17/3 NZLR

SET 3.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.2455/89

HIGH PRIORITY

DMB, RM

BETWEEN EQUITICORP INDUSTRIES GROUP LIMITED (In Statutory Management) and Another

Plaintiffs

AND A. R. HAWKINS AND Others

Defendants



Hearing: 22 February 1990

Counsel: Mr P.F.A. Woodhouse and Mr A. Tompkins for 14th Defendant
Mr D. J. Chisholm for Plaintiffs

Judgment: 26 February 1990

---

REASONS OF WYLIE, J. FOR JUDGMENT No.2
ON APPLICATION FOR PRODUCTION OF DOCUMENT

---

Earlier today I issued a very brief judgment directing the plaintiffs to serve on all defendants by 10.00 a.m. tomorrow, Tuesday 27 February a copy of the report of Mr David Jones, Solicitor which was the subject of this application. I indicated that reasons for the ruling would be given later.

In the late afternoon of Thursday last, there were applications before me by the 11th defendant (Mr Darvell) the 14th defendant (Equiticorp Australia Ltd) and the 16th defendant (Rudd Watts & Stone) for production of a report prepared for the plaintiffs on the subject matter of this action by one of their solicitors, Mr David Jones ("the Jones

Report"). This report is referred to in the affidavit of Mr Frederick Nelson Watson, one of the statutory managers sworn and filed on 23 January 1990 in opposition to applications by most of the defendants for security for costs. Mr Woodhouse and Mr Tompkins appeared to argue the application for the 14th defendant and informed me that all other defendants save the 17th, which has entered a protest to jurisdiction supported the applications. Mr Woodhouse also reminded me that the 14th defendant had protested jurisdiction and that this application was being made without prejudice thereto.

The applications for security for costs are to be heard by me in a three day fixture commencing 28 February. The plaintiffs oppose the applications and in their notice of opposition have included inter alia two grounds which are particularly relevant to the present application. They are first, that the plaintiffs impecuniosity has been caused substantially by the acts of the defendants and second, that the plaintiffs' claim is bona fide and has at the least a reasonable prospect of success. The plaintiffs have filed two affidavits in opposition - from Mr Watson and from Mr Jones. For the purposes of these reasons for judgment it is necessary to set out some extracts from those affidavits.

First, from Mr Watson's affidavit of 23 January the following are important:

> "5. SHORTLY after the commencement of the statutory receivership it became apparent that there were issues

that needed to be investigated arising out of the acquisition of the shares in NZS by the Equiticorp Group. We instructed our solicitors Messrs Phillips Nicholson, and in particular Mr David Jones, to investigate the nature and extent of the funding of the NZS/EHL Parcel, and to advise whether any of the Equiticorp Group might have legal redress against any of the parties involved in the relevant transactions. Equiticorp staff employed by the Statutory Managers were instructed to assist Mr Jones with his enquiries. Mr Jones' investigation took nearly four months. At the end of that time, Mr Jones produced a detailed report. Annexed to the report were appendices, which included supporting documentation and evidence upon which Mr Jones based his conclusions in the report. Mr Jones' opinion was that on the information then available to him, certain parties had a legal liability in damages to the companies which are plaintiffs in this proceeding.

6. THE factual matters identified in the report provided the basis for the factual allegations contained in the statement of claim. I and my fellow Statutory Managers have considered the report and its appendices. On the basis of this material I believe that the factual allegations contained in the statement of claim are true and correct.

7. MR JONES' report was subsequently reviewed by senior counsel, who confirmed that there existed sound causes of action against a number of the parties involved in the funding. The causes of action identified by Mr Jones and senior counsel are pleaded in the statement of claim herein.

20. BASED on Mr Jones' investigations I believe that the acquisition of the Second EHL Parcel was deemed an investment falling within the Industries/Investment Group and accordingly EIGL assumed prime responsibility for funding. However, for the purposses of funding the NZS/EHL Parcel this responsibility was assumed by the Finance Group for the reason, as I ascertain it, that there were concerns that the provision of the funding by a compny not in the business of lending money would be in breach of s.62 of the Companies Act 1955. Subsequently this funding was refinanced by EIGL, as detailed in the statement of claim filed in this proceeding.

