IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

13/11 NZCR

M 703/84

No Special Consideration

IN THE MATTER of Sections 320 and 321 of the Companies Act 1955

1387

BETWEEN THE OFFICIAL ASSIGNEE

Applicant

AND LANCE YUILL BAILLIE

Defendant

Hearing: 24 October 1984

Counsel: Mr A. Grove for applicant
Mr Jenkins for defendant

Judgment: 24 October 1984

(ORAL) JUDGMENT OF HILLYER J

This is a motion for an order rescinding an order made in chambers. On 21 September 1984 the parties appeared before me and Mr Grove, on behalf of the applicant, asked for an order that the defendant make discovery of all documents in his possession relating to the matters in question in the action. Mr Jenkins opposed that motion. For the reasons I gave in an oral judgment at that time, I granted the order sought.

The motion was a motion to the Court. It was not a motion to the Judge in chambers, and although I did hear the matter in chambers, it may well be it was still a court order that was made. Further the order is drawn as

a court order and not as a chambers order. It may well be therefore, that there is not power to deal with the matter under rule 426A, as is apparently the intention. Rule 426A provides that :

> "Any party affected by any order made or decision given in chambers or in court for chambers, may apply to the court to vary or rescind the order."

Since the motion was to the court and the order was drawn as a court order, it may well be I was sitting in chambers for court.

Be that as it may, Mr Jenkins and Mr Grove have appeared again before me this morning, and Mr Jenkins has made three points.

The first point, he submits, is that the defendant should not have to make discovery because the papers disclose that he might thereby be made liable to prosecution. He produced to me the case of Wanganui Abattoir Co Ltd v Hansel and Wanganui Mild Cure Bacon Co Ltd 1931 GLR.38. That case, however, makes it clear that the objection should be taken in the affidavit as to documents, and that the objection is not to the discovery of the document, but to the production of the document. Reid J said:

> "It is, prima facie, a valid objection therefore, that the production for inspection of the account books of the defendant company might tend to lay the company open to prosecution. The affidavit that it would do so is not however conclusive; the court must see from the circumstances of the

> case that there is reasonable ground to apprehend danger of incrimination."

It may be that there will be danger of incrimination of the defendant in these proceedings, but that objection, it appears, should be taken in the affidavit as to documents and not by way of objection to the order for discovery in the first place.

The second point made by Mr Jenkins was that the order for discovery is not apt, because proceedings are brought by notice of motion, and that relevant documents would be produced in the affidavits filed in support of and in opposition to that motion. He quoted from the White Book in support of that proposition, but as I have noted in the oral decision I gave when the matter first came before me, the provisions in the United Kingdom are different from the provisions in New Zealand regarding discovery. Discovery is, in my understanding, not merely for the purpose of producing documents that will support the party's case. The party is entitled to obtain from his opponent, documents that may harm his opponent's case. Such documents would be unlikely to be produced by that opponent in an affidavit sworn by him in support of his case. They could be obtained, I imagine, only pursuant to an order of the Court, which is the purpose of the order for discovery.

The third point made by Mr Jenkins was that the application for discovery is premature since a motion to

strike out the proceedings has been filed. That motion has not yet been heard, but I dealt with that question when the matter first came before me; rightly or wrongly. No different submission has been made to me at this time, and I see no basis on which I should change the opinion I then gave that the discovery should be granted.

The motion for an order rescinding the order made in chambers therefore is dismissed with costs of $150 to the applicant.

P.G. Hillyer J

Solicitors:
Anthony Grove & Darlow for applicant
B.M. Laird, Orewa for defendant