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N.Z.L.Reports

A.292/81

Appeal reported [1984] 1 NZLR 290.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

508

BETWEEN FLETCHER TIMBER LIMITED

Plaintiff

AND THE ATTORNEY GENERAL

Defendant

Hearing: 14, 15 June 1983

Counsel: E.W. Thomas Q.C. and R.H. Hansen for Plaintiff in support
A.G. Keesing for Respondent contra

Judgment: 5 September 1983

JUDGMENT OF O'REGAN J.

INTRODUCTION :

The plaintiff is a company carrying on the business of timber merchants. In 1970, it became the assignee of all the rights interests and undertaking of Stuart and Chapman Ltd., which, at relevant times, carried on business as sawmillers on the West Coast of the South Island.

The defendant is sued on behalf of the New Zealand Forest Service which, under the direction of the Minister of Forests, has "exclusive responsibility for carrying out all matters of forest policy affecting State forest land" and has "exclusive control and management of . . . . the granting of licences, leases, permits and other rights and authorities under the Forest

Act 1945." (Forests Act 1949, s.14).

The plaintiff has alleged breaches of contracts made between Stuart and Chapman Ltd and the New Zealand Forest Service or alternatively, that negligent misrepresentations were made by certain servants of the Forest Service upon which it relied and suffered resultant loss.

In the present proceedings, the plaintiff seeks to have produced for inspection by the Court and ultimately for its own inspection 66 documents, to the production of which the defendant objects on the ground that their disclosure would be contrary to the public interest.

II The documents

The documents are :-

Number	Date	Description
41	9.6.64	Memorandum from Minister of Forests to Director-General.
45	15.7.64	Statement drafted for Minister.
47	24.6.64	Letter from Westland District Progress League to Minister of Forests.
48	29.6.64	Copy of letter Minister of Forests to Progress League.
51	27.7.64	Notes for Minister by Director-General.

Number	Date	Description
53	10.8.64	Copy memorandum Director-General to Minister of Forests.
54	22.7.64	Letter from W. Fraser to Minister of Forests.
55	28.7.64	Copy letter Minister to W. Fraser.
67	6.11.64	Draft memorandum to Minister by Director-General.
72		Draft memorandum to Minister by by Director-General.
84	7.5.65 or 7.7.65	Copy memorandum Director-General to Minister.
85		Memorandum by Secretary of Cabinet to Minister.
137	8.10.76	Memorandum from Director-General to Minister.
143	10.10.77	Memorandum Director-General to Minister.
161	Undated 1978	Copy memorandum from Deputy Director-General to Minister.
177	Undated	Draft memorandum to Minister.
178	Undated	Copy draft memorandum to Chairman, Cabinet Economic Committee from Chairman, Officials Economic Committee.

Number	Date	Description
185	7.6.78	Minutes of Cabinet Economic Committee meeting.
186	2.6.78	Copy memorandum from Chairman Officials Economic Committee to Chairman, Cabinet Economic Committee.
208	31.10.78	Copy memorandum Minister of Forests to P.M.
209	2.11.78	Covering memorandum from Private Secretary Forests to Private Secretary P.M.
210	Undated	Copy memorandum for Cabinet from Minister of Regional Development.
221	27.11.78	Copy Cabinet Minute.
222	Undated	Memorandum for Cabinet from Minister of Regional Development.
223	29.11.78	Copy memorandum Director-General to Minister of Forests.
225	8.12.78	Copy Treasury memorandum to Minister of Finance.
230	13.12.78	Copy Cabinet minutes.
232	18.12.78	Memorandum Director-General to Minister.
236	12.1.79	Copy memorandum Treasury to Minister of Finance.
239	8.2.79	Copy memorandum Director-General to Minister.

Number	Date	Description
240		Copy memorandum Minister to Cabinet.
243	16.2.79	Copy memorandum Treasury to Chairman Cabinet Economic Committee.
244	20.2.79	Minutes Cabinet Economic Committee.
245	23.2.79	Copy memorandum Minister to Cabinet Economic Committee.
247		Copy memorandum for Cabinet Economic Committee from Minister.
248		Copy memorandum Minister of Regional Development to Cabinet Economic Committee.
250	6.3.79	Copy minutes Cabinet Economic Committee.
253	Undated	Copy memorandum from Officials Economic Committee to Chairman, Cabinet Economic Committee.
254	Undated	Report from Chairman Officials Committee for West Coast Reserves Proposal to Minister.
255	23.3.79	Copy memorandum from Cabinet Office to Cabinet Economic Committee.
256	27.3.79	Copy minutes Cabinet Economic Committee.
257	2.4.79	Copy Cabinet minutes.