Because the whole tenor of his affidavit is of importance I set out all of the affidavit of Mr Jones apart from the introductory paragraphs.

2. I practice in the field of commercial law and have done so since commencing legal practice in 1977. Generally I act on behalf of corporate clients, particularly larger corporate clients. Typically my work involves company acquisitions and mergers, company financing, company restructuring, receivership and liquidations.

3. I became involved in the statutory receivership of the Equiticorp Group and the Ararimu Group of companies as a member of the legal team assisting the Statutory Receivers, immediately following the announcement of the statutory receivership of the Equiticorp Group on 22 January 1989. For the first six months or so of the receivership, I was working virtually full time on a variety of Equiticorp and Ararimu matters, and a considerable amount of my time is still devoted to Equiticorp. In the course of my work I became thoroughly familiar with the structure of the Equiticorp and Ararimu Groups, with the relationship between the Groups and between the companies within the Groups, and in general terms with their funding mechanisms.

4. IN the first two weeks of the statutory receivership, I became aware of funding which had been provided by members of the Equiticorp Group in connection with the NZS/EHL Parcel. I reported what I had learned to two of the Statutory Receivers, Messrs Watson and Stotter, and was instructed by them to investigate the matter thoroughly. I began a detailed investigation regarding the nature and extent of the funding provided by the Equiticorp Group for the acquisition of the NZS/EHL Parcel from the Crown. The purpose of my investigation was to determine the extent of the funding, to reconstruct the way in which it had been effected, to determine whether any loss had been suffered by any company within the Equiticorp Group, and in the event that losses had been suffered to advise the Statutory Managers on whether they might have legal redress against any party involved.

5. MY investigation took over three months. In the course of my investigation I personally reviewed all of the material documents and most of the surrounding documentation, then available to me. I had numerous discussions and interviews with all of the senior administrative and accounting executives of the Equiticorp Group and the Ararimu Group who were in a position to assist in the investigation. As my investigation progressed, I had numerous meetings with Hawkins in which I sought and generally received his confirmation of the information I was obtaining, particularly with regard to the funding details.

6. MY investigation culminated in May 1989 with a 54 page report (with over 20 appendices annexed) to the Statutory Managers in which I reported on my factual

findings, and on what I considered to be the legal consequences of those findings. The report incorporated detailed findings, both factual and legal, regarding the funding of the Second EHL Parcel, which had come to my attention in the course of the investigation.

7. IN view of the very substantial resources of the Equiticorp Group which were found to have been committed to the NZS/EHL Parcel and the Second EHL Parcel, and the legal consequences which I considered flowed from the commitment, the Statutory Managers decided that they should afford the directors and Darvell the opportunity to comment on the accuracy of the material factual findings. Accordingly, I drafted a letter on behalf of the Statutory Managers which enclosed an appendix summarising the material facts and requesting the recipient in each case to respond to the facts contained in the appendix, and to answer a number of supplementary factual questions. The letter was despatched on or about 30 May 1989. With the exception of Hawkins, each of the EHL/EIGL Directors and Darvell responded to the questions asked of them. The answers did provide further information not previously available, but perhaps more significantly, there was no disagreement with the facts as stated in the appendix. Typically, the resppondents stated that they could neither confirm nor deny the statements of fact put to them.

8. IN or about July 1989 the Statutory Managers, acting on the advice of senior counsel, decided to bring legal proceedings regarding the funding of the NZS/EHL Parcel and the Second EHL Parcel. Following the decision I worked very closely with counsel in preparing the statement of claim in this proceeding. In particular, I had the primary responsibility for the factual allegations contained in the statement of claim and the appendices to it. In that regard the starting point was my report of 15 May 1989. However for the purposes of settling the pleading, I undertook further, extensive investigations. These involved for example continuing discussions and correspondence with personnel at RWS, Denton Hall, HKSB, Elderbank, Bank of New Zealand, obtaining documentation from the Crown under the Official Information Act, tracing the funding which was channelled through the Hong Kong Companies in the Turks & Caicos Companies, and securing the financial records confirming the circumstances which had occurred.

