IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

13/12

C.L. 101/90

BETWEEN GEOTHERM ENERGY LIMITED

First Plaintiff

2383

AND ALISTAIR STUART McLACHLAN and AVA MARIE McLACHLAN

Second Plaintiffs

AND GEOTHERM EXPORTS NEW ZEALAND LIMITED

Third Plaintiff

AND GEOTHERMAL PRODUCE NEW ZEALAND LIMITED

Fourth Plaintiff

AND the said ALISTAIR McLACHLAN and AVA MARIE McLACHLAN

Fifth Plaintiffs

AND ELECTRICITY CORPORATION OF NEW ZEALAND LIMITED

First Defendant

AND TRANS POWER LIMITED

Second Defendant

Hearing: 27 August 1991 (In Chambers)

Counsel: D.J. White Q.C. and D.A. Laurenson for defendants in support
W.D. Baragwanath Q.C.and Ms N.W. Symmans for plaintiffs to oppose

Judgment: 25 September 1991

JUDGMENT (NO 3) OF BARKER A.C.J

The defendants seek an order that certain documents disclosed in the first defendant's preliminary list of documents be kept confidential and be not revealed to any person other than to (i) senior counsel for the plaintiffs, (ii) the solicitor on the record for the plaintiffs (and nominated assistants within his firm) and (iii) independent experts - restricted in number and class - advising the plaintiffs in their preparation for trial.

The defendants initially objected to disclosure of the documents to Mr D.J. Ross, Chartered Accountant Auckland, an advisor of the plaintiffs; this objection was later withdrawn. The defendants now do not object to Mr Ross or to Mrs K.M. Vautier, an economist, sighting the documents provided each gives an undertaking of confidentiality. A further requirement of the defendants is that all copies of documents made by the plaintiffs' advisors be delivered up to the solicitors for the defendant at the determination or earlier settlement of the proceedings.

The plaintiffs acknowledge the normal responsibility resting on a party to litigation who inspects the documents of the opposing party. They ask that the documents be inspected not only by counsel, the solicitors, Mr Ross and Mrs Vautier, but also by Mr A.S. McLachlan, one of the plaintiffs who could be said to be the driving force behind the plaintiffs' determination to operate a power generating station in competition with the first defendant. The plaintiffs wish also inspection by named members of the consulting engineering firm of KRTA Limited.

A summary of what the litigation is about can be found in my judgment of 5 June 1991 wherein I refused to strike out many of the plaintiffs' allegations in their statement of claim. That judgment is still under consideration by the Court of Appeal. Essentially, the plaintiffs' claim is that the defendants in various ways are in breach of the anti-competitive provisions of the Commerce Act 1986 and that the first defendant operates as a monopolist, restricting competition by potential entrants into the electricity supply market such as the plaintiffs.

Counsel for the plaintiff submitted that the defendants' present application was premature in that there should first have been a requirement by the plaintiffs that the defendants produce the documents for inspection; the Court could not make an order under R.312 because the plaintiffs are not yet in a position to request the defendants to produce the documents. However, the matter was argued and the Court asked to rule on the application as it stands, although counsel for the plaintiffs submitted that the alleged prematurity of the application provided a further ground for its dismissal. This point is technical; in view of counsel's preparadness to argue the merits, I do not allow it to intrude upon my consideration.

Two affidavits from Mrs Baumann, the secretary of the first defendant, detailed the types of documents said to be confidential and the reasons why the defendants did not wish them to be disclosed, other than in the limited way mentioned. In her first affidavit the objection was stated thus -

> "3 Many of the documents specified in the schedule of confidential documents ("the confidential documents") relate to the formulation of the first defendant's pricing policy and strategy. For example, there are documents containing research and analysis upon which the first defendant's pricing policy and strategy are based. There are internal

memoranda and board meeting minutes of the first defendant which not only convey and evince the policy and strategy, but also indicate how the first defendant approaches these major issues. The first defendant regards these documents as highly confidential and is most concerned to ensure that they and the information contained in them are not disclosed to its competitors.

4. The other confidential documents relate to negotiations between the first defendant and electrical supply authorities, together with the agreements which were eventually reached between those parties. The terms and rates contained in each supply agreement are highly confidential as between the first defendant and each electrical supply authority. The documents relating to the negotiations also contain internal memoranda of the first defendant which discuss and evince its pricing policy and strategy. The first defendant regards these documents as highly confidential and is also most concerned to ensure that they and the information contained in them are not disclosed to its competitors.

5. Very little of the information contained in the confidential documents would be otherwise available to the plaintiffs. The confidential documents do not contain any information the significance of which for the purpose of this proceeding would not be readily identifiable by the plaintiffs' independent expert and/or legal advisors. I therefore do not believe it is necessary for any person other than the plaintiffs' counsel, solicitor and independent expert to see the confidential documents in order to fairly and justly dispose of this proceeding. The grounds for my belief are based on my knowledge of the files, and my understanding of the issues involved in this proceeding."

In an answering affidavit, Mr McLachlan claimed that the information in the defendants' documents would disclose policies and procedures for discouraging others from entering into competition in power generation. He claimed that it would be impracticable for his legal and other advisors to inspect the defendants' documents without assistance from himself. Mr McLachlan also asserted that, because of engineering constraints, the plaintiffs would be unable to enter business before June 1993 by which stage the contracts of the defendants with

power supply authorities would all have been renegotiated from their present form.

Mrs Baumann in her affidavit in reply, stated that many contracts with supply authorities are 'rolled over' following the expiration of current contractual terms or have a longer than annual term. She articulated the first defendant's concern over KRTA inspecting the documents (particularly all three persons nominated by the plaintiffs) because KRTA is also advising the defendants and is also actively marketing its ability to advise any new entrant into the electricity generation field.

