FILE

IN THE HIGH COURT OF OF NEW ZEALAND
WELLINGTON REGISTRY

A. No. 168/84

BETWEEN STEVEN EDWARD MARVIN of Santa Anna, California, United States of America, Plumber

Plaintiff

A N D HER MAJESTY'S ATTORNEY-GENERAL FOR THE DOMINION OF NEW ZEALAND (sued in respect of the Minister of Immigration and the Immigration Department; and the Minister of Foreign Affairs and the Foreign Affairs Department)

Defendant



Hearing: 16 November 1984

Counsel: J.L. Marshall for Plaintiff in support
W.R. Flaus for Defendant to oppose

Judgment: 6 December 1984

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JUDGMENT OF QUILLIAM J

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The plaintiff has applied for leave to deliver interrogatories to the defendant. With some minor exceptions these are all resisted by the defendant. In order to consider the application it is necessary to set out in some detail the plaintiff's case as it appears from the amended statement of claim.

During 1981/82 the plaintiff was employed in Antarctica by an American company. In about October 1981 the plaintiff, while in Antarctica, was sent a very small

quantity of cannabis through the mail by a person in America. This was intercepted by Customs in New Zealand. On his return to Christchurch on 20 February 1982 the plaintiff was interviewed by Customs and Police and he then made it clear that he had no involvement in the sending of the cannabis to him. He was told that neither Customs nor Police would take the matter any further and he returned to the United States.

The plaintiff then proposed to return to Antarctica for the 1982/83 season and on 5 October 1982 was waiting to board an aircraft when he was informed by his company that he would not be allowed transit through New Zealand because he had been refused right of entry. He had no prior notice of this decision. His solicitors in New Zealand wrote to the Minister of Immigration on 21 October 1982 and 11 January 1983 requesting reconsideration of the decision. By letters dated 8 November 1982 and 24 February 1983 the Minister advised that the plaintiff would not be permitted to enter New Zealand and that the Minister had thoroughly reviewed the plaintiff's case in the light of the submissions made but was not prepared to reverse his decision.

The plaintiff's solicitors then wrote to the Ombudsman seeking an investigation of the matter and the outcome was that the Ombudsman, on 8 March 1984, informed the plaintiff's solicitors that the Minister had said that if the plaintiff applied again for entry his application "would be dealt with on the basis of his meeting normal criteria and considerations which have precluded his entry in the past do not now apply". The plaintiff was then able to resume his employment in Antartica for the 1984/85 season. The plaintiff alleged that an agreement made in 1958 between the American and New Zealand governments contained a clause which should have entitled him to transit

through New Zealand without complying with passport and other requirements. It was alleged that the defendant owed a duty of care to the plaintiff when considering whether to refuse him the right to enter New Zealand and when reviewing the decision refusing him entry. There follow then allegations of breach of those duties and it is necessary to set those paragraphs out in full.

> " 19. THE Defendant was in breach of his duty of care when he refused the Plaintiff the right to enter New Zealand in October 1982 in that he -
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> (i) Applied a policy of refusing entry to New Zealand to all American citizens working on the Operation Deep Freeze programme in Antarctica who had any suspected involvement with drugs without properly investigating and considering the special facts and circumstances of the Plaintiff's case.
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> (ii) Failed to make proper inquiries of, or obtain reports from, the Customs Department and/or the Police Department.
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> (iii) Failed to make inquiries as to whether the Plaintiff had a criminal record in the United States of America.
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> (iv) Failed to properly interpret or apply the 1958 agreement between the Governments of New Zealand and the United States of America insofar as it affected the Plaintiff.
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> (v) Acted contrary to advice from the legal division of the Foreign Affairs Department.
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> (vi) Failed to obtain advice from the Crown Law Office.
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> 20. THE Defendant was in breach of his duty of care when he reviewed the

decision refusing the Plaintiff entry to New Zealand in that he -

(i) Failed to give proper consideration to the matters raised by the Plaintiff's solicitors Buddle Findlay, in each of their two applications for a review of the Defendant's decision.

(ii) Failed to make proper inquiries of, or obtain reports from, the Customs Department and/or the Police Department.