9. I am thoroughly familiar not only with the substance, but also the detail of the statement of claim filed in this proceeding. On the basis of the investigations to which I have referred above, and of my review of all of the documents specifically referred to in the statement of claim, I confirm that to the best of my knowledge and belief the statements of fact contained in the statement of claim and in the appendices annexed thereto, are true and correct. I confirm further that the

> claim has been brought against the defendants bona fide in the belief that the plaintiffs' causes of action are soundly based.

It will be immediately apparent that both deponents have gone far beyond a bare reference to the report and far beyond what was contemplated by Barker J in Securitibank Ltd (in receivership and in liquidation) & Ors v Rutherford & Ors (1984) 2 NZCLC p 99,073 when in the context of a similar opposition to an application for security for costs he said:

> "I should have thought that it would have sufficed for the liquidator to have stated (as he does) that he had been advised by his solicitors and counsel that he had a good cause of action against the shareholders. He could also have stated (as he does) that he had formed his view from his own perusal of relevant documents and left it at that. Such a considered statement from the Court's officer in whom the Court has reposed the confidence of appointment would have been enough to satisfy one of the criteria - viz, that the claim is a bona fide one."

It is, I think, impossible to escape the conclusion that the extracts I have set out have been put before the Court to add credibility and weight to the expressed belief of the plaintiffs as to the bona fides of their case, its prospects of success, and the allegation that the losses of Equiticorp were brought about by the actions of the defendant.

It is not in dispute that the Jones report was initially a privileged communication between solicitor and client. From its description in the affidavits, it appears to go much further than the usual legal advice based on a set of supplied facts. Mr Jones has been both investigator and adviser, but

it has not been suggested that this double role alters the character of the communication. The real issue on the present applications is whether the undoubted privilege has been waived. Privilege apart, the applicants submit that the report clearly relates to matters at issue in the proceedings and that because it forms the foundation to the plaintiff's opposition to the applications for security for costs, it should be disclosed forthwith to enable the defendants and the Court properly to deal with the issues that arise in the security applications. Having regard to the two grounds of opposition I have mentioned I must accept those submissions. It follows toothat apart from the question of privilege the document would be discoverable.

That privilege can be waived is, of course, clear. The privilege vests in the plaintiffs and as one of the statutory managers of the plaintiffs, Mr Watson must be taken to be acting on behalf of the other statutory managers and thus of the plaintiffs. It is not necessary to consider whether Mr Jones has any implied authority to waive the privilege. It is on the contents of his affidavit as well as those of Mr Watson that the applications are based and it is enough that his affidavit is filed by or on behalf of the plaintiffs and used by them.

There is here no express or intentional waiver by the plaintiffs. Mr Watson in his affidavit in opposition to the present application says:

"At no stage have the Statutory Managers intended to waive the legal professional privilege attaching to the Jones report. More specifically, by referring to the Jones report in my first affidavit, I did not intend thereby to waive the privilege. The reason for the reference was twofold. First, the Jones report formed part - and indeed, a critical part - of the steps leading up to the decision to file this proceeding. Secondly, although I am thoroughly familiar with the substance of the transactions which form the subject matter of this claim, and have first-hand knowledge of the corporate context in which they occurred, I have only indirect knowledge of the detail of the claim; that knowledge having been gained from the Jones report, and from my many meetings with Mr Jones and my other advisers in relation to this matter. In expressing my belief that the factual allegations in the statement of claim are true and correct - as I did at paragraph 6 of my first affidavit - I referred to the Jones report, because I wanted to make it quite clear that my belief was not based on my own direct knowledge, but on the investigations of one of my advisers. As I say, in doing so, there was no intention of waiving the legal professional privilege attaching to the Jones report."

Th however, is not determinative. Waiver may be implied. The basis of such an implication is made very clear in Attorney-General for the Northern Territory v Maurice & Ors (1986) 69 ALR 31. Gibbs CJ at p 34 said:

"There was of course no express waiver in the present case and there is nothing to suggest that the claimants had any actual intention to waive privilege in the source documents. The principle applicable in those circumstances seems to me to be well stated in Wigmore, op cit, para 2327:

"In deciding it, regard must be had to the double elements that are predicated in every waiver, ie, not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to

withhold or to disclose, but after a certain point his election must remain final."

