certain to have in relation to the matters alleged in this cause of action. I am therefore not prepared to order further discovery in respect of the third cause of action.

I accordingly turn to the first and second causes of action, which it is convenient to deal with together. Mr. Henry directed the greater part of his submissions to these causes of action. In relation to both he pointed out that paragraphs 11 and 15 of the Statement of Claim in each case refer back to paragraphs 7 and 8, which in turn provide particulars of the Defendants' conduct which is alleged to constitute the cause of action. Paragraph 7 deals solely with the Defendants' resignations of 22nd September, and paragraph 8 deals with alleged conduct of the Defendants from 23rd September onwards. Mr. Henry submitted that in respect of the pleadings relating to these causes of action nothing is in issue as to the Defendants' conduct prior to the 22nd September, 1981, with both causes of action being based on alleged continuing duties following resignation.

This was certainly not the basis upon which Mr. Nicholson made his submissions, and in his reply he suggested that this was an unfairly restrictive view of the pleadings. In that regard Mr. Nicholson pointed to paragraphs 5, 6 and 18 of the Amended Statement of Claim. I consider, however, that, as the Statement of Claim at present stands, it must be read in the way in which Mr. Henry submitted, i.e. as alleging breaches of continuing duties subsequent to the 22nd September. The thrust of both the first and second causes of action appears to be that the Defendants were in breach of their duties to the

Plaintiff in their activities after the 22nd September. If the Plaintiff desires to allege and claim damages for breaches of duty by the Defendants prior to 22nd December, the pleadings can no doubt be amended (though possibly not by introducing a new cause of action). I have therefore given some thought to the situation if an amendment was to be made. Mr. Henry submitted in that event I would still be unable to order further discovery because there is nothing to indicate the Defendants had relevant documents relating to the earlier period, i.e. the Plaintiff cannot go beyond the Defendants' denial of any relevant documents. While that might be so, the Defendants would have to consider the matter in the light of any new pleadings and I would not at this juncture be prepared to hold that the Court could not, in those circumstances, at least require the filing of further affidavits referring to the existence or otherwise of documents relevant to breaches of contract or fiduciary duty prior to 22nd September. To date the Defendants have presumably only directed their affidavits to the post 22nd September period. If, for example, it were to be alleged that the Defendants were in breach of contract because they did not devote themselves properly to the Plaintiff's business prior to 22nd September, then it seems to me, though I have not heard full argument on the question, that documents which showed the Defendants were, for example, planning to set up a new business prior to 22nd September, could be relevant and discoverable. I do not consider, however, that I can order further discovery in relation to such documents (if indeed they exist) on this application and the pleadings as they at present stand.

As far as documents relevant to the post 22nd September period are concerned, Mr. Henry submitted that on analysis of the categories of documents referred to in paragraph 3 of Mr. O'Sullivan's affidavit none are shown to be discoverable. In relation to the documents referred to in sub-paragraph (a), Mr. Henry pointed out that the incorporation of the Defendants' Company

and the commencing of business following the Defendants' resignations were both admitted. He therefore contended that documents relating to incorporation are not relevant to any issue between the parties. Most such documents would in any event be matters of public record and, in addition, communications with the Defendants' solicitor concerning company formation would be privileged.

The remaining documents referred to by Mr. O'Sullivan (excluding those in category (g) concerning which Mr. Nicholson conceded there was no indication from any of the papers that such documents existed, so that the affidavits must as to those be regarded as conclusive) all come within the category of documents relevant to the establishment and running of the business of the Defendants' new company. Mr. Henry submitted that whether or not these documents existed (and I comment that many obviously must), none is shown to be likely to be relevant to any question in dispute. He suggested that this might have been otherwise if the allegation of setting up business had been denied. That having been admitted, however, the nature and extent of the business and internal details of the business are, he submitted, not relevant to the questions of breach.

In relation to the first and second causes of actic and the documents referred to in sub-paragraphs (b) to (j) (excluding (g)) of Mr. O'Sullivan's affidavit, that submission appears to me to be one which is soundly based. All the documents mentioned in those sub-paragraphs appear to relate to the extent and organisation of the business of the Defendants' new company and to be largely irrelevant to the question of breach of contract or fiduciary duty. I would accept that if any of the documents disclosed, for example, the use of confidential material they would be relevant to the third cause of action, but in that respect the situation is covered, as I

have already indicated, by the denials in the Defendants' affidavits that any other documents relevant to that cause of action exist.

The above reasoning relating to allegations of breach does not apply to issues relating to damages and this was an area where Mr. Nicholson suggested that some of the documents referred to by Mr. O'Sullivan would be relevant. In this respect Mr. Henry submitted that damages for breach of contract are assessed on the basis of the Plaintiff's loss and that what was done by the Defendants' new company in its business is irrelevant. It may, for example, be relevant that the Plaintiff lost customers to the new company, but that does not mean that details of the new company's business are relevant. The Plaintiff's loss relates to its own business and the effect which the loss of customers had on it.

