

Exchange Commerce v Nat. Companies & Secs Comm. (Sinclair J) 19/2/87

SET 2

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.1515/86



IN THE MATTER of an Intended Proceeding

BETWEEN EXCHANGE COMMERCE CORPORATION LTD

First Plaintiff

A N D F.F.I. GROVIT

Second Plaintiff

A N D THE NATIONAL COMPANIES AND SECURITIES COMMISSION (Australia)

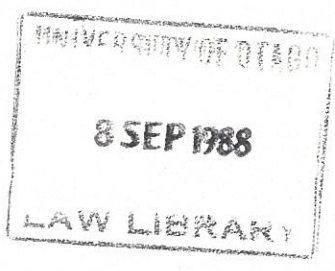
First Defendant

A N D R. SHOER

Second Defendant

A N D N.Z. NEWS LIMITED

Third Defendant



Hearing: 17 February 1987

Counsel: Day & Mrs Davenport for Plaintiffs
Wallis for Third Defendant

Judgment: 19 February 1987

JUDGMENT OF SINCLAIR, J.

The present application is one made pursuant to R.299 of the High Court Rules which provides for an order for particular discovery before the proceedings are commenced.

That Rule reads as follows:-

"299(1) Where it appears to the Court that any person (hereinafter in this rule referred to as the intending plaintiff) is or may be entitled to claim in the Court relief against another

person (hereinafter in this rule referred to as the intended defendant) but that it is impossible or impracticable for the intending plaintiff to formulate his claim without reference to a document or class of documents and that there are grounds for a belief that such document or one or more documents of that class may be or may have been in the possession, custody, or power of a person (whether the intended defendant or not), the Court may, on the application of the intending plaintiff made before any proceeding is brought, order the last-mentioned person -

(a) To file an affidavit stating whether that document or (as the case may be) any document of that class is or has been in his possession, custody, or power and, if it has been but is no longer in his possession, custody, or power, when he parted with it and what has become of it; and

(b) To serve the affidavit on the intending plaintiff.

(2) An application under subclause (1) shall be by interlocutory application made on notice to the person from whom discovery is sought."

It is necessary to refer briefly to the facts which give rise to the present application, which is an application that the Third Defendant file an affidavit stating whether there is in its possession, custody, or power notes of any telephone discussions between one of its employees, Warren Berryman and the Second Defendant such discussions having taken place in or about the period 22 May 1986 to 10 June 1986, and that if such notes are no longer in the Third Defendant's possession, custody or power, when it parted with them and what has become of them.

In May 1986, the First Defendant sought ex parte orders freezing the shareholding held by Chequepoint Securities

Ltd in the Australian company Claremont Petroleum N.L. In an affidavit filed in support of the application, it was contended that Chequepoint and associated companies had conspired to "ramp" the price of shares in New Zealand Goldfields from \$1 to \$6 and then "milk" Claremont Petroleum of A\$13m by a sale of the allegedly overvalued shares. On 29 May 1986, an order was made out of the Supreme Court in Queensland vesting Chequepoint's shares in Claremont Petroleum in the First Defendant. That order was subsequently discharged on 15 July 1986. It was further contended that the reporting of the allegations in the New Zealand press has caused a drop in the share price of New Zealand Goldfields from NZ\$5.50 to NZ\$3.50 and that the losses sustained in consequence by the First Plaintiff have been substantial.

On 11 June 1986, an article appeared in the Auckland Star written by Mr Warren Berryman in which reference was made to the above occurrences in the following terms:-

"NCSC executive director Ray Schoer told the NZN News Bureau Chequepoint's shares in Claremont had been frozen to give Claremont shareholders time to take civil action against Chequepoint.

The NCSC had reason to believe Chequepoint planned to sell its Claremont shares, he said. If this shareholding had not been frozen, Claremont shareholders would have little chance of recovering anything from Chequepoint should their civil action succeed."