The decisions in which this question has been considered seem to me to be particular applications of the rule that in a case where there is no intentional waiver the question whether a waiver should be implied depends on whether it would be unfair or misleading to allow a party to refer to or use material and yet assert that material, or material associated with it, is privileged from production."

The joint judgment of Mason and Brennan JJ at p 39 has the following:

"An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege. The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication .... In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject matter: see Great Atlantic Insurance Co v Home Insurance [1981] 1 WLR 529; [1981] 2 All ER 485".

To the same effect Deane J at p 43 said:

"Waiver of legal professional privilege by imputation or implication of law is based on notions of fairness. It occurs in circumstances where a person has used privileged material in such a way that it would be unfair for him to assert that legal professional privilege rendered him immune from procedures pursuant to which he would otherwise be compellable to produce or allow access to the material which he has elected to use to his own advantage. Thus, ordinary notions of fairness require that an assertion of the effect of privileged material or disclosure of part of its contents in the course of proceedings before a court or quasi-judicial tribunal be treated as a waiver of any right to resist scrutiny of the propriety of the use he has made of the material by reliance upon legal professional privilege."

I have already observed that the descriptions of the Jones report in the affidavits of Mr Watson and Mr Jones go far beyond a bare reference to the existence of the document. As Donaldson LJ (as he then was) observed in Buttes Gas and Oil Co v Hammer (No 3) [1980] 3 All ER 475 a bare reference to a document in a pleading does not waive any privilege that may attach to it, but if the document is reproduced in full in the pleadings then its confidentiality has gone, and where the line is to be drawn between those two extremes may be a matter of some nicety. To find where this case lies between those two extremes it is necessary to look at what is said with some care, but before doing so, I observe that the issues of bona fides, prospects of success, and whether the defendants have brought about the present financial situation of the plaintiffs, are likely to be very material considerations for me to take into account when I deal with the applications for security for costs. Inevitably the latter two considerations can only be considered in a very superficial way at this early stage in the proceedings. So it is to be understood that the plaintiffs will wish at that hearing to have as much material to back their assertions as they are able without embarking on a full scale hearing of the merits. Now as I read Mr Jones' affidavit its whole tenor, as to his experience, as to the time he spent on researching the facts, and as to the depth of his investigations, it is an attempt to clothe the report which he gave to the plaintiffs with an aura of carefully researched credibility as to matters of fact. Then both Mr Jones at paragraph 8 and Mr Watson at paragraphs 6 and 7 link

the allegations in the statement of claim to the factual matters said to be contained in the Jones report. Those paragraphs are tantamount to the deponents saying that the report contains "findings" of all the facts alleged in the statement of claim. It is just as if the deponents had said "the Jones report contains findings by Mr Jones as follows -", then set out all the facts alleged in the statement of claim, and continued saying "The plaintiffs have incorporated those facts into their allegations in the statement of claim." Given the scope of the factual allegations in the statement of claim, the facts, if such they are, extracted from the Jones report must have constituted a very substantial part of it. Had those alleged facts been set out directly in the affidavits as being incorporated in the Jones report that recital of its contents could not have been regarded as other than a substantial disclosure of the report itself. And in my view that is exactly what the plaintiffs have done by an oblique method. But what has thus been disclosed indirectly is or may be selective, and does not or may not constitute a fair representation of the whole contents of the report. To adopt the phrase used by Deane J, "ordinary notions of fairness" which are the basis of the implication of waiver even though not intended, in my view require disclosure of the whole report, given what I perceive to be the clear purpose of the selected material indirectly disclosed by the two affidavits.

The Court should no doubt be reluctant to break down the protection of privilege. Free and unfettered communication

between solicitor and client goes to the root of the proper conduct of the affairs of man and particularly to the conduct of litigation. But legal privilege like every other privilege carries with it obligation, and must not be abused. If it is abused it is likely to be lost. That I think is what has happened here and I do not think it avails the plaintiffs to say that they did not intend to abuse it, nor to say that they did not intend to waive the privilege. Their use of the material was quite deliberate and it can only have been for one purpose. It was the consequences which they did not intend or foresee.

