

6/10/86

NOT  
RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY

A. No. 399/85

1432

BETWEEN

MICHAEL VICTOR JONES  
Plaintiff

AND

JAMES COOK HOTEL LIMITED  
Defendant

Hearing: 29 September 1986

Counsel: J.V.B. McLinden for Plaintiff  
C.H. Toogood for Defendant

Judgment: 1 October 1986

---

JUDGMENT OF HERON J.

---

This is an application seeking further discovery, limited to certain clauses in an operating and management agreement between the defendant and the Tourist Hotel Corporation of New Zealand (T.H.C.). The action involves a claim for constructive dismissal following the plaintiff's resignation from the employment of the defendant on 17 March 1985. The plaintiff pleads that by a series of express or implied conditions in his contract of employment he was vested with certain functions as Operations Manager, and between November 1984 to March 1985 was systematically deprived of such functions and authorities, particulars of which are given, and that he later resigned but in circumstances where he says that he was constructively dismissed.

The employer, at about the time that the plaintiff alleges he commenced to lose some of the benefits of his contract of

employment, had entered into an operating and management agreement with the T.H.C.. The coincidence of these events is not far removed from the allegations which the plaintiff makes, going as they do to a reduction in his role as Operations Manager.

The defendant puts its case no higher than this. It says that its arrangements with the T.H.C. are relevant, and it produces the contract for inspection with certain clauses deleted, which it says are commercially sensitive, and which are on any view of the proceedings, not relevant. The agreement in toto has been made available to me for my consideration. The plaintiff has of course not been able to consider matters of relevancy, except in general terms, having regard to the description of the clause which has been excised from the copy of the agreement and produced as an exhibit to Mr Hoy's affidavit. This case does not involve anything other than a consideration of relevancy. Mr Toogood does not suggest that there is any question of wider public interest involved, but says that on a proper consideration of the issues some of the information in the agreement which is commercially sensitive but not relevant should not be available, particularly to a person with the experience of the plaintiff in the hotel industry. In any event the defendant says that if it is made available then there should be strict terms as to the basis on which it is released. It could not be denied that the contractual commitments that an employer makes for the operation and management of a hotel, particularly to an independent

contractor in the form of the T.H.C. would be relevant to its general motivations and actions in dealing with an employee who up until that time had been, and continued to be actively engaged in one aspect of operations and management. The passages which are sought to be protected are covered in paragraph 6 of Mr Hoy's affidavit, and I set that clause out in its entirety as a convenient starting point.

"6. The defendant objects to producing for inspection the following parts of the Agreement (the "sealed passages"):

- (a) Clause 1(i)(a)(i) only insofar as it states the expiry date of the management contract.
- (b) Clause 1(ii) which sets out renewal provisions.
- (c) Clause 5(ii) and (iii) which deals with the provision by THC of services to other hotels in Wellington and the disclosure of fees and other benefits received by THC.
- (d) Clause 7(i) (ii) and (iii) which specify the manner, amount and method of payment of fees to the THC pursuant to the agreement.
- (e) Clause 8 which relates to changeover expenses.
- (f) Clause 9(vi) which concerns the minimum level of operating profit to be achieved.
- (g) Clause 10 which provides for remedies if either party fails to perform the agreement.
- (h) Clause 15 which deals with the contingency of the destruction or suspension of operations of the hotel.
- (i) Clause 20 which concerns the payment of accounts owing between the parties in the event of termination.
- (j) Clause 23 which deals with the assignment by either party of its interests under the contract."

I deal with the matters in the same order as dealt with by Mr Hoy and refer to his paragraphs.

6(a). This date has been revealed in the statement of defence,

so no objection can be taken to Clause 1(a)(i) being discovered.

6(b) I think it could be argued that the right of renewal is of some probative value in determining the attitude of the defendant towards the plaintiff and the position he held. The notice of an exercise of the right of renewal must be given prior to 31 March 1989. I think that is sufficiently close to the events to still be probative and to bear on the relationship between the employer and employee. It follows that the extent of the commitment to be entered into following the decision to issue the notice to renew is of relevance (perhaps only peripherally) but relevant nevertheless. I think Clause 1(ii) should be discovered.