Number	Date	Description
259	Undated	Memorandum for Cabinet from Minister of Regional Development and Minister of Finance.
264	9.4.79	Copy Cabinet minutes.
266	12.4.79	Memorandum Conservancy to H.O.
277	21.5.79	Copy memorandum Director-General to Minister.
316	27.2.81	Director-General to Treasury.
339	12.8.81	Copy memorandum Director-General to Minister.
350	12.10.81	Cabinet minute.
355A	13.12.78	Copy memorandum Director-General to Minister.
355B	17.4.79	Director-General to Minister of Forests.
356	16.5.62	Extract from Cabinet Committee decisions.
366	7.7.70	Copy memorandum Director-General to Minister.
404	1960-63	File of NZ Forest Service - 13 documents.
(a)	29.6.61	Copy memorandum Poole (Director-General) to Minister of Forests.

Number		Date	Description
	(b)	18.7.61	Copy file note by Thomson, Director of Forest Management (re his observations and participation at meeting of Cabinet Committee.)
404	(c)	9.10.61	Copy unsigned memorandum Minister of Forests to Minister of Trade and Industry.
	(d)	Undated	Copy suggested press statement by Minister of Forests (probably accompanied (c) above.)
	(e)	7.10.61	Copy memorandum Director-General to Minister of Forests.
	(f)	12.2.62	Memorandum Poole to Minister of Forests.
	(g)	14.2.62	Copy memorandum Minister of Forests to Prime Minister.
	(h)	16.5.62	Extract from Cabinet Committee Decisions (W(62)M2 ("confidential").
	(i)	5.7.63	Copy memorandum for Cabinet Committee on West Coast by Secretary (re agenda for meeting of 18.7.63).
	(j)	5.7.63	Copy memorandum for Cabinet Committee on West Coast by Secretary (attaching copies of item below)
	(k)	26.6.63	Copy memorandum from Minister of Forests to Minister of Industries and Commerce.
	(l)	19.7.63	File note by Poole (re his attendance at and discussions during Cabinet Committee meeting of 18.7.63).

Number	Date	Description
(m)	30.7.63	Copy minutes of meeting of Cabinet Committee on West Coast (18.7.1963 meeting).

III The Minister's certificates.

The Minister of Forests, the Honourable Jonathan Elworthy, has provided two certificates in which he expresses the opinion that all the documents belong to a class or classes of documents such that it would be injurious to the public interest to disclose or to produce them for inspection or have them adduced in evidence. On those bases he objected to their production. He allowed that all such documents relate directly or indirectly to the subject matter of the action and he described them - and I paraphrase - as communications either between senior departmental officials and Ministers of the Crown and Cabinet, or between Ministers and the Prime Minister, between Ministers and Cabinet, between Ministers and third parties and memoranda of Cabinet Committees.

The last three paragraphs of the first certificate which is dated 3 February 1983 read :

> " 4. The origin of the relevant steps taken by the parties to this action was the change in Government policy in 1978, decided upon in order to accord

with national philosophy as to preservation of forests and resulting in the creation of reserves and implementing of selective logging. This change of policy and all the consequential decisions which Government had to make were of high national importance.

5. It is of public importance that communications of the character described above and the deliberations to which they relate in matters of national interest should always be made with frankness and freedom, which exposure to public scrutiny might inhibit. It is of great public importance that the Cabinet and Ministers should receive completely frank advice from the Director-General of Forests and other Government officials.

6. In my opinion all the documents referred to above belong to a class or classes of documents such that it would be injurious to the public interest to disclose or produce them for inspection or to have adduced in evidence. I therefore object to the production of any of the said documents. "

In the second certificate, which referred to additional documents which were discovered in a second affidavit of documents, the Minister reiterated that the steps taken by the Forest Service which are the subject matter of the action, were connected with the change in government policy in 1978 in respect of the preservation of forests and that the change of policy and consequential decisions of the government were of high national importance. And the reasons given for claiming public interest immunity in respect of those documents were substantially the same as those given in paragraph 5 of the first certificate.

The objections are based on the "character" or "class" of documents and not on their contents. That is evident from the Minister's description of the documents involved, and his statements in the final paragraphs of the two certificates. Not surprisingly therefore, the affidavits in general contain only brief descriptions of the documents involved and there is little or no reference to their contents. The little reference there is to such is found in a letter dated 9th June 1983 from the Director-General of Forests to the plaintiff's solicitors giving detailed information as to thirteen documents which make up document Number 404.