In Attorney-General for Northern Territory v Maurice there was held to have been no waiver on the facts but I have cited from it extensively because it discusses so fully the principles applicable and the expressions of those principles are, I think, very apt to the present case. Instances where waiver has been implied are Great Atlantic Insurance Co v Home Insurance Co & Ors (1981) 2 All ER 485 (CA) and the decision of Barker J in Chandris Lines v Wilson & Horton Ltd [1981] 2 NZLR 600. In the former the act constituting implied waiver occurred in the course of trial. A passage in the judgment of Templeman LJ (as he then was) at 491 suggests that in interlocutory proceedings and before trial it is possible to allow a party who discloses a document or part of a document by mistake to correct the error in certain circumstances. This, however, is not one of those situations. The disclosure was not by mistake. The damage has been done in the sense

that the disclosure has been deliberately put before the Court. It is not, for example, a case where a belated claim to privilege could be allowed to remedy an oversight in an affidavit of documents on discovery. In Chandris waiver occurred long before trial, in the context of a newspaper article. As Barker J said in:

> "It is not possible to assess whether reference to part of a document might be unfair or misleading unless the whole document is disclosed. This surely was the gravamen of the Great Atlantic case. The defendant deliberately chose to refer to the report in the article. .... The defendant advised the world it had the report. It disclosed part of its contents. Yet it still refuses to disclose the whole document. I consider in all the circumstances, supported by the law as shown in the Marlborough Hotel* and Great Atlantic cases, that there has been a waiver of privilege. I therefore order production of the analyst's report for inspection by the plaintiff."
>
> *(Marlborough Hotel Co Ltd v Parkmaster (Canada) Ltd & Anor (1959) 17 DLR (2d) 720).

In the present instance a selected and substantial part of the Jones report has indirectly been disclosed in an important interlocutory proceeding, with the clear purpose in my view of adding weight to the plaintiffs opposition and thus to influence the Court in its consideration of the interlocutory applications. It is that in particular which introduces the element of unfairness or the possibility thereof.

I should add that Mr Chisholm for the plaintiffs offered to present the Jones report to me for my perusal to assist in determination of these present applications. He did so, he said, in reliance on r.311 and on the Court's inherent jurisdiction to receive for inspection a challenged document

to determine its status. I declined to accept Mr Chisholm's offer. In so far as r.311 is concerned that is for the purpose of considering whether a document is privileged. That is not the issue here. The question is rather one of waiver of an acknowledged privilege. Assuming an inherent jurisdiction the considerations to be brought to be bear in the exercise of a Judge's discretion as to whether he should receive a document in that way are conveniently discussed in Taranaki Co-Op Dairy Co Ltd v Rowe [1970] NZLR 895 at 903, 904. As will be seen it is a matter of weighing in the balance the advantages and disadvantages of such a course. I do not think in the present instance that I would be assisted by looking at the document. I am not left in any doubt which such an inspection might enable me to resolve. Thus the disadvantages of such an inspection can be avoided.

Counsel for the plaintiffs referred me to Curlex Manufacturing Pty Ltd v Carlingford Australia General Insurance Ltd [1987] 2 QdR 335, a decision of the full Court of Queensland given on 30 October 1986 just six weeks before the decision of the High Court of Australia in Northern Territory v Maurice. In Curlex there was some criticism of passages in the judgment of Templeman LJ in the Great Atlantic case as to severance of that part of the document which has been disclosed and the remainder to which privilege might still attach. Templeman LJ expressed the view that severance would only be possible if the memorandum dealt with entirely different subject matters or different incidents and could in

effect be divided into two separate memoranda each dealing with a separate subject matter. In Curlex McPherson J traced the history of discovery and the practice of sealing over parts of documents in respect of which privilege was claimed as to part only and considered that the test formulated by Templeman LJ was inappropriate and not in accordance with history and practice. I do not need to pursue that issue. There was no real suggestion from Mr Chisholm that the Jones report was capable of being divided into two parts discrete or otherwise. I do not think Curlex helps his case. Indeed, at p 340 McPherson J makes the point that Great Atlantic was not a case involving a waiver of privilege on discovery but that it raised the issue of waiver in the course of trial. He said:

> "The decision, which, with respect, appears plainly to be correct, was concerned with the principle that a party cannot ordinarily claim at trial to use part of a document in support of his case, while at the same time also claiming to conceal the remainder of it from his opponent."

