

BETWEEN      FILTRATION AND PUMPING  
                         INDUSTRIES LIMITED

First Plaintiff

A N D      WELLINGTON DEVELOPMENT  
                         CORPORATION LIMITED

Second Plaintiff

A N D      J.D. DAVIES

First Defendant

A N D      AQUA DYNAMICS LIMITED

Second Defendant

Hearing:    July 10, 1990

Counsel:    Mr. Miles for First & Second Plaintiffs  
                 Miss Diamond for First Defendant  
                 Mr. Alter for Second Defendant

Judgment:    20/8/90

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JUDGMENT OF MASTER ANNE GAMBRILL

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I have before me an application by the First Plaintiff for particular discovery by the First and Second Defendants under Rule 300. The Plaintiff is required to show there are grounds for believing some document or class of document relating to any matter in question in the

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proceeding is extant and has not been discovered and the documents are in the possession, custody or control of the Defendants and that such documents are relevant to the matters in question between the parties.

The Statement of Claim, as is subsequently amended, pleads a number of causes of action, including copyright, breach of restraint of trade covenant, breach of the First Defendant's duty of fidelity to his employer and conspiracy and inducement by the Second Defendant. The solicitors acting for the Plaintiff have sought documents as outlined in the letter of 30th March relying on the affidavit of Mr. E.T. Stenner. The solicitors indicate the documents may not be common to both Defendants but one or other of the Defendants can and should have been in their possession or control and deposed to their existence.

1. Drawings, orders, invoices, statements and related correspondence for the drawings, dies, mouldings and patents that form the range of products developed by Mr. Davies, Technical Mouldings or Aqua Dynamics Ltd.

2. All patent applications and documents relating thereto made in early 1988 by Mr. Davies and any other patent applications the Defendants have made after 1986 relating to the products of the type sold by the Plaintiff.

3. Documents relating to the sale or licensing of any rights and products developed by the First and Second

Defendants and the products identified and relating to the subsequent sale to the not yet identified company.

4. Documents relating to the funding of Mr. Sutherland's shareholding in Aqua Dynamics Ltd.

5. Documents prepared or submitted for the purposes of the offers to sell Technical Mouldings at the time of takeover and it is indicated in paragraph 16(a) of Mr. Davies' first affidavit there may be a document relevant thereto listing assets.

6. Documents relating to the restraint of trade in terms of future employment at the time of the takeover.

7. Documents relating to the use of the Aqua Dynamics Ltd., by Desk Top Publishing such as a lease or other recorded arrangement.

8. Diaries.

9. Records of products sold by Mr. Davies/Technical Mouldings/Aqua Dynamics Ltd., the prices and purchasers of such products and the orders made by the aforesaid First and Second Defendants for materials.

10. Board Minutes for Aqua Dynamics Ltd.

The Defendants have refused to file a further list and say that they have made proper discovery herein. The Plaintiff seeks to challenge the conclusiveness of the Defendants'

list alleging that from the record the Court must have grounds for recognizing certain documents have not been disclosed and that in refusing to disclose e.g. patent applications, the Defendants have misconceived their case. On 7th July the First Defendant made certain further documents available and at the hearing the Second Defendant agreed that it would discover documents listed in paragraphs 4, 7, 8 and 10.

The Plaintiff says the nature of the claim is fully set out in the amended Statement of Claim. The Plaintiff manufactures and sells a range of products (e.g. pumps and filtration equipment) for use with spa pools. The Second Defendant manufactures a competing range. The Plaintiff claims that the First Defendant, when employed by the Plaintiff and in a breach of a restraint of trade covenant, developed Aqua Dynamics Limited's range of products and is now associated with that company. Mr. Davies denies the allegation and says he is involved only through a partnership called Technical Mouldings. He claims that through that partnership he developed a valve that he has sold to Aqua Dynamics Ltd. The Plaintiff claims that the products were in fact developed by Mr. Davies in the course

of his employment with the Plaintiff and there is a breach of his obligations to that company. The Plaintiff's deponent says that in order to develop the products, such as Mr. Davies has provided for the Second Defendant, there would be drawings, detailed engineering drawings, tooling, samples and finally the finished product. The work would have been contracted out to specialists, draftsmen, toolmakers and injection moulders and there should be considerable documentation thereto but the First Defendant, through his Counsel, denies the existence of such documents.