IV The effect of the Minister's certificate as to public interest immunity

The law as to public interest immunity has changed markedly since the decision of the House of Lords in Duncan v Connell Laird & Co Ltd 1942 (AC) 624.

That case had to do with matters of high national security and strategy at a time of dire national peril and I rather think a deal of what was said took colour and texture from those surrounding features. And, unfortunately, in a matter as to which it was regarded as not only desirable but also important that the law of Scotland and the law of the rest of the United Kingdom should coincide, the case proceeded on a mistaken view of the law of Scotland. The full rigour of the decision was mitigated in 1956 and again in 1962 when the Lord Chancellor of the day made statements on the subject of Crown privilege to the House of Lords the effect of which was to place practical limitations upon the claims to privilege that could, but for the directives, have been lawfully made. That decision held sway for over a quarter of a century until Conway v Rimmer (1968) AC 910 was decided and its influence pervaded the law beyond that time. However, it is not necessary to go into the subsequent cases of high authority since decided because the courses to be taken in New Zealand have been chartered as recently as 1981 by the decision of the Court of Appeal in Environmental Defence Society Inc v South Pacific Aluminium Ltd (No. 2) (1981) 1 NZLR 153 in which it was held that, even in cases involving cabinet papers, the Court, notwithstanding ministerial objection, has jurisdiction to inspect and, if thought fit, to order production of the subject documents for inspection by other parties to the litigation. It was held, also, that inspection by the Court should not be ordered without good reason. And, in that case reference was made to the circumstances when such inspection is permissible which had been detailed by various of the Lords of Appeal in Burmah Oil Co Ltd v Bank of England (1980) AC 1090 where Lord Wilberforce at p 1117, said

"in rare instances where a strong positive case is made out"; and Lord Edmund-Davies, at p 1129 - either to confirm or not confirm a likelihood postulated that the documents contained substantially useful to him seeking discovery, and Lord Keith (at pp 1134-5) and Lord Scarman (at p 1145) - for the resolution of judicial doubts as to whether or not production should be tendered or the certificate sustained.

Since the Environmental Defence Society case there has been a further development of the law of England in respect of the Court's power to inspect documents before ordering production - the decision of the House of Lords in Air Canada v Secretary of State for Trade (No. 2) (1983) 1 All E.R. 910. The point settled in England by that case did not directly arise in the Environmental Defence Society case nor in Burmah Oil Co. In the two latter cases the Courts were concerned with the circumstances in which the Court, on an application for an order for the production of the documents, should, of its own motion, inspect the documents in question. In the Air Canada case the question was in what circumstances the Court should examine such documents privately before deciding whether their production should be ordered when it was one of the parties to the litigation who sought such an examination - see per Lord Edmund-Davies op cit at p 921 d - e. And that is the first question which arises in the present case. The questions, of course, to a large measure must needs overlap but nonetheless are different questions - indeed Lord Scarman observed that the issue in Air Canada had not been previously explored by the House (p 923h).

It seems to me that the differences in approach laid down in Air Canada on the one hand and the E.D.S. case and Burmah Oil on the other, are explicable by the fact that considerations always applicable to the adversarial system (or as Lord Wilberforce put it - at p 919(g)-"in a contest purely between one litigant and another") had necessarily to be considered in the former case but not in the other two. In the first a party is discharging an onus he has, by his application, assumed. In the second a Judge is confirming a view - perhaps a tentative view - or resolving a doubt not merely as to probable degree of support the documents might lend to the applicant's case but rather as to the primacy of one or the other of two opposing facets of the public interest.

The majority view of the Law Lords was that a party, seeking to persuade a Court to inspect ought at least establish that the documents were likely to contain material substantially useful to him. Lord Fraser, at p 917, put it thus :

> " The most that can be usefully said is that, in order to persuade the Court even to inspect documents for which public interest immunity is claimed, the party seeking disclosure ought at least to satisfy the Court that the documents are very likely to contain material which would give substantial support to

> his contention on an issue which arises in the case, and that without them he might be 'deprived of the means . . . . of proper presentation' of his case : see Glasgow Corp v Central Land Board 1956 S.C. (H.L) 1 at 18 per Lord Radcliffe. "

And Lord Wilberforce at p 919 agreed with the Court of Appeal which "held that there must be a likelihood that the documents would support the case of the party seeking discovery . . ." and later, at p 920 said :

> " The degree of likelihood (of providing support for the plaintiff's case) may be variously expressed : 'likely' was the word used by Lord Edmund-Davies in the Burmah Oil case; 'a reasonable probability' by Lord Keith. Both expressions must mean something beyond speculation, some concrete ground for belief which takes the case beyond a mere 'fishing expedition'. One cannot attain greater precision in stating

> what must be a matter
> of estimation. I would
> accept either formula. "

And Lord Edmund-Davies expressed similar views.

