

The plaintiff seeks orders for the production and inspection of certain documents.

The action was commenced against eight defendants approximately 12 months ago. By consent an order has been made dismissing the fourth defendant from the suit it being a company in receivership and acknowledged to be insolvent. The first defendant is a limited liability company which owned shares in the third defendant now called West Coast Tourist Industries Limited but once called New Zealand Jade Limited. The second defendants are or were directors of all the other defendants each of which is a limited liability company. The fourth, fifth, sixth, seventh, and eighth defendants are all alleged to be wholly owned subsidiaries of the third defendant. The fourth defendant, which has now been dismissed from the action as a defendant, is alleged to have a deficit of \$24,068 at the time it was placed in receivership on 31st March 1982. The plaintiff alleges that he has paid the first defendant \$U.S.100,000 and \$N.Z.50,000 as part payment of the purchase of 200,000 shares in the third defendant which is now said to be worthless. The statement of claim pleads no less than five causes of action:- deceit against all defendants, negligent misstatement against all defendants, mistake against the first defendant, relief under the Contractual Remedies Act against the first defendant and equitable relief arising from the agreement being unconscionable against the first defendant.

Orders for discovery have been obtained and to some considerable extent discovery and inspection has taken place. The present motion seeks orders that the defendants produce for the inspection of the plaintiff, his solicitors and accountant financial

statements and records of all defendants other than the second and fourth defendants. Rule 163 of the Code of Civil Procedure is relied upon. It provides as follows:-

"The Court or a Judge may at any time order either party to the action to produce, for the inspection of the opposite party, such of the documents in his possession or power relating to any matter in question in the action as the Court or a Judge thinks right, and the Court may deal with such documents when produced in such manner as appears just."

It is acknowledged that the requirements of Rule 164 as to affidavits are complied with.

No objection is taken by the defendants to production and inspection by the plaintiff's solicitors or accountant except as to the particular accountant nominated by the plaintiff. He is a chartered accountant who is currently the liquidator of a company which is described as a member of the group of companies of the first defendant. It is not, and never has been, a party to these proceedings. He is also the receiver of the fourth defendant now dismissed from the suit. The defendants submit that knowledge acquired by the chartered accountant by virtue of discovery in these proceedings may be of material interest to the chartered accountant as liquidator of the one company and as receiver of the other because there are many inter-related transactions between the companies. The defendants have submitted that the plaintiff should be required to obtain the services of another chartered accountant to assist him in discovery and inspection.

Mr Hamilton, the accountant concerned, has deposed that he believes that all of the assets of the company in liquidation have been realised and that no further attendances are required of him as liquidator. He does not see any position of conflict. He further deposes that as receiver of the fourth defendant he has realised all the assets with the single exception of a mining licence. He repeats that he sees no position of conflict.

Although the Rules of the Supreme Court of England contain much more detailed provisions for discovery and inspection than are contained in the New Zealand Code of Civil Procedure the general principles explained by the Court of Appeal of England in Church of Scientology of California v Department of Health and Social Security and Others (1979) 3 All E.R. 91 appear to be appropriate to the New Zealand provisions. The use of the word "may" in Rule 163 clearly imports some element of judicial discretion. This was recognised in similar circumstances by the Court of Appeal of New South Wales in Kimberley Mineral Holdings Ltd (In Liq.) and Another v McEwan (1980) 1 N.S.W.L.R. 210.

In the Church of Scientology case Stephenson L.J. stated that the Court had inherent jurisdiction to do what it can to restrain a threatened or likely or foreseeable abuse of the process of the Court by misusing the documents subject to an order for discovery for a purpose other than the purposes of the particular action, and to do that by controlling or restricting production for inspection of the documents in question. In the same case Brandon L.J. succinctly stated the principles at p113 when he said:-

"1. A party to litigation has a prima facie right of unrestricted inspection of the documents of which discovery has been made by the other party so far as may be necessary to dispose fairly of the case or for saving costs. 2. A party is not entitled to use his right of inspection for any collateral purpose. 3. If it is shown that there is a real risk of a party using this right for a collateral purpose, the court has power to impose restrictions on such right in order to prevent or discourage him from doing so. I think that this power is derived from the inherent jurisdiction of the court to prevent abuse of its process rather than from anything in RSC Ord 24 itself."