(iii) Failed to make proper inquiries as to whether the Plaintiff had a criminal record in the United States of America.

(iv) Failed to properly interpret or apply the 1958 agreement between the Governments of New Zealand and the United States of America insofar as it affected the Plaintiff.

(v) Failed to obtain advice from the Crown Law Office.

(vi) Failed to properly investigate and consider the special facts and circumstances of the Plaintiff's case. "

The plaintiff claimed that he suffered loss as a result of the breaches of duty alleged and sought damages.

The statement of defence contains simple denials of the principal allegations. A number of documents were discovered by the defendant in response to an order of discovery. Among them were some communications between the United States and New Zealand governments. The documents discovered appear to be the principal basis upon which interrogatories are now sought to be delivered. Nine questions have been asked but with various sub-questions they require in all some 80 answers. The defendant has agreed to answer three of them.

On behalf of the defendant a general objection to all the interrogatories is taken and I must deal with that first. That objection was that the interrogatories are fishing, oppressive and prolix and are designed to try and make a case out of what are no more than speculative pleadings. It was argued that this is in the nature of a public law action and so the decisions of the Courts in respect of interrogatories in motions to review under the Judicature Amendment Act 1972 will have a relevance. Accordingly a good deal of reliance was placed upon the decision of the Court of Appeal in Environmental Defence Society Inc. v South Pacific Aluminium Ltd [1981] 1 NZLR 146. That was a motion to review in which it was sought to challenge the validity of an Order in Council applying the "fast track" procedure of the National Development Act 1979 to certain works to be carried out. The main question considered by the Court was whether discovery was available against the Crown. This is not a question which arises here. Having decided, however, that discovery was available, the Court of Appeal went on to consider the matter of interrogatories. The basis of objection to the interrogatories in that case was similar to that raised here. There were a number of allegations in the statement of claim and the Court of Appeal took the view that in respect of only one of them (breach of natural justice) was there any evidence to support the allegation. As this was a motion to review there were affidavits which had been filed and so the Court of Appeal was looking at the case in the light both of the statement of claim and of those affidavits. This, of course, provides a distinction from the present case. With that distinction in mind I set out the comments of the Court of Appeal at p 150:

> " The affidavits in support of the statement of claim thus provide evidence of the standing of the two societies and of facts on which the Environmental Defence Society relies

> for its contentions regarding natural justice. But it is apparent that as to many of the allegations in the statement of claim, including all those relating to the meeting of the Executive Council, consultations and the affairs of the company and the Board, the plaintiffs in these proceedings have put forward no supporting evidence at all. Some of the individual interrogatories appear to be irrelevant in any event, but we need not go into that aspect.
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> Against that background we accept the submissions for the respondents that the interrogatories are fishing interrogatories sought to be administered with the intention of ascertaining by minute examination whether the plaintiffs can find out some ground of invalidity other than the specific one (alleged breach of natural justice) on which the plaintiffs have evidence. What has just been said is an adaptation to the circumstances of this case of the observations of Kennedy LJ in Barham v Lord Huntingfield [1913] 2 KB 193, 197, which are in point in principle. "

Rather similar observations were made in W.A. Pines Pty Ltd v Bannerman (1980) 30 ALR 559 upon which the defendant also relied. That was an appeal under the Trade Practices Act 1974 from a notice given under the Act requiring the production of certain documents. It was alleged that the Chairman of the Trade Practices Commission, who had given the notice, did not have, as required by the Act, reason to believe that the appellant was capable of furnishing the information and documents sought. It is apparent that the action was in the nature of an administrative proceeding more akin to a motion to review in this country. In this regard it does not seem to me to add anything to what was said by the Court of Appeal in the Environmental Defence Society case to which I have just referred.