I think that the plaintiff's first application - that is for an order that the documents should be inspected by the Court - should be considered on the yardsticks laid down in the Air Canada case. That application does not initially involve any consideration of the weight that should properly be given to the Minister's certificate in the circumstances disclosed or the level of the public interest it seeks to protect. Nor does it initially involve a decision as to which of the two competing matters of public interest must be accorded priority. The application is that the Court should inspect the documents for the purpose of deciding those questions. And before ordering production for its own inspection the Court must be satisfied that it is likely that such documents will be helpful in fairly disposing of the case. That entails an examination of the causes of action and the issues that are involved.

V The Issues

The causes of action fall into two groups. The first three causes of action are based upon either

an alleged term of an agreement or an alleged negligent misrepresentation that the defendant would advertise a long term sale of timber in Westland and that such sale would be made to Stuart and Chapman Ltd.

The first cause of action alleged such a term in an agreement made in 1965. The defendant denies the existence of such an agreement. Thus the issues raised are :

(1) Was an agreement made between the company and the defendant in 1965 ?

(2) If so, did it contain the alleged term ?

In the second cause of action, the plaintiff alleged that there was such a term, express or implied in agreements made between the company and the defendant on or about 1 October 1967 or that there were warranties or agreements collateral to such to that effect. The defendant denied that there had been any such term in the 1967 agreements or in any other agreement. The issues arising are :

(1) Was there such a term in the 1967 agreements ?

(2) If not, were there collateral agreements which contained such a term or warranties as to such.

The third cause of action alleged a negligent misrepresentation made between 25 February 1965 and 2 November 1965 as described above. This raises the issues :

(1) Was a representation made as alleged ?

(2) If so, was it false and misleading ?

(3) Was it negligently made ?

In respect of each of those three causes of action the plaintiff has claimed damages in the same amount. It alleges that the failure of the defendant to advertise a further long term sale rendered its business uneconomic and that losses were incurred when the business was sold. The second head of damages is for consequential losses as a result of the breach of the agreement or negligent misrepresentation. The issues raised are therefore :

(1) Were the losses incurred ?

(2) If so, were they caused by the breach of the agreement or by the negligent misrepresentation ?

The second group of causes of action involves allegations that it was a term of the 1965 agreement or of an agreement collateral thereto that the plaintiff would process in Westland 80% of the sawn production of each of its sawmills and that all other sawmillers who entered into like contracts with the defendant in Westland would also be required to do likewise.

The issues raised here are :

(1) Was there any such agreement made between the defendant and the company in 1965 ?

(2) If so, did it contain such a term as alleged ?

(3) If so, was it breached ?

In the fifth cause of action there are similar allegations in respect of the 1967 agreements raising identical issues.

And, in its last cause of action the plaintiff alleges that it was represented to it by a servant of the Forest Service on or about 27th May 1964 that all sawmillers in Westland to whom the Forest Service sold timber would be required to process 80% of its sawn production in the district; that the representation was false or misleading and that the plaintiff acted upon it and thereby suffered loss. Accordingly, the issues arising are :-

(1) Was such a representation made ?

(2) Was it false and misleading ?

(3) Was it negligently made ?

In respect of each of the causes of action in the second group the plaintiff claims that it has suffered loss and incurred extra expense as a result of the breaches of the term in the agreement or of the negligent misrepresentation. The issues raised are :

(1) Were these losses and expenses incurred ?

(2) Were they a result of the breach or of the alleged negligent misrepresentation ?

Counsel for the plaintiff submitted that it was quite impossible for it to establish how or if particular documents would assist him in respect of particular issues, and that it was necessary to look at the documents as a whole and the plaintiff's case as a whole to determine whether all or some of the documents meet this prescription.

Although the causes of action raise issues as to agreements said to have been made between 1965 and 1967, and alleged negligent misrepresentations made in 1964 and 1965 counsel for the plaintiff submitted that it was unrealistic to say that only documents arising in those periods would be of assistance because it had already emerged from documents made available for inspection that there may be in documents as yet undisclosed information as to the Government's understanding of the relevant events.