An affidavit sworn by Mr Brew of Belgium in support of the application indicates that Mr Berryman had conceded

to the Plaintiffs' solicitors in Auckland that he had had discussions with Mr Shoer and that notes of the interview existed. It is those notes of which the Plaintiffs now seek discovery it being contended that it is impossible for the Plaintiffs to formulate their claims against the First and Second Defendants without reference to those notes. Mr Berryman, in an affidavit in reply, deposed to the fact that he had had a discussion with the Plaintiffs' solicitor, Mr Roger Craddock, in Auckland and that he had conceded having discussed this particular matter with Mr Shoer and made notes of the conversation. Mr Berryman maintained in his affidavit that he was informed by Mr Craddock that the Plaintiffs planned legal action in Australia against the first two named Defendants. There is no necessity for me to refer to all that is contained in Mr Berryman's affidavit but it is clear that Mr Berryman had the clear impression from copies of documents which he was shown by Mr Craddock that the Plaintiffs intended filing certain affidavits in the Supreme Court at Brisbane and that he was informed there was no intention to sue either the Auckland Star or Mr Berryman personally. Mr Craddock has filed an affidavit in reply and it is patently clear from it that he concedes he informed Mr Berryman that he was acting on behalf of London solicitors who had been instructed by Chequepoint Securities Ltd in connection with proceedings which had already been commenced in Australia arising out of the First Defendant's action against Chequepoint. Mr Craddock, in paragraph 3 of his affidavit thus joins issue, in a limited way, with Mr Berryman when he stated his belief

to be that his assistance was being sought in relation to proceedings to be commenced in Australia. However, it is made perfectly plain by Mr Craddock that he informed Mr Berryman that the assistance which he was seeking was in connection with proceedings already commenced in Australia - and that is plain from the final sentence in paragraph 3. Again, in paragraph 7 Mr Craddock acknowledged that he informed Mr Berryman he had not received any instructions to commence proceedings either against him or the Auckland Star and he reiterated that Mr Berryman was simply a potential, although not a compellable witness in the Australian proceedings. In paragraph 8, it is stated by Mr Craddock that it was only at a considerably later date that he received instructions to take proceedings as against New Zealand News Limited. A further affidavit has been filed by Mr Berryman in which he reiterates that he was informed that the Plaintiffs had no intention of proceeding against New Zealand News Ltd in relation to the article which appeared in the Auckland Star.

The original application for discovery was filed on 27 November 1986 and Mr Craddock's affidavit was filed on 12 February 1987. It is silent as to when he received instructions to take proceedings against New Zealand News Limited and I have no way of knowing whether his instructions to sue the Third Defendant came before or after the filing of the initial application. However, an amended application was filed on 12 February 1987 which is in substantially the same form as the first application but

the amended application does make reference to Mr Craddock's affidavit which, of course, had not been filed as at the date of the filing of the original application.

At the time Mr Craddock interviewed Mr Berryman, it would not have been competent for the Plaintiffs to have obtained an order under Rule 299 as that rule is available in respect of, and only in respect of, a claim to relief in the High Court of New Zealand and there was no individual intention to commence proceedings in New Zealand. There is specific reference in the Rule to "the Court" and under Rule 3, the word "Court" is defined as the "High Court". Thus, no order for discovery would have been permitted for the purposes of proceedings which had already been commenced or were to be commenced in any of the Australian Courts. That situation was specifically recognised by counsel for the Plaintiffs and it was further stated that it was now intended to commence proceedings in New Zealand against all three Defendants but that it was impossible and impracticable for the Plaintiffs to formulate their claim against the first two Defendants without having access to the notes of the conversation between Mr Berryman and Mr Shoer.

Insofar as a claim against the Third Defendant is concerned, it is plain in my view that that can relate, and relate only, to the article which appeared in the Auckland Star on 11 June 1986. The notes in relation to the telephone conversation are not necessary for the purpose of formulating the Plaintiffs' claim against New Zealand News Limited. What then is the position in relation to the remaining

two Defendants?

The Plaintiffs rely strongly upon the judgment of Heron, J. in Nelson v. Dittmer, Wellington Registry, CP.130/86, Judgment 5 June 1986, and in particular a passage of the judgment which appears at p.4:-

"I do not think a plaintiff should be placed in the sort of procedural bind which could develop in this case by the application of Kerr v. Haydon and Collinc v. Jones (1955) 1 Q.B. 564. In implementing this rule it seems to me the primary inquiry should be whether it is likely the plaintiff is entitled to claim and, as a result of the circumstances (in this case being the law on this particular point) it is impracticable to proceed further or to formulate the claim without availing oneself of the document or communication. Nor do I think an intending plaintiff must be put into a position where he must show impossibility to the extent of demonstrating that by no means whatsoever could he launch these proceedings without the communication. It may be that proceedings issued on the assumption as to what is contained in the communication might ultimately reveal the exact nature of what was said or written, but I do not consider the test requires those steps to be taken before applying for relief here."

