

14/6

NZLR



X

IN THE HIGH COURT OF NEW ZEALAND  
ROTORUA REGISTRY

CP No 99/86

380

UNDER THE Property Law Act  
1952

IN THE MATTER of Mortgage No  
H620453 (South  
Auckland Registry)

BETWEEN J E HEDLEY  
Plaintiff

A N D NATIONAL AUSTRALIA BANK  
(NZ) LIMITED  
formerly  
BROADBANK  
CORPORATION  
LIMITED


Defendant

A N D S J HEDLEY  
Counterclaim  
Defendant

Hearing May 9, 1989

Counsel Mr Briscoe for Plaintiff  
Mr Olphert for Defendant

Judgment *Delivered* 12 JUN 1989

  
B. J. HANNAH.  
DEPUTY REGISTRAR  
HIGH/DISTRICT COURT  
ROTORUA.

---

JUDGMENT OF MASTER ANNE GAMBRILL

---

This is an application by the defendant against six Banks named on the application here for the said Banks to report by written advice to the defendant's solicitors as to whether or not they have had, as a client banking with each of them, in the period between 1 January 1984 and 14

2.

August 1985, being any person by the name appearing in the schedule annexed to the said application. Twelve names are given with their addresses. Thereafter the application seeks that the Banks will upon written request of the defendant by its solicitors, provide statements of any account held in those names and the defendant undertakes to meet their costs.

The basis of the claim is as follows :

The counterclaim defendant had been employed by the defendant and had, over a period misappropriated certain funds, and was convicted on twelve charges of false pretences in the Rotorua District Court in 1985. The defendant says it has never been known by the Police or by the defendant company how many accounts were operated by Mr Hedley at this time and what he was doing thus with the money stolen from the defendant. The defendant has sought discovery from the plaintiff in these proceedings (the counterclaim defendant's wife) as to the funds and accounts that were operated, but this information has not been forthcoming. Steps do not appear to have been taken to enforce the discovery orders, seek interrogatories or obtain discovery from the counterclaim defendant.

In support of the application, the defendant adduces nine Bank of New Zealand cheques drawn on the defendant company, and one National Bank withdrawal slip. The names

3.

to whom the cheques were made out and the endorsements thereon are clear from the file.

The defendants have sought from the plaintiff (by way of letter posted 10 September 1988) details of the plaintiff's bank accounts, the solicitor's file dealing with the conveyancing and loan for the purposes of construction of the plaintiff and her husband's house, and the documents relating to the source of funds.

Mrs Hedley has filed proceedings in the Court that arise from her execution of the mortgage in favour of the defendant. She signed the document during the course of negotiations to avoid the prosecution against her husband and substantial repayment in relation to the misappropriation that had been carried out by her husband was made at that time. She filed an action in respect of the mortgage against the defendant and sought an interim injunction preventing the sale of the property by the mortgagee, the defendant herein. This injunction was granted by Gallen J on 1 August 1986. The defendant then obtained an order against the husband, naming him as the counterclaim defendant.

This application was opposed only by the Westpac Banking Corporation on the basis that :

(a) The application did not fall within the ambit and

4.

spirit of s.6 of the Banking Act 1982.

- (b) That the orders sought were too general.
- (c) The defendant has failed to provide particulars of the orders sought against the Westpac Banking Corporation.
- (d) The defendant fails to adduce any substantial grounds for seeking disclosure of confidential banking accounts.

The defendant says in support of its application that it believes the plaintiff has used funds negotiated through Bank accounts and says it cannot identify the source of the plaintiff and counterclaim defendant's fund for the purchase of their house. It says that because of the criminal act of the counterclaim defendant this is a special case and that it is necessary in the public interest to produce the Bank records and it relies on Russell's text on Banking Law Ch.8 p.52. I was referred to the decision of R v William Baker Vol 28 NZLR p 536. I was also referred to an English decision Bankers Trust Company v Shapira [1980] 3 All ER 353. The Court of Appeal held there that the defendants were entitled to the Bank's correspondence because of the fraud of the customer. I set out the headnote :

"Held - The Court was entitled, for the purpose of giving effect to a defrauded plaintiff's

equitable right to trace his money, to order a bank to disclose the state of, and the documents and correspondence relating to, the account of a customer who was prima facie guilty of fraud even though the bank had not incurred any personal liability for the fraud, for unless there was the fullest possible disclosure the fund could not be traced. To justify such an order, however, the evidence of fraud against the customer had to be very strong, but, where it was, the customer was disentitled from relying on the confidential relationship between him and his bank to prevent the discovery. Moreover, such an order for discovery would only be made on terms that the plaintiff gave an undertaking in damages to the bank, paid the bank's expenses of making the discovery and used the documents disclosed solely for the purpose of trading the money. On that basis, the court would aid the New York bank's claim to trace the money paid to the discount bank by making an order for discovery in the terms sought against that bank."

