

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.994/83

484

BETWEEN THOMAS AYLMER KENNY
Plaintiff

A N D DEVELOPMENT CONSULTANTS LIMITED
Defendant

Hearing : 13th April 1984 (In Chambers)

Counsel : K.F. Gould for Defendant in support
C.W. Hankins for Plaintiff to oppose

Judgment : 13th April 1984 (In Chambers)

(ORAL) JUDGMENT OF BARKER, J.

This is a motion by the defendant for an order permitting the defendant, on inspection of the plaintiff's documents, to photocopy plans, working drawings and specifications relevant to the subject matter of this action.

The plaintiff is a registered surveyor who sues the defendant, Development Consultants Limited, for \$42,818 for surveying work allegedly done by the plaintiff at the Marsden Point Oil Refinery.

The defendant has paid the sum of \$33,000 on account. The plaintiff refuses to permit the defendant to photocopy plans, working drawings and specifications recording and embodying the work which he performed for the defendant on the principal ground

that, if the defendant were allowed to photocopy this material, then the defendant would, in a back door way, know the thrust of the plaintiff's work; the plaintiff would thereby effectively lose his common law lien over the documents.

It is also relevant to note that the plaintiff has registered against the defendant's land, a notice of lien under the Wages Protection and Contractors' Liens Act 1939, although counsel for the plaintiff expressed some misgivings about the validity of this lien. There is also the question of copyright in the plans and arguments between the parties which cannot presently be resolved, as to whether the plaintiff is entitled to copyright in the plans.

Mr Hankins submitted that the Court is entitled to impose conditions on the making of an order for inspection to restrict the right of the party seeking inspection. He relied on The Church of Scientology of California v. Department of Health and Social Security, (1979) 3 All E.R. 97, where the Court of Appeal in England stated that there was not a right of unrestricted publication of medical records because the Court had, as part of its inherent jurisdiction, to ensure that the ambit of discovery was no wider than necessary to dispose fairly of the action and to prevent conduct which might amount to an abuse of the process of the Court; there was jurisdiction to impose restrictions on inspection if there was a real risk of inspection being used for a collateral purpose.

The somewhat unusual facts of that case are far removed from the fairly ordinary facts of the present case. However, the

principle is clear.

The defendant has instructed an independent surveyor, Mr Wright, to advise it on its liability for and the quantum of the plaintiff's claim. Mr Wright, in an affidavit, has stated that to be deprived of copies of the plans, working drawings and specifications would make his task of advising the defendant very difficult and much more costly.

I think that the normal rule about inspection must apply; prima facie, the defendant is entitled to inspection. In this day and age, the right to take photocopies must be regarded as a concomitant of the right of inspection.

Mr Gould states that Mr Wright is prepared to undertake to the Court that he will take photocopies of the relevant documents and hold the copies pending further order of the Court; he will not show them to the defendant other than for the purpose of advising the defendant on this litigation. The defendant will not of course be entitled to use the documents for any purpose other than defending the plaintiff's claim; I think that the defendant should give an undertaking in this regard.

Therefore, I make an order on the motion as moved on terms:

- (a) That an undertaking be filed by Mr Wright that he will hold the photocopies of the relevant documents in his possession until further order of the Court, and that he will not show them to officers of the defendant other than for the purpose of advising the defendant on its liability for and the quantum of the plaintiff's claim;

- (b) That the defendant files an undertaking that he will not use any information so obtained from the documents for any purpose other than the proper defence of the plaintiff's claim.

The question of costs is reserved.

R. J. Baker J.

SOLICITORS:

Edge, Beech & Norton, Auckland, for Plaintiff.

Jamieson, Wilkinson, Castles, Auckland, for Defendant.