So the Court there was expressly acknowledging the correctness of the decision in Great Atlantic in the context of disclosure in the course of trial. In the present instance I regard affidavits in the interlocutory applications for security for costs as part a hearing in the nature of trial of that issue, and the consequence of partial disclosure in the course thereof to be no different.

For those reasons I think the plaintiffs must be taken to have waived their privilege in respect of the Jones report

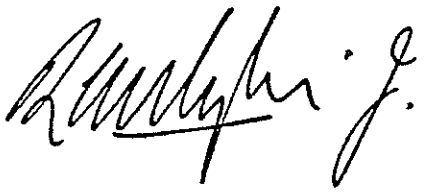
however unwittingly, and accordingly the defendants are entitled to have the document produced.

Before concluding these reasons for judgment I should refer to three other bases on which Mr Woodhouse submitted there had been disclosure disentitling the plaintiffs to continue to claim privilege. I will do little more than mention them because they are not necessary for the purpose of this decision. In a paragraph of his affidavit in opposition to the present applications which I have not set out earlier Mr Watson referred to the statutory managers having refused to publish the report despite numerous requests from members of the media and others. From this Mr Woodhouse invited me to infer that the existence of the report must have been made known to the media and other people and as a report of significance otherwise such numerous requests would not have been made. He submitted that publication of existence was enough and cited in support Chandris. With respect I think that overstates Chandris where the newspaper report which made reference to an independent chemical analysis went on to indicate something of its contents. Had it been necessary for me to decide Mr Woodhouse's point I think I would not have regarded that matter was amounting to disclosure raising implied waiver. Secondly, in the same paragraph, Mr Watson refers to having provided copies to the Securities Commission and to the Department of Justice "under requisition". Mr Woodhouse submitted that there was no statutory obligation to disclose to either of those bodies and no authority under

which either of them could "requisition" a copy. As a matter of law, that may well be correct, but given the role played by the Department of Justice and the Securities Commission in the appointment of statutory managers under the Corporations (Investigation and Management) Act 1989 I would hesitate without hearing fuller argument to conclude that that was publication at large rather than disclosure on a confidential basis to persons intimately involved in the conduct of the statutory management. Thirdly, Mr Woodhouse relied on the summary of facts which was supplied by Mr Jones to each of the defendants referred to in paragraph 7 of his affidavit. This Mr Woodhouse said was partial disclosure to the defendants and on the principles expressed in Northern Territory v Maurice they should be entitled to the whole. The giving of such a summary does not, I think, create such a clear cut situation as confronts me in the present application as a result of the affidavits of Mr Watson and Mr Jones. Whether such a summary is capable of amounting to an implied waiver need not be decided now and can safely be left until it arises as a matter of necessity.

Under r.307 the defendants are entitled to production and inspection but given the exigencies of time it will be more useful for them to have immediate copies of the report and its appendices. For that reason, in the brief judgment which I delivered earlier today, I have ordered that a complete copy of the report, together with all its appendices be served on all defendants by 10.00am on Tuesday 27 February. In the

circumstances I have not thought it necessary to require a verifying affidavit. I have reserved costs on the present applications.



Solicitors: Glaister Ennor, Auckland for 14th Defendants
Phillips Nicholson, Auckland for Plaintiffs

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.2455/89

| | |
|---|---|
| BETWEEN | EQUITICORP INDUSTRIES GROUP LIMITED (In Statutory Management) and Another |
| | Plaintiffs |
| AND | A. R. HAWKINS AND Others |
| | Defendants |

---

REASONS OF WYLIE, J. FOR JUDGMENT No.2 ON APPLICATION FOR PRODUCTION OF DOCUMENT

---