On the other hand, counsel for the defendant submitted that if an agreement was proved to have been made in November 1965 then the only relevant documents would be those listed up to number 84, and evidence provided by communications of later years would be irrelevant.

Similarly, in respect of the alleged misrepresentation, he contended that the only relevant documents would be those listed up to number 84.

And, as to breaches, the defendant submitted that if it was found that there was an agreement containing a term that a further long term sale would be made or if there was a negligent misrepresentation to that effect, then the questions of breach would not be in issue for the very good reason that the defendant allowed that no such sale or advertisement was made.

As for the second major cause of action, the 80% scheme, the defendant submitted that nothing relevantly important could have occurred after the close down of the plaintiff's plant in 1979, and that accordingly the only documents possibly relevant could be those up to number 301. And on the issues of loss, the defendant submitted that the defendant's documents could not possibly support them and that such should be proved in the ordinary way from the plaintiff's own records.

The plaintiff conveniently divided the documents into three groups. Those between 1960-1965, and between 1966-1977 and those of 1978 and after.

In respect of the first group, it was submitted on behalf of the plaintiff that the documents were of assistance in determining :

(a) Whether there was an intention to create legal relations in relation to the alleged agreement to advertise a further long term sale and to enforce the 80% commitment;

(b) Whether there was knowledge on the part of the Government that a commitment to advertise was the equivalent of a commitment to sell;

(c) Whether there was an agreement to advertise the sale;

(d) The elements of the alleged negligent misrepresentation;

(e) Whether the loss was within the presumed contemplation of the parties in the light of the general or special facts known to them.

Counsel for the defendant contended that the documents could not be useful, saying that surrounding evidence of intention was not going to be relevant especially as no oral agreement was alleged, and that generally, most of the issues raised would involve construction of agreements themselves or the drawing of inferences from their provisions and not from other documentary evidence.

In respect of the issues relating to an alleged agreement in 1965, alleged terms of the agreements of 1967 and the alleged misrepresentations made in 1964 and 1965, it seems to me that, generally speaking documents preceding those dates are likely to meet the prescriptions for orders for inspection by the Court.

In particular, the alleged agreement in 1965 and the alleged misrepresentations appear to be largely based on discussions and negotiations between Stuart and Chapman Ltd and the defendant. The plaintiff has made it clear during the argument (if not by its pleading) that there is no single document which embodies the agreement of 1965 or contains the alleged misrepresentations.

Similarly, on the alternative cause of action in respect of the 1967 agreements there are allegations, inter alia, of a collateral agreement.

Accordingly it seems to me that reference may properly be made to documents as to other negotiations or discussions at the time to establish such a collateral agreement.

The state of Government policy at the time and the advice and recommendations of the New Zealand Forest Service are likely to indicate the position of the parties when negotiating the agreements. Thus it seems to me that documents dated in the period 1960-1965 would be likely to assist substantially the plaintiff's case.

As to the second group of documents (1966-1977) there are only three documents involved - numbers 137, 143 and 366 - document 143 has already been produced. It is exhibited to an affidavit filed by the plaintiff. The plaintiff allows that it is of no more than peripheral relevance to the issues. And the plaintiff has made no submission that document 366 was likely to be of assistance to its case. I accordingly think that no case has been made out for either the inspection or indeed the production of those two documents.

In document 142 (Exhibit "P" to an affidavit sworn by Mr W.M. Bryan and filed by the plaintiff) reference is made to a report of 8 October 1976 by the Director-General to the Minister of Forests which sets out the background to the plaintiff's West Coast logging operations and also records that the interim short term sales were being made to the company until such time as, inter alia, "the undertaking given by Cabinet in 1965 regarding the advertising of a further long term sale in Westland could be honoured".

That report corresponds with document 137 and that material in respect of it inclines me to the view that it is likely to be of substantial assistance to the plaintiff in furthering its case.

The final group of documents are those arising in 1978 or subsequently and it comprises the bulk of the documents for which public interest immunity has been claimed. Counsel for the plaintiff submitted that the documents were likely to assist him on the same issues as he described in respect of the 1960-1965 documents. He also submitted that the documents would also help to establish the Government's understanding of its obligations in respect to the commitments alleged to have been made in the 1960's. That consideration however, is of no moment. It is not a factor for consideration at this stage.

He submitted also that the documents would have a bearing on the question of whether or not the Government was in breach of its agreement to sell timber on a long term basis to the plaintiff, and would be likely to assist in establishing that the plaintiff suffered loss as a result of the breach.