Whatever is the analogy to be drawn between a public law action against the Crown and a motion to review, I can see no variation from the well recognised principles governing interrogatories. The expression "fishing", as applied to interrogatories, has been described in various ways. I think the different considerations involved are aptly summed up in the judgment of Lord Esher MR in Hennessy v Wright (No. 2) (1882) 24 QBD 445 (reported as a note to Parnell v Walter (1890) 24 QBD 441):

> " In other words, the plaintiff wishes to maintain his questions, and to insist upon answers to them, in order that he may find out something of which he knows nothing now, which might enable him to make a case of which he has no knowledge at present. If that is the effect of the interrogatories, it seems to me that they come within the description of 'fishing' interrogatories, and on that ground cannot be allowed.
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> The moment it appears that questions are asked and answers insisted upon in order to enable the party to see if he can find a case, either of complaint or defence, of which at present he knows nothing, and which will be a different case from that which he now makes, the rule against 'fishing' interrogatories applies. "

Looking at the present case in that way, it seems to me at once plain that what is now proposed cannot be called fishing. This is where the difference between an action such as this one and a motion to review becomes apparent. In a motion to review there must be affidavits which disclose the evidence on which the applicant relies. If that evidence is deficient and it can be seen that an attempt is being made to find out whether a cause of action exists when there is, at the moment, nothing to suggest that it does, then the attempt may fairly be described as

fishing. In an action, however, the plaintiff can do no more, and is required to do no more, than to set out his allegations so that the defendant may see the kind of case he must meet. If the plaintiff makes an allegation and then seeks to interrogate in order to find out whether there is a basis for some further and different allegation then that will not be allowed.

Turning then to the statement of claim in this case, what the plaintiff alleges is that he was given to believe his explanation had been accepted, but, notwithstanding that, he was refused re-entry and his request for reconsideration was also refused. While he could not know what had gone on within the offices of government so as to produce that result he is, I think, entitled to allege that the result is so strange that, particularly in view of the later removal without explanation of the restriction, there is an inference that no proper enquiry was made regarding his case. He therefore seeks to find what steps were taken by way of enquiry and what information was in the possession of the decision-maker in order to see whether the inference he alleges can find support. I am unable to regard this as a fishing expedition. Nor do I see the proceedings as speculative. They may or may not, in the end, turn out to have substance, but at the present stage I consider the plaintiff has done enough to entitle him to interrogate.

So far as the claims of oppression and prolixity are concerned, once it is accepted that there is a proper basis for interrogation there is no support for regarding the interrogatories as a whole as oppressive and prolix. In some individual respects they may be objectionable but not, in my view, on a global basis.

It is necessary then for me to consider the individual questions, although I do not propose to do so

seriatim as similar considerations apply to a number of them. Certain basic objections have been raised and I think it more convenient to deal with those and the fate of the individual questions may be determined as a result. It is first necessary, however, that I remind myself of the general principles which should be applied. I ventured to state these in Athfield & anor v Drewitt (unreported, Wellington, 26 April 1982, No. A.559/79) and I have felt no occasion to depart from what I then said. I accepted the long standing observations of Lord Esher MR in Marriott v Chamberlain (1886) 17 QBD 154 at p 163:

> " The law with regard to interrogatories is now very sweeping. It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call, and their names not forming any substantial part of the material facts; and I think we may go so far as to say that it is not permissible to ask what is mere evidence of the facts in dispute but forms no part of the facts themselves. But with these exceptions it seems to me that pretty nearly anything that is material may now be asked. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue. "

To this I added that I thought the Court should err, if it is to err at all, on the side of allowing interrogatories, being too liberal rather than too conservative.

The general question of relevance was raised in respect of many of the questions asked. Having regard to the view I have expressed as to the way in which the plaintiff has presented his case, I do not think it necessary to deal with the matter of relevance on an individual basis. Once it is accepted that the plaintiff

has provided a basis for the inference that no proper enquiry was made, then the relevance of the questions becomes apparent.

