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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.900/83

IN THE MATTER of Sections 71 and 71A of the District Courts Act 1947

BETWEEN PAN AMERICAN WORLD AIRWAYS LIMITED a company incorporated in New York, United States of America, and carrying on business in New Zealand and having its registered office for New Zealand at South British Building, 3 Shortland Street, Auckland, Airline Carrier

Appellant

AND SEIKO TIME PTY LIMITED a company incorporated in New South Wales, Australia and carrying on business in New Zealand and having its registered office for New Zealand at 20 Heather St, Parnell, Auckland, Watch Distributors

First Respondent

AND QANTAS AIRWAYS LIMITED a duly incorporated company having its principal place of business in New Zealand at 154 Queen Street, Auckland and carrying on business as an Airline

Second Respondent

Hearing: 10th February, 1984

Counsel: Mrs Turner for Appellant
No appearance for First Respondent
Mr Law for Second Respondent

ORAL JUDGMENT OF SINCLAIR, J.

This is an appeal from a decision in the District Court declining to make an order which the Appellant sought

for further and better discovery against the second Respondent, Qantas Airways Limited.

It is necessary to briefly refer to the facts which have brought this matter before the Court: the First Respondent, Seiko Time Pty Limited, despatched a consignment of watches apparently from Japan to Sydney and from Sydney to New Zealand. From Sydney to New Zealand they were carried by a Pan American 'plane. That consignment arrived in New Zealand on or about 25th November, 1979. It was discovered on arrival in Auckland that a certain number of the watches which were included in that consignment had been stolen. In consequence, Seiko commenced an action in relation to that particular consignment against Pan American World Airways Limited for the value of the watches stolen.

The statement of claim, when one reads it, solely relates to that one transaction and to no more. A statement of defence was filed denying any liability in relation to that particular loss.

An application was then filed by the Defendant to join Qantas as a third party in respect of the one transaction I have just referred to. A third party notice was duly issued and later affidavits of documents were made in response to an order for discovery by both Seiko and Qantas. As I read the affidavits of documents, neither of those parties referred to an earlier theft which occurred in respect of a consignment which arrived in New Zealand on or about 2nd November, 1979. Indeed, in accordance with the proceedings which were then before the Court the earlier theft, if in fact it did occur, is not adverted to at that

point in time in the statement of claim, the third party notice or either of the statements of defence. It was referred to in an affidavit filed in support of the application for leave to file the third party notice, but that of course did not get served upon the third party who, once the order was made, was served merely with the third party notice, a copy of the summons, a copy of the statement of claim and a copy of the statement of defence. That document, in any event, was a self serving document filed by Panam and was not one which was produced by either Seiko or Qantas.

The affidavit of documents made on behalf of Qantas was on 9th May, 1983 and after that date, as a result of correspondence between solicitors, a letter was written by the solicitors for Qantas dated 24 May, 1983 which stated that it was not accepted that the documents concerning an alleged earlier theft from a Qantas flight were discoverable in this action. It is to be noted that it was not even acknowledged that there had, in fact, been an earlier theft. But that letter, once again, is after the date of the affidavit of documents. It appears on the District Court file only because it was used in support of the application for further and better discovery.

The only matters in issue before the Court in accordance with the pleadings as at the time the District Court was required to consider the application for further and better discovery was the alleged theft which occurred on the 25 November, 1979 consignment. The affidavit of documents which the parties were required to make was restricted to

the matters which were in issue in that transaction and that transaction alone.

This is not a case which relates to a series of transactions, nor is it one which relates to a general method of trading. Therefore, it seems to me that at the present time the relevance of the documents relating to the suggested earlier theft has not been made out at all. It may well be that once the evidence is commenced it will become highly relevant that there has been another theft which has occurred and which has been perpetrated in a similar way, and that that has occurred to a consignment which at no time came within the hands of Panam. That may inevitably lead to a Court, on hearing that sort of evidence, to come to a conclusion on the balance of probability that the theft did not occur whilst the goods were within the control of Panam. It is trite law that normally an affidavit of documents is conclusive unless it can be demonstrated either from the affidavit itself or from the pleadings that there are other documents which are relevant and which ought to have been discovered. One of the leading cases is the British Association of Glass Bottle Manufacturers Limited v. Nettlefold (1912) A.C. 709. That is an illustration where the House of Lords followed the general principle but in relation to the facts in issue in that particular case, and because there was a document in existence which was relevant to the proceedings, directed further discovery.

The pleadings at present in the proceedings before me do not make the theft of the 2nd November, 1979 relevant and until they become relevant they are not discoverable.

There are other ways of getting at the matter in my view and if the solicitors acting for Panam follow the other avenues which are available to them I have little doubt that in due course they will be able to get into their hands the documents in question.

I am advised by Mrs Turner from the Bar that Seiko have now made available to Panam the documents which that firm has in its possession relating to the earlier theft. It may well be that now Qantas may see fit to likewise make the documents available, but I do not see how I can, by an order of this Court, at the present time compel the discovery of those documents. It may appear on the face of it to be needlessly pedantic to adopt this course, but sometimes it is necessary to act in this way to ensure that the rules are properly applied. I would not like to see a case of this nature start off with a hearing and then have to be adjourned half-way through for the production of what then may well appear to be relevant documents and which could quite easily have been discovered at some earlier time during the proceedings.

Accordingly the present appeal must be dismissed but in the circumstances I am of the view that each party can bear its own costs.

P. D. [illegible]

SOLICITORS:

Alexander Bennett & Co., Auckland for Appellant
McElroy Duncan & Preddle, Auckland for First Respondent
Russell McVeagh McKenzie Bartleet, & Co., Auckland for Second Respondent