Mr Keesing re-iterated his earlier submission that if it be established that there was an agreement as alleged, then breach is not in issue as the defendant allows that no further long term sale was advertised or made to the plaintiff. As to the issues relating to losses, he renewed his submission that the plaintiff must needs prove its losses from its own sources and the defendant's documents cannot possibly prove or be relevant to the quantum of loss.

The final submission advanced by the plaintiff was that if the documents provided no evidence confirmatory of the denials and averments made in the statement of defence, then that factor could be almost as telling as the existence of documents positively inculpating the Government or Forest Service. Understandably, Mr Keesing submitted that this point was irrelevant. There is nothing to it.

In June 1978 the Forest Service advised the plaintiff that it would not advertise a further long term sale. Correspondence then followed between the two parties. In June 1979 the plaintiff advised the Minister of Forests that it had referred the matter to solicitors for appropriate legal action. In that letter the plaintiff observed that the Minister and plaintiff were "in basic disagreement as to the facts". In my view, it is likely that communications to the Minister from his department prior to June 1979 will throw substantial light on the position of the Government as regards the proposal to advertise a long term sale.

Further, documents between 1978 and 1979, might well throw some light on the changes of Government policy and their implementation but will only assume relevance if a term that there was to be a further long term sale to the plaintiff is established. For all that, there seems only a remote possibility that documents from 1978 onwards will bear on the issues. The crucial period is 1964 to 1967. If there was an agreement containing the terms that the plaintiff alleges, or there were negligent misrepresentations then they should be established from the evidence available for that period and not from documents in

existence in subsequent years recording the beliefs and understandings of particular officers as to such. In any event evidence as to such would be admissible - if at all - only in very limited circumstances - see Watcham v The Attorney General of the East African Protectorate 1919 A.C. 533; and its decline in the United Kingdom in Wickman Machine Tool Sales Ltd v L Schuler AGH (1974) A.C. 235, 261; and its fall there in James Miller (James) & Partners Ltd v Whitworth Estates Manchester Ltd (1970) A.C. 583, per Lord Reid at p.603; and see also Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Limited (1981) 3 All E.R. 577 per Lord Denning at p.582 et seq; and its tenuous hold in New Zealand - see the cases collected in Adaras Developments v Marcona Corporation (1975) 1 N.Z.L.R. 324 at p.334 et seq; and the reservations concerning it expressed in the Court of Appeal in Trailways Motel (P.N.) Ltd v The Commissioner of Inland Revenue (1973) 2 N.Z.L.R. 537, 547 and Devonport Borough v Robbins (1979) 1 N.Z.L.R. 1, 24.

Five of the documents for which the privilege is sought have already been produced (documents 143, 209, 277, 339 and 355B) and copies of them are in evidence. In my view, none of them meet the criteria.

The arguments for inspection of the third group of documents is not strong. The crucial events are said to have occurred in 1964-1967 and the substantive action will have to determine whether the alleged agreements or terms existed or whether the negligent misrepresentations were made. The documents from 1978 onwards can shed but little light on these

matters. This is particularly so in respect of the three documents made in 1981, documents 316, 339 and 350. They are so remote from the period 1964-1967 and to the Government's decision in 1978 not to advertise a further long term sale that there is little possibility of these documents being likely to assist the plaintiff on the issues. In my view there is no warrant for the inspection of the documents from 1978 onwards. The plaintiff's submissions as to this group of documents were borne of the perennial and abiding hope of the fisherman.

VI Considerations on the application for production

The Minister has objected to the production of the documents on the grounds that they belong to a class of documents the disclosure of which would be injurious to the public interest. It is thus immaterial whether or not the disclosure of the particular contents of the documents would be injurious to the public interest. The point is, is that it is the immunity of that class of documents from disclosure in litigation that is important : per Lord Wilberforce in Burmah Oil at p.1111; and per Lord Edmund-Davies at p.1124.

The documents here fall into several groups - Cabinet minutes, memoranda and communications to and from Cabinet, communications between senior Government officials and Ministers, between senior Government officials and between Ministers and third

parties. All but perhaps the latter group of documents can be regarded as high level executive documents. Nevertheless, none of those documents are absolutely immune from inspection or production. It is accepted now that even Cabinet papers are not immune, though they are entitled to a high degree of protection : Sankey v Whitlam (1978) 142 C.L.R. 1 and the E.D.S. case (supra).