However, I also consider pertinent the words of Eichelbaum, J. in Gray v. The Crown Superannuation Fund, Wellington Registry, CP.65/86, Judgment 20 March 1986. In the course of his judgment, Eichelbaum, J. had regard to the terms "impracticable" and "impossible", particularly in relation to the formulation of the claim. At p.2 of his judgment he had this to say:-

"It is self-evident that the situation is not within the description "impossible" nor can I say it is impracticable. Note that in terms of the rule the impracticability has to relate to the formulation of the claim, not its pursuit to finality. Even if the latter was relevant (I do not believe it is) then

in the ordinary use of the word I could not say pursuit of the action is rendered "impracticable". Inconvenient, yes; or at any rate less convenient than would be ideal."

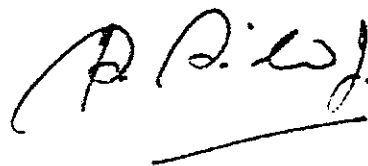
I accept Mr Wallis' submission that if it is desired to take proceedings against the first two Defendants in New Zealand, it would be possible to formulate the claim without the necessity of there being available at this stage Mr Berryman's notes of the conversation he had with Mr Shoer. It would not require any great acumen of legal draftsmanship to draw up a statement of claim alleging defamation and referring to the above two paragraphs from the Auckland Star on 11 June 1986 to which I have earlier referred.

But even if the Plaintiffs had some difficulty in formulating their claim at this stage, there are a number of avenues which, in my view, are open to them. If it is desired to pursue the matter in this country, then proceedings could be commenced against New Zealand News Limited in respect of the article and an order for discovery in those proceedings would probably then result in the notes being discovered. If those notes could be relied upon as being a true and accurate record of the telephone conversation, then it would be open to the Plaintiffs to issue separate proceedings against the first two abovenamed Defendants and later seek consolidation. Alternatively, as I have earlier indicated, it would be possible - and certainly not impossible or impracticable - to formulate a claim at the present time against the first two abovenamed Defendants

and if, on discovery being obtained at a later date, it was deemed necessary to file an amended statement of claim, then that course could be followed. In other words, a little more effort may be required on the part of the advisors of the Plaintiffs to reach the goal that is desired but in my view that is all that is required and one should not resort to the use of R.299 simply as an expedient to make a plaintiff's - or an intending plaintiff's - task more easy. I draw attention to the wording of the Rule itself and in my view this case does not come within the ambit of the Rule. Accordingly, the application by the Plaintiffs is dismissed.

However, before departing from this particular matter, I did hear argument from counsel for the Third Defendant that the obligation of discovery is mutual as between the parties to an action and reliance was had upon certain statements which appear in Riddick v. Thames Board Mills Ltd (1977) 1 Q.B. 881. I do not think those statements are appropriate in relation to the ambit of the present Rule and I think this present Rule 299 is in a particular category of its own which enables, in appropriate cases, discovery to be ordered before any proceedings are issued and it may be as a result of that discovery that wiser counsel might prevail and no proceedings would ever be issued. Thus, the notion of mutuality of discovery does not, in my view, arise in relation to this particular form of discovery which can be authorised under R.299.

The Third Defendant, in my view, is entitled to costs which I allow in the sum of \$300. Security for costs has been fixed at \$2,000 and that has been paid into Court by the Plaintiffs. Counsel can make their own arrangements as to the payment of the above amount of costs but in the event of any difficulties arising, leave is reserved to either party to apply further.

A handwritten signature in cursive script, appearing to read "P. R. W. J.", with a horizontal line underneath it.

Solicitors:

Holmden Horrocks & Co, Auckland, for Plaintiffs;

Brandon Brookfield, Auckland, for Third Defendant.