Some of the questions objected to ask for information as to the substance of conversations. This is a matter dealt with by Barker J in his judgment No. 31 in the Securitibank proceedings (unreported, Auckland, 14 August 1984, No. A.355/81). At p 9 he said:

> " The situation is correctly covered in the useful recent Australian work: Cairns, Law of Discovery (1984) where the learned author says at 146:
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> ' Where the contents of a conversation are material a party may interrogate about the substance of what was said. When, however, an interrogatory is simply about the name of a witness or the details of evidence it is inadmissible. The matter depends on how material the conversation is to the issues on the pleadings. It seems, however, that a party may only interrogate about the substance of a conversation, when and where it took place and the parties to it. '
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> I think that conversations can be proper material for interrogation; it is self-evident that there will be greater scope for oppression when one is asking details of conversations by persons some years before, than if one is merely asking questions on events which are recorded in documents of a similar age. "

I accept that this sets out the principle which should be applied and is in conformity with what was said on the subject in Attorney-General v Gaskill (1882) 20 ChD 519 at pp 527 and 529. The test is one of materiality and, having regard to my earlier remarks, I am satisfied that it is material to the allegations the plaintiff makes to find out

what was said in the conversations to which the questions refer.

There are then some questions which enquire as to who had drafted certain documents and the position within the department held by such person. I am unable to see the relevance of those questions. The responsibility for any decision made will be that of the person who made it. It may be of relevance to know whether he obtained information before making it and the nature of that information so that it may be seen whether there was, as alleged, a lack of care. It cannot, however, be relevant to that to know the name and status of the person who supplied the information. This is the same as asking for the names of witnesses which is not a proper subject for interrogatories. I accordingly propose to disallow such questions.

A further question was objected to as being simply an enquiry as to what the defendant's view of the law was. In the course of argument it was suggested that perhaps the question could properly have been asked in a slightly different form so as to be an enquiry as to whether the defendant had acted in reliance upon a particular view of the law. I am not sure whether the question can be saved by such an amendment but in any event I do not think the topic a proper one for an interrogatory.

Applying the various findings I have made to the interrogatories sought to be put, I now deal with the individual interrogatories as follows:

1. Allowed.

2. Allowed in respect of each part.

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| 3. | (i) & (ii) | Allowed. |
| | (iii) | Disallowed. |
| | (iv) | Allowed. |
| | (v) & (vi) | Disallowed. |
| 4. | | Allowed in respect of each part. |
| 5. | (i) | Allowed except for the words "by whom and to whom were they made and what position did each person concerned hold at the time" which are to be deleted. |
| | (ii) (a) & (b) | Allowed. |
| | (c) | Disallowed. |
| 6. | | Allowed in respect of each part. |
| 7. | (i), (ii) & (iii) | Allowed. |
| | (iv), (v) & (vi) | Disallowed. |
| | (vii) | Allowed. |
| | (viii) | Disallowed. |
| | (ix) | Allowed except for the words "who made that |

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| | | recommendation and" which are to be deleted. |
| | (x) | Allowed. |
| | (xi) (a) | Allowed except for the words "by whom and to whom were they made and what position did each person concerned hold at the time" which are to be deleted. |
| | (b) | Allowed except for (iii) which is disallowed. |
| 8. | (i), (ii) & (iii) | Allowed. |
| | (iv) & (v) | Disallowed. |
| | (vi) | Allowed except for the words "who made that recommendation and" which are to be deleted. |
| | (vii) | Allowed. |
| | (viii) (a) | Allowed except for the words "by whom and to whom were they made and what position did each person concerned hold at the time" which are to be deleted. |
| | (b) | Allowed except for (iii) which is disallowed. |

9. Disallowed on the basis that there is no pleading to which this question could be relevant.

There remains to be considered a possible difficulty arising from the fact that the allegations in paras 19 and 20 of the amended statement of claim are directed simply against the defendant. The defendant is the Attorney-General who is sued in respect of the Minister of Immigration, the Immigration Department, the Minister of Foreign Affairs and the Foreign Affairs Department. It may well be that it is a matter of no great difficulty to determine against which Minister or Department a particular allegation is directed, although it would certainly have assisted if this had been made clear. It may be that counsel can resolve this satisfactorily between them and also as to the person who should answer the interrogatories. In case that cannot be done there will be leave reserved to apply further on those two matters. The interrogatories should be answered within a period of 28 days.

The costs are reserved.

Solicitors: Buddle Findlay, WELLINGTON, for Plaintiff

Crown Law Office, WELLINGTON, for Defendant