The plaintiff submitted that if the concern was to protect a class of documents then this concern was undermined by the ready disclosure of documents which also fitted into those categories, or the failure to claim privilege in documents that were of the same nature. For example, in respect of communications between senior Government officials and Ministers the following documents have already been produced - documents 277, 339 and 355B; and privilege has not been claimed in respect of documents 37, 142, 145, 152, 181, 206, 229 and 231. And there are numerous examples of the failure to claim privilege in respect of correspondence between Ministers and third parties, for example, 26, 27, 35, 36, 38 and 39.

Counsel for the defendant said that this "all or nothing" approach was wrong and that commonsense had to prevail. He relied on Air Canada (supra) and the decision of the majority of their Lordships that as the plaintiff had to establish that the documents were likely to assist his case scope remained for the party claiming the immunity to be selective and that, accordingly, nothing turned on the fact that privilege was not claimed for every single document.

It seems to me that the failure to claim the immunity for all documents of the type described as communications between Ministers and senior Government officials does undermine the defendant's claim for immunity. The whole essence of a class objection is that it is the class of document which is being protected regardless of content. The kind of selective approach adopted by the defendant would be appropriate to instances of objections to disclosure on both grounds of class and contents, or contents only.

The plaintiff submitted that the four documents that comprise of communications between the Minister and third parties should be produced as they do not fall into a category for which privilege is normally claimed or upheld without sound specific reasons.

The defendant conceded that documents 47 and 48 which were letters between the Minister and Westland District Progress League were "outside the umbrella". However, counsel contended that documents 54 and 55 being letters between the Minister and a Member of Parliament, Mr W. Fraser should be protected. But the mere fact that the letters are to or from a member of parliament does not automatically put them in the same class as communications between Ministers and senior Government officials. While in respect of the latter there are valid reasons to preclude the production of those documents, those reasons may not have the same force for the former because generally in such cases the member of parliament is doing no more than representing the views or interests of a constituent.

The reason given for claiming public interest immunity was that it was of public importance that communications and deliberations that relate to matters of national interest should be made with frankness and freedom which exposure to public scrutiny might inhibit - commonly labelled the "candour" argument.

This reason for withholding the production of documents has received mixed reaction by the courts. In Burmah Oil Lord Keith said that it must now be treated as having little weight. He was of the opinion that the notion that any competent and conscientious public servant would be inhibited at all in the candour of his writings by the consideration of the off chance that they might have to be produced in litigation 'was grotesque'.

Lord Wilberforce took a contrary view. He said that it seemed fashionable to decry the grounds of need for candour in communications between those concerned with policy making but in the case before him he was not prepared to discount that need for frank and uninhibited advice in the formation of very controversial policy as was there involved.

Although it was not mentioned in the Minister's certificates the defendant also maintained that the reason for withholding the documents was to prevent ill-formed or captious public or political criticism. In Conway, at p.952, Lord Reid said that this was a more important reason than the reason that premature disclosure would inhibit candour. He was speaking of the withholding of the production of Cabinet minutes. However, he widened the application of those

observations to include all documents concerned with policy making within departments including, may be, minutes and the like by quite junior officials and communications with outside bodies, and even further, it might be that deliberations about a particular case required protection as much as deliberations about policy. He said that the business of Government was difficult enough as it was and no Government could contemplate with equanimity the inner workings of the Government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background : p.952.

The consideration of candour and criticism are legitimate factors to weigh in the balance. However, the weight of these factors varies according to the nature of the proceedings in which disclosure is sought, the relevance of the documents and the degree or likelihood that the documents will be of importance in the litigation : per Lord Scarman in Burmah Oil at p.1145.

Unlike the situation in Burmah Oil the documents in this case do not involve the formation of any controversial policy. No doubt decisions as to the future of State forests are always matters of public interest but by 1975 Government policy had already been changed and formulated, and what is more, had been published by the Government in 1977.

There appears to be more force in the candour and criticism arguments where policy is in the process of being devised. In those cases, untimely disclosure of documents may provoke ill founded criticism and inhibit the giving of advice. Moreover, changes in policy will be topical and attract a great deal of public interest and comment.

However, in this case the documents between 1960 and 1965 cannot be said to have involved forming of Government policy. Instead they must have dealt with the existing Government policy at the time. And the documents which came into existence after 1978 did not involve formulation of Government policy or the change of it. They dealt instead with the implementation of that new policy. The plaintiff argued that it was the formation of policy which was the sensitive area and that if the continued application of a policy was a grounds for resisting production then it was difficult to see any situation where the claim could be overruled.