The Second Defendant says that some of the products have been developed and manufactured in conjunction with third parties and the identification of those third parties would be prejudicial to the interests of the Second Defendant and that the products are irrelevant to the matters in issue. Furthermore, it would involve the Second Defendant in disclosure of all its products which would then make the Second Defendant's business vulnerable to attack either by competition with like products or to a takeover bid.

By the time a hearing was reached the First Defendant was able to inform the Plaintiff of certain documents that may or may not be available and it appeared that the parties accepted that any discovery should relate to items referred to in paragraph 13 of the amended Statement of Claim, that is, "relating to products commissioned, ordered or designed by the First Defendant and marketed by the Second Defendant".

The Plaintiff relies on the fact that the Statement of Defence of the Second Defendant concedes its products made are similar to those the Plaintiff makes. The Plaintiff says that the documents are all relevant because of the nature of the claim, the need to know the patent applications, the details of sale of the goods and the involvement of Mr. Davies with the Second Defendant and the times he became associated with the Second Defendant. The Plaintiff says oppression in the sense the Defendants are trade competitors is not a reason for refusing discovery. It may be a reason for specifying who in the Plaintiff should receive the information. The Plaintiff says the ground for oppression is not made out in the affidavit of Mr. Sutherland on behalf of the Second Defendant and it is

not explained how wholesale disclosure would make the business vulnerable. The Plaintiff complains there is no affidavit by Mr. Davies and says that it is clear law that the Plaintiff cannot misuse the information. Counsel says that as the Second Defendant has effectively admitted the existence of the documents, it can only say it would be oppressive to discover. In fact it is tantamount to saying that when there is a dispute between trade competitors, the Defendant need not disclose documents even though they are relevant. There is no authority to support such a proposition. The Plaintiff complains about the reference to the third parties and says it is a smokescreen now raised to prevent the production and delay the hearing of the claim.

Counsel for the First Defendant says from the Bar there are no affidavits because the First Defendant does not have nor never has had documents referred to in paragraphs 1 and 3 - 10, they do not exist. Counsel has discussed the matter, undertaken his responsibilities properly and there are no such documents which should now be disclosed. Furthermore, the list is conclusive unless the Plaintiff identifies deficiencies and known documents and this has not been done.

As to the claim in paragraph 2., Patent Applications, she says it would be oppressive to disclose and it would prejudice her client's business. The disputed trade processes herein relate primarily to the manner of mounting the motor for spa pool equipment and the First Defendant says it would give the Plaintiff the opportunity to adapt for its own purposes the First Defendant's model. It is not relevant to the litigation. She says that the Defendant has denied he has worked with Aqua and was not employed by Aqua and therefore has not access to the documents as sought. Furthermore, all the evidence the First Defendant has is extant in the documents made available on 7th July.

The Plaintiff complains that there is no affidavit by Mr. Davies and he should go on oath in opposition. He complains that the grounds of oppression have not been made out and he says the Plaintiff will accede to any reasonable arrangement for the purposes of inspecting the documents. Mr. Davies has filed his list and his Counsel says it is conclusive.



The Second Defendant complains about the lack of detail, but I believe that if discovery is confined to paragraph 13 of the amended Statement of Claim, it is quite simple as to identification of the same.

Much of the Defendants' submissions related to the application as it was initially drawn without the limitation of paragraph 13 of the Statement of Claim. Furthermore, the Second Defendant acknowledged that it was prepared to discover documents referred to in paragraphs 4, 7, 8 and 10 of the letter of the Plaintiff which I believe would encompass much of the material that is asked for. The Second Defendant relied on T.D. Haulage Limited v. N.Z. Railways Corporation Ltd. 1 P.R.N.Z. 668. The headnote reads therein:

**"Held,** (1) rule 293 permits discovery of documents relating to any matter in question in the proceeding and is not restricted to matters of issue between the plaintiff and one defendant. The test is whether documents may, not must, be relevant to any matter in question in the proceedings.

(2) Unlike former r 163 Code of Civil Procedure, r 307 contains a restriction on production. Where there is a reasonable objection to production, even where no question of public interest immunity arises, but the documents are confidential, the Court should not order production unless it is thought necessary.