In the case before me there is no submission that the documents should not be produced and inspected. The objection is to the inspection by a particular chartered accountant because of other positions held by him which the defendants submit place him in a position of conflict. There can be no doubt that in many cases inspection of documents is required by an agent or person other than the party or his solicitors because special expertise is required. Such is no doubt the case here. Likewise however there is no doubt that objection can validly be taken to inspection by a particular person. In the Church of Scientology case Stephenson L.J. said at p105:-

"The authorities seem to me to show that one party can object to a particular agent appointed by the other party to inspect, and the court will uphold the objection and restrict inspection to an agent considered suitable, appropriate or approved. They also show that one party can object to the other party, whether an individual or a corporation, inspecting, and the court will uphold such objection and control disclosure in the interests of justice and fairness to both parties, and will restrict inspection to an approved agent on his undertaking not to disclose the inspected documents or its contents to others, including his own principal, the party

concerned himself or itself. This is established in the case of trade secrets and in the case of press information on the authorities which I have already cited."

Counsel for the plaintiff submits that if I consider there to be a risk of conflict the problem could be met by requiring a specific undertaking from the accountant. The requirement of such an undertaking is not unusual although it adds nothing to the obligations on those participating in discovery as it is clearly improper and no doubt a contempt of court to use or disclose information obtained in discovery for a purpose other than directly related to the proceedings themselves. Such would be known to the accountant who is a professional man of some standing. I should be reluctant to offend him by requiring an undertaking of him which was no more than his duty in any event.

The defendants allege a conflict of interest. The plaintiff and the accountant deny the conflict. The position is that the accountant is in a position as liquidator of one company and receiver of another both of which have had dealings with the defendants, or some of them. It is possible that knowledge acquired by him on inspection will apply to matters in respect of which he has duties as liquidator or receiver. Notwithstanding his professional integrity it could be well nigh impossible for him to remove from his mind the knowledge which is already there.

The plaintiff submits that to uphold the objection of the defendants will be to deny the plaintiff's chosen financial adviser. That may well be so but the position is one of balance as to the justice of the case. The relationship between the plaintiff and the accountant is not a long standing one. He was retained by

the plaintiff's solicitors for this action in or about December 1982. Some 5 months later he agreed to accept appointment as receiver by the debenture holder of the fourth defendant. Four months after that he accepted the nomination of creditors of a company described as being part of the group of the first defendant as liquidator. It is difficult to understand how he could have felt sure that there would be no conflict when he accepted these two appointments but possibly the issue of conflict did not arise then as it does now.

The question is essentially one of expense. There clearly will be additional costs incurred in engaging an independent accountant. The expense does not appear to me to outweigh the risk of injustice to the defendants. If the defendants' attitude is ultimately shown to have been unreasonable the matter can be dealt with by way of costs at the final hearing. The matter may also be capable of solution by the accountant and his firm immediately completing the winding up and possibly resigning as receiver. I do not know whether such are real possibilities but I am satisfied that it would be unjust to order the defendants to produce their documents for inspection by him while he holds these positions of conflict.

There will be an order that the defendants do produce for the inspection of the plaintiff and his solicitors and a chartered accountant who shall not at the time, nor shall his partner, firm or employee be liquidator or receiver of the fourth defendant or of the House of Block Limited (in liquidation) or of any company owned or controlled by the second defendants or which is an associate company of any of the other defendants, at the offices

of the solicitors for the defendants or such other place or places as the parties may agree and within fourteen days of the date hereof, of the documents described in paragraph 1 of the motion.

Although an order has been made in terms of the motion the defendants have succeeded on the only point in issue. The plaintiff is apparently legally aided and there may be no point in the reservation but costs are reserved.

A D Holland J.

Solicitors:

Geddes & Maciaszek, Christchurch, for Plaintiff
Wynn Williams & Co, Christchurch, for Defendants