While Mr Kirkland, the Deputy Director-General of Forests, has deposed that the policy is still current and involves frequent decisions, the making of these decisions will be unlikely to attract the same amount of controversy as the making of a change in policy and that, in this case, is particularly so since the new policy has been already widely publicised and has been in operation for a number of years.

In respect of the post 1978 documents, the current policy has been "confirmed and published" and accordingly there is little possibility of captious or ill informed criticism over its implementation.

The plaintiff submitted that the documents could only relate to the Government policy of regional development in Westland with particular reference to the exploitation of indigenous forest resources and this fell outside the category of sensitive policy matters which could be said involve delicate questions relating to national security and the like, which it would not be

in the public interest to disclose. It is trite to say that Government policy as to natural resources is in a different category from matters which involve national security, diplomacy and the safety of the nation. Nonetheless it could give rise to strong local criticism of the nature and kind to which Lord Reid referred in Conway v Rimmer (supra) to which I have already alluded.

The plaintiff alluded to the fact that this case involves a commercial transaction between it and the Government and submitted that if a private individual or a company had been a party to the transaction all the documents would have been discoverable. And counsel for the plaintiff cited Robinson v State of South Australia /1931/ A.C. 704 where the Privy Council made the distinction between documents of a political nature and those that were in respect of the contractual, trading and commercial activities of a State and said that in times of peace, it would be rare indeed that such documents would be protected from production. But the defendant submitted that the main issue in Robinson was whether the Government's claim for privilege was to be regarded as absolute and the commercial aspect of the case was directed to this point. As it is now accepted that a Minister's objection is not absolute, it seems to me that the commercial aspect has lost its force but of course, it is a factor in the balancing process.

The object of public interest immunity is to ensure the proper working of Government and not to shield the Government by giving it an undue advantage where it is a party to a commercial bargain. Where advice is tendered to the Government by its servants

as to its commercial contracts, the reasons for non-disclosure on the basis that candour should be encouraged or ill-informed criticism should be avoided become less valid grounds for denying access to relevant documents.

And, it might well be that there is not complete detachment of the Government in resisting disclosure in cases relating to its commercial contracts. Therefore it may be in the public interest for the documents to be disclosed as the appearance of justice is just as important as the actual administration of justice : per Lord Edmund-Davies in Burmah Oil at p.1127.

And then there is the temporal factor. The first group of documents is already 20 years old and they must needs have had to do with old Government policy. Those documents are now of little more than historical interest and there can be little harm in disclosing them now or at the very least in inspecting them with a view to deciding whether they should be disclosed. It is idle to suggest that disclosure of them is likely to affect the proper working of Government or to inhibit candour in the giving of advice. Their contents are stale and the matters they deal with can surely no longer be said to be either of topical interest or controversial nature.

In relation to these early documents, the plaintiff submitted that because there has been disclosure of related documents and that many of them refer to and in some cases repeat the contents of high level communications and deliberations, weakens the claim for privilege.

In Sankey v Whitlam (supra) it was said that once a document has been published to the world then there no longer exists any reason to deny to the Court access to that document if it provides evidence that is relevant and otherwise admissible. Once published it is impossible to say that public interest immunity requires that it should not be produced or given in evidence : per Gibbs ACJ at p.45; per Stephen J at p.64. But in this case - and indeed the plaintiff's counsel so acknowledged - the documents have not been "published" in that sense. In Burmah Oil Lord Wilberforce said that a class objection remains one even though something is known about the contents of the documents or even if parts of documents are revealed and parts disclosed : p.1111.

All in all, I am of the opinion that when, as here, one is considering a class objection the fact that parts of withheld documents may have been referred to or disclosed is an irrelevant consideration.

VII Conclusions

1. I direct that documents 41, 45, 47, 48, 51, 53, 54, 55, 67, 72, 84, 85, 356 and 404 (comprising 13 documents be produced for the inspection of the Court.

These are the 1960-1965 documents. They are likely to bear on the issues as to whether a 1965 contract existed, or whether there were the alleged terms in the 1967 agreements and finally, whether negligent misrepresentations were made as alleged.

Although there are some Cabinet papers involved those like the rest of them are of an historical interest only now and that there is little likelihood of harm being done if the documents are ultimately disclosed.

Furthermore, the reasons of candour and criticism as grounds for withholding their production is of little validity when considering their age and the fact that they are not of topical interest or controversy.

2. In respect of the documents 1966-1977 for reasons already given I make no orders in respect of documents 143 and 366, but I order that document 137 be produced for inspection by the Court.

3. I make no orders in respect of the post 1978 documents.

Costs are reserved.

Solicitors :
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