Counsel urge upon me the need to assist the defendant because of the fraudulent acts of the counterclaim defendant.

The defendant urges upon me the criminal offences committed by Mr Hedley, the fact that Mrs Hedley is refusing to make proper discovery, the fact that she now has an interim injunction which prevents the sale of the property which she and her husband bought subject to the defendant's mortgage and says that without this information the defendant will be unable to trace the moneys it has lost. It says that no other Bank objects to furnishing this information and that it needs this information. It says it has been unable to establish the amounts the counterclaim defendant misappropriated.

Westpac asked me to look at all the cheques before the Court and it is clear that none of the cheques produced to the Court were negotiated through Westpac. Westpac has no reason to believe and no evidence points to any involvement of the fraud committed by Mr Hedley being carried out through the accounts controlled by Westpac.

Counsel say that s.6 of the Banking Act 1982 is the mechanism whereby business records of a Bank not a party to the proceedings, can be obtained and used. However, the applicant must show special cause. Section 7 also provides for disclosure of documents by a Bank not party to legal proceedings.

Counsel's submission for the Bank was the authorities show that disclosure is only ordered in strict circumstances and there must be a balance that is discretionary between confidentiality of clients and the requirements of justice. He refers me to James v Mayben 3 [1929] NZLR 899, and Bankers Trust Company v Shapira [1980] 3 All ER 353, 358 and head notes. The submission was that the request must be specific, the evidence in support clear. He said that disclosure should only be granted relating to the accounts in question as part of a fraud or wrongdoing subject to the litigation, and he submitted there must be specific evidence to justify the lifting of the veil of confidentiality of why a customer and banker relationship should be broken. The

responsibilities for confidentiality imposed on the Banks must be an important factor here. The defendant seeks access to all accounts in the names of the people listed. How the defendant can be entitled on this application to access for example to Mrs V Hedley's account (the counterclaim defendant's mother) from 1.2.84 to 14.8.85 without her knowledge and/or consent I am not aware.

The submission that there is not sufficient identification of the matters sought to be discovered bears weight. Halsbury 4th Edition, Vol 3 Banking, paragraph 126 states :

"The power to order inspection is a discretionary power and will be exercised with great caution and on sufficient grounds only and the order if made should be limited to relevant entries. The order will only be made with the entries of which inspection sought will be admissible in evidence at the trial. It would appear that there is jurisdiction to order inspection of the accounts of a person who are not party to the litigation but this power will seldom if ever be exercised except where the account sought to be inspected is in form or substance really the account of a party to the litigation or is kept on his behalf so that the entries in it would be evidence against him in the trial and then only on notice to the third party and to the Bank. When therefore the plaintiff brought an action to rescind a contract for the purchase from the defendant of shares in the company on the grounds of misrepresentation by the defendant as to the company's finances leave to inspect the company's banking account was refused."

At this stage in the proceedings, Mr Hedley has recently been joined as the counterclaim defendant. It

appears discovery is not completed and the defendant who really has no evidence of involvement of the Westpac Banking Corporation, is seeking discovery which I am informed by the Bank's solicitors could be a fairly heavy task (without any real evidence to support the involvement of the Westpac Banking Corporation). I believe the Court should be satisfied both on discovery and interrogatories that neither Mr or Mrs Hedley operated all or any bank accounts at Westpac Banking Corporation in the names of the parties listed. There is also no evidence of discovery by the counterclaim defendant and I would have thought interrogatories directed towards both the plaintiff and counterclaim defendant could have ascertained certain other aspects in respect of the claims formulated. I believe that the application at this stage is in the nature of a fishing application. I note however there has been no appearance by the other Banking parties. I note the affidavit of service says that the documents were served on 16 February 1989, and none of the other parties have taken any steps. It is regrettable the affidavit does not identify on whom the documents were actually served, but as the parties have taken no steps there will be orders against all parties as listed in the application excepting Westpac Banking Corporation. Leave is reserved for any such party to apply for further directions as to the nature of the discovery to be made within seven days of service of this order upon it. The application against Westpac Banking Corporation is hereby



9.

dismissed with costs to the Corporation of \$500 and disbursements as fixed by the Registrar.

*A. G. S. Gambrell*  
.....  
MASTER A G S GAMBRILL