(3) In deciding whether an order for production under r 307 is necessary, the Court

must consider whether there are other ways for an applicant to obtain the private information, and if there are not, how the privacy of the party required to discover can be maintained.

(4) The principle that a party should know what his/her advisers know should be modified where trade secrets are to be protected from disclosure to possible competitors."

It appears paragraph (4) is particularly applicable herein.

The Plaintiff herein has said if the Defendants do not have the documents that it is seeking particular discovery for, then he or it should go on oath and say so. With that view I tend to concur.

I therefore believe that as a number of matters canvassed in the letter of the Plaintiff have been addressed, that it is appropriate now to order further discovery in terms of paragraph 13 of the Statement of Claim and the First Defendant and Second Defendant should go on oath in respect thereof.

In practical terms in respect of the Second Defendant because of the acknowledgement of the matters it would discover and because of the statement that it would not be relevant to any matters therein, it appears to me that the

only disputed issues are the claims in respect of paragraphs 1, 3 and 9 of the list and the patent applications particularly for the motor mounting. I believe that 1. is far too wide and general. That can be accounted for by the First Defendant making the necessary affidavit in respect of paragraph 13 of the Statement of Claim. In respect of paragraph 3 of the Statement of Claim which the Second Defendant objects to production of, I believe the statements in T.D. Haulage Limited (supra) may be relevant but I am not yet satisfied that there is any material or identification of documents that are not listed before me that requires the Court to investigate the sale to an unknown company, the cause of action being between the First and Second Plaintiffs and the First and Second Defendants.

As to paragraph 9, I accept what the Second Defendant says that if it was required to disclose generally its records of sale and the purchasers to whom it is sold, it would make available to the Plaintiff all its confidential business arrangements. With that view I concur. The record of product is only the product sold. The dispute herein with the Second Defendant relates to the "copying"

of equipment. It is Mr. Davies' evidence as to whether he introduced former customers of the Plaintiff to the Second Defendant that is the only relevant fact. The Defendant is entitled to sell to whom it pleases if Mr. Davies has not breached his contract with the Plaintiff. I reserve leave for the Plaintiff to put further evidence before the Court in support of the application in respect of paragraph 9, but on the information I have before me I am not satisfied that the Second Defendants should be required to discover in terms of paragraph 9 of the request by the Plaintiff but should list only documents in terms of paragraph 13 of the amended Statement of Claim.

It appears to me then that the orders should be follows:

1. The First Defendant should make a list relating to the documents informally discovered and the matters addressed in paragraph 13 of the Statement of Claim. If the list includes any patents which are of products similar to those manufactured by the Plaintiff, then leave is reserved to apply for an order to produce to the Plaintiff and I will hear Counsel as to whom the patent details should be given in terms of T.D. Haulage Ltd. v. New

Zealand Railways Corporation (supra).

2. The Second Defendant should file and serve a verified list relating to the matters that it has already acknowledged it is prepared to do, namely paragraphs 4, 7, 8 and 10 of the letter of Messrs. Bell Gully Buddle Weir, dated 30th March 1990 and if there are any documents that it now holds in its possession and control that were either formerly the property of the First Defendant or are its own documents in terms of paragraph 13 of the Statement of Claim, then it should also list such documents.

3. Leave is reserved to any party to apply for any further directions herein as it will be seen the request for relevant documents changed during the hearing because of the concessions made by the Defendants at the hearing.

I also believe that I am entitled to hear Counsel further as to production, as if there are particular patent applications and records of tools and dies, these documents are commercially sensitive and must not be shown to the Plaintiff and the parties would have to accept inspection by independent witnesses of the alleged patents owned by the First or Second Defendants, probably with the

opportunity to sight the Plaintiff's patents.

I believe that this is a matter where the costs should be reserved to be costs in the cause and the argument took one hour.

A handwritten signature in cursive script, reading "Anne Gambrell", is written over a horizontal line.

MASTER ANNE GAMBRILL

Solicitors:

Bell Gully Buddle Weir, Auckland, for Plaintiffs  
Glaister Ennor & Kiff, Auckland, for First Defendant  
Buddle Findlay, Auckland, for Second Defendant