6(c) I have examined the statement of claim. In 5(c) there are particulars given as to difficulties with computers so far as the plaintiff was concerned. I think for that reason the content of Clause 5(ii) is relevant, but there is no requirement to disclose the exceptions to the agreement not to provide services to the public or elsewhere, and accordingly the words after the word "from" in the fourth line of Clause 5(ii) down to the word "has" in the fifth line should be deleted. 5(iii) I think has some general relevance going to the attitude of the defendant, having regard to the commitment received from the T.H.C. in Clause 5(iii). This may have some peripheral relevance and that should be produced.

6(d). Clauses 7(i) (ii) and (iii) specify the manner, amount

and method of payment of fees to the THC pursuant to the agreement. Mr McLinden submits that depending on the magnitude of the commitment might depend the attitude of the defendant to its employees. In other words if it was paying so much money for the services to be provided then it might not hesitate to save money elsewhere by forcing the plaintiff to resign, or that it might be relevant to a question as to whether despite assurances that James Cook Limited staff were to be protected the financial arrangements did not allow any such protection to be in fact given. I cannot entirely exclude it, and after reflection am not prepared to uphold the defendant's objection. The clause in its entirety must be made available.

6(e) I think this clause comes under the general considerations mentioned in Clause 7. It may become relevant as to what expenses were involved in the changeover and the implications of that on the plaintiff's position. There are allegations that the plaintiff's position was downgraded. That might have some relevance in the calculation of this amount or the way in which the parties reacted to it. It should be discovered.

6(f) In my view this clause is directly relevant, and goes to the actual commitments made by the defendant and the THC as to ongoing profitability which could provide relevant background to the alleged actions of the defendant towards the plaintiff. That clause must be disclosed.

6(g) I see nothing in Clause 10 which is particularly confidential, and as it may bear on the entitlement of either party to this agreement to determine it, that is a proper and relevant consideration in considering the other conditions. It should be made available in its entirety.

6(h) Clause 15 deals with the contingency of the destruction or suspension of operations at the hotel. I am a little puzzled as to why there is a sensitivity about this matter, but do not think it can have any possible relevance to this action. I think I should respect, however, the confidential nature claimed of it. Accordingly clause 15 is to be deleted.

6(i) Clause 20 concerns the payment of accounts owing between the parties in the event of termination. I cannot at this stage see any relevance of this to the matters in issue between the parties, and on the other hand cannot see a great deal of confidentiality involved. Nevertheless, it may be a matter which concerns the defendant, and that being so I will order that clause not to be discovered.

6(j) I consider that clause 23 is a matter unrelated to the dispute between the parties. It is an assignment provision and does not go to the contract as such. I cannot see at this stage any possible relevance it would have to the dispute between the parties, and accordingly it need not be discovered.

It will be clear from the above what further discovery has to

be made, and I hope it is not necessary for me to make a formal order. But I do make an order as to the way in which discovery is to be given of the additional material, together with the material already made available. Mr Toogood has suggested some conditions which I do not think are onerous. The defendant is to make available the abridged copy of the agreement as ordered to the plaintiff's counsel, to be marked "Copy for the purposes of inspection". It is to be disclosed to the instructing solicitors for the plaintiff and the plaintiff for the purposes of obtaining instructions. After the disposal of the litigation the copy is to be returned to the defendant. This copy is only to be used for the purposes of litigation, and no further copies are to be made. I reserve leave to either party to apply further. In particular the plaintiff must have leave to apply for further discovery of this agreement in the event that in the course of evidence excised passages become relevant. If that is so, then it is appropriate the trial judge should be able to reconsider the ruling I have given here. I think that is unlikely but I make it clear that that decision is best dealt with by the trial judge. The complete agreement which was made available to me may be uplifted by Mr Toogood on application to the Senior Deputy Registrar. Both parties have succeeded in part. I make no order as to costs.



Solicitors:

Philip McCabe for Plaintiff

Kensington Swan for Defendant