In his reply Mr. Nicholson contended that assessment of the quantum of the Plaintiff's loss could make an examination of the business of the Defendants' new company relevant because there must be a relationship between the Plaintiff's loss and the company's gain. I am not aware of any authority relevant to this, but on general principles it does not appear to me that this argument can be sustained. I regard such an enquiry as akin to a fishing expedition designed to find out as much as possible about the company's business but not in fact assisting the Plaintiff to establish its cause of action or right to damages. With regard to this aspect of discovery, I should perhaps also record that the new company is not a party to the action. Mr. Henry made no point in relation to this and I have not considered whether the Defendants would have a further ground for resisting discovery upon the basis that some of the documents may be in the possession or power of the company (of which the Defendants are, however,

presumably directors and shareholders).

In relation to the suggestion that some of the documents are relevant to damages, it is also necessary to consider paragraph (d) of the prayer for relief, which refers to an accounting for profits. This does not apply to the first cause of action but it does apply to the second and third causes of action. Mr. Henry submitted, however, that an accounting for profits (where details of the Defendants' business would clearly be relevant) should not be considered until an entitlement to relief is established, i.e. it is irrelevant to the establishment of a cause of action. If it is found that the Plaintiff is entitled to relief, then the order made will no doubt include an order for taking of accounts, but Mr. Henry submitted that it would not be appropriate for documents to be made available at this stage in the absence of proof of an entitlement to relief. This submission is in accord with my understanding of the principle upon which a taking of accounts is ordered and I do not consider that at this stage in the action the Plaintiff is entitled to information relevant to an accounting for profits.

I should also refer to the Plaintiff's claims for exemplary and aggravated damages. These can be eliminated because they are not claimable in respect of contractual causes of action (see Halsbury, 4th Ed., Vol. 12, paras. 1187 and 1190) and, as earlier mentioned, it was accepted by Mr. Nicholson that he could not found the Plaintiff's application for further discovery on the tortious causes of action.

It is therefore my conclusion that as the pleadings at present stand the Plaintiff is not entitled to an order for further and better discovery in relation to any of the

documents referred to in Mr. O'Sullivan's affidavit.

(2) It remains to deal with the second matter raised by Mr. Nicholson which was that one of the Defendants' own documents provides reasonable ground for being fairly certain that there is another relevant document which has not been discovered. The document relied upon in this regard is a letter from the Club Mediterranée (document 19 of the First Defendant's affidavit of documents and exhibited as part of Exhibit C to the First Defendant's affidavit of 2nd October, 1981). That letter is dated 27th September, 1981, but refers to a letter dated 28th September. It is not clear to me whether the date of 28th September is an error. An alternative possibility is that the letter, though dated 27th September, was written at a later date. Mr. Henry submitted that the letter dated 28th September was not relevant and that the Defendants' denial of this must be accepted. However, the letter of 27th September refers to "staying with the team that created the campaign which I have chosen for next year", which statement may contain a real inference that material created before the Defendants left the Plaintiff's employment was to be used by the Defendants' new company. This would therefore appear to be relevant to the third cause of action. The letter also refers to a transfer of "all Club Mediterranée materials which had gone to Lintas when I appointed you", and then continues "I acknowledge your letter of 28th September and am sure of your ability to deliver your promises". In those circumstances there appears to me to be a clear indication that the letter of 28th September is relevant to the third and possibly the first and second causes of action. The letter is not referred to in the First Defendant's affidavit of documents and I have formed the provisional view that it should have been included.

If the First Defendant is now prepared to make the

letter available for inspection a further affidavit should be filed within ten days and the letter made available to the Plaintiff. If, however, the First Defendant desires to maintain that the letter is irrelevant, I think this is one of the occasions when I should require the document to be made available to the Court for inspection (the Court's power of inspection apparently extends to documents claimed to be privileged from discovery on grounds of irrelevancy: see Halsbury (4th Edition) Vol. 13, para. 68 N.1) after which I will make a final ruling as to whether the First Defendant is obliged to discover the letter. If counsel desire to be heard in relation to the question of inspection by the Court or any other aspect of discovery of the letter, arrangements should be made through the Registrar to fix a suitable time. In the meantime I will defer making a final ruling concerning discovery of the letter of 28th September, 1981.

Counsel did not address submissions to me concerning costs and in the circumstances I consider costs should be reserved.

J. A. Wallace J.

Solicitors:

John Collinge, Auckland, for Plaintiff.

Graham & Co., Auckland, for First and Second Defendants.