In T.D.Haulage Limited v New Zealand Railways Corporation [1986] 1 PRNZ 668, I had occasion to limit the production of confidential documents where the discovery process could disclose sensitive pricing information to a potential competitor. I do not repeat the summary of the law given in that case which appears to have passed the scrutiny of the Court of Appeal in New Zealand Railways Corporation v Auckland Regional Council (unreported judgment, 19 June 1990).

In T.D. Haulage, documents alleged by the defendant to be of extreme commercial sensitivity were ordered to be inspected initially only by the plaintiff's solicitor, counsel and investigating accountant. If those persons had formed the view that all or any documents should be produced as a necessary part of the plaintiff's case, then liberty was reserved to apply to the Court, stating grounds for the belief.

Counsel for the plaintiffs stressed the normal principle of discovery that, in general, an undertaking as to non disclosure and/or a restriction as to disclosure is required only in a small hard core of cases where a party cannot be trusted not to misuse the information (e.g. The

Church of Scientology v Department of Health and Social Security (1979) 3 All ER 97,106,109) or where there are trade secrets of a most sensitive kind.

Counsel submitted there was no evidence that Mr McLachlan personally could not be trusted with this information; counsel pointed to Mr McLachlan's assertion that given all the lengthy processes through which the plaintiffs have journeyed (many of which were retailed in the earlier judgment) their resources are such that they cannot retain power costing experts. Mr McLachlan himself, whilst not a qualified expert, has familiarised himself with the subject and could assist counsel and solicitors on the inspection exercise.

Counsel further submitted that the first defendants is a monopolist. Because the plaintiff is alleging breaches of the competition laws, the very sort of thing likely to be unearthed on inspection which the defendants are unwilling to disclose, could be evidence of the predatory pricing. Counsel stressed the difficulty of a party deciding for itself what should be the subject of limited disclosure.

In Warner-Lambert Co v Glaxo Laboratories Ltd [1975] RPC 354 confidential disclosure was given to the plaintiff's Chief Executive, in addition to counsel and expert witnesses, on the grounds that he alone would be likely to appreciate the significance of the documents of the discovery.

As I noted in T.D. Haulage, the dilemma faced by the Court is stated succinctly by Buckley LJ in the Warner-Lambert case at 356. Translated to a competition law, as distinct from an intellectual property law context, the dilemma can be thus stated. The plaintiff is entitled to flush out and have the Court punish breaches of the Commerce Act and unlawful exercise of market dominance.

If a defendant is acting in this way, it should not be permitted to shelter behind a plea of secrecy. If, however, a defendant is not acting contrary to the Commerce Act, it is entitled to have its secret pricing arrangements maintained as confidential. The problem is how justice can be done to both sides and, at the same time, effect be given to the rights of each party. I note that the burden of proving anti-competitive conduct rests upon the plaintiffs and part of the legitimate means of discharging that burden is by use of the discovery process.

The course that has been taken in a number of varying situations has been to direct disclosure to selected individuals, upon terms aimed at securing that there be neither use nor disclosure of the information in ways which might prejudice the defendant. If Mr McLachlan came to know the pricing policies of the defendant even though he retained no document or any record he may still be able to remember them. It would be hard, however conscientiously he tried, to divorce himself from this knowledge, if he found himself in the situation of selling electricity to a supply authority in the future.

I consider that the initially controlled discovery device is one which will protect the defendants if events transpire that the defendants' information is worthy of protection. At the same time if, in the opinion of the solicitors, counsel, Mr Ross, Mrs Vautier and/or a representative of KRTA Limited, there exist documents which Mr McLachlan should see, then an application can be made for a further order. As indicated in the T.D.Haulage case, if necessary, I could inspect the documents myself before permitting their disclosure.

I consider that it is reasonable to have at least one technical person from KRTA look at the documents in case

something technical arises which would have little significance for the other persons inspecting.

Little harm is done by making a T.D. Haulage type order at this initial stage restricting disclosure of the documents referred to in Mrs Baumann's affidavit to the plaintiffs' counsel and solicitors, counsel, Mr Ross, Mrs Vautier and one representative from KRTA Limited to be agreed between the parties or failing agreement by me.

If any of these advisors considers that the documents or segments of documents should be disclosed to Mr McLachlan, then an application can be made to the Court or the defendants' may consent to his seeing the documents. The defendants should not be encouraged by this judgment to make a blanket refusal to Mr McLachlan's inspection of the documents. He is a plaintiff and, but for the alleged commercial sensitivity of the documents, he would normally be entitled to peruse them. If necesssary, I would err in favour of allowing him to peruse them, bearing in mind the aim of the Commercial List to allow parties to come quickly to the merits of the litigation. If there is evidence of anti-competitive conduct revealed in the documents of the plaintiff then, I have no doubt that this will be fairly readily apparent to the plaintiffs' solicitors, counsel and other advisors.

It will be necessary for the three advisors, other than solicitors and counsel, to sign an undertaking of non disclosure; the form to be approved by the parties, failing agreement to be approved by me. I also make the order for return of any copies to the defendants after the case has been determined or settled.

Liberty to apply is reserved, as is the question of costs.

This matter is to be called before me on the Commercial List on 11 October 1991 by which time the Court of Appeal judgment may be to hand. Counsel for the defendants may wish then to attend by telephone conference for which arrangements can be made with the Registrar.

R G Barker A.C.J

Solicitors: Jackson, Russell, Dignan, Armstrong, Auckland, for plaintiffs
The Solicitor, Electricorp, Wellington, for defendants