IN THE HIGH COURT OF NEW ZEALAND S/3 CP 518/89
WELLINGTON REGISTRY

	BETWEEN	JOHN AUSTAD
		Plaintiff
120	A N D	JARDEN MORGAN NZ LIMITED
		First Defendant
	A N D	JARDEN MORGAN SECURITIES LIMITED (als known as JARDEN SECURITIES LIMITED)
		Second Defendant
	A N D	BRYAN EWART JOHNSON
		Third Defendant

Date of Hearing: 8 February 1993

Counsel: J C D Corry for Plaintiff to oppose
Cath J Jamieson for Defendants in support

Date of Judgment: 25 FEB 1993

JUDGMENT OF MASTER WILLIAMS QC

This is an application by the defendants for an order for further and better discovery by the plaintiff. As appearing in the defendants' amended application, the additional discovery sought was of all documents which:

> "... disclose the extent to which the plaintiff, on his own behalf and on behalf of or jointly with others, held or traded shares in the sharemarket in each of the years between and including 1977 and 1987 ..."

Mr Austad opposed on the ground that the order sought was not relevant to any matter in issue in the proceeding; that he had made voluntary discovery of lists of share sales and purchases made by him through a sharebroking company called Mouat Bolland in 1986; that the defendants already had a full list of share sales and purchases made by Mr Austad through them for other years; and that the order sought was oppressive both in duration and in extent, particularly as it related to share trading by persons other than the plaintiff.

The claim is one arising out of Mr Austad's share dealings through the first defendant, Jarden Morgan, as a sharebroker. The second defendant, Jarden Morgan Securities, operated as Jarden Morgan's merchant banking arm. Mr Austad, an experienced invester, claims that between April-October 1987 he purchased shares in Judge Corporation Limited, Kupe Group Limited and Ariadne Australia Limited through Jarden Morgan for a total of $409,829.48, financing approximately half of that purchase through Jarden Morgan Securities. Mr Austad claims that, as a result of the collapse in the share values of those three companies following the stock market crash in October 1987, the worth of his shares fell to a total of about $9,000.00 thus giving him a capital loss which he claims in this proceeding of $400,829.48 in addition to which he has incurred a liability for interest to Jarden Morgan Securities of approximately $170,000.00. There is a conterclaim by the second defendant for that amount.

Mr Austad pleads that Jarden Morgan were at the time he purchased the shares just referred to also advisers to Judge Corporation and closely involved with that company's business. Mr Austad also claims that Jarden Morgan had a considerable amount of contact with those controlling Ariadne and Kupe. He particularises the details of that claimed relationship in his statement of claim. Mr Austad claims that before purchasing the Judge, Kupe and Ariadne shares he sought advice from the defendants concerning the wisdom of the proposed purchases and claims that he relied on that advice in proceeding with them.

Mr Austad sues Jarden Morgan in negligence and sues both the first and second defendants for breach of a claimed duty to inform him of the information and association which they had concerning the three companies. To meet Jarden Morgan Securities' counterclaim he includes in his statement of claim allegations that it is acting oppressively under the Credit Contracts Act 1981, that it misrepresented the position or that he entered into the purchases pursuant to a mistake and he seeks orders under the Credit Contracts Act 1981, the

Contractual Remedies Act 1979 and the Contractual Mistakes Act 1977 re-opening or cancelling the loan contracts or declaring them to be unenforceable. The third defendant, Mr Johnson, was at all material times a director of Jarden Morgan and, against him, Mr Austad claims that Mr Johnson gave him advice concerning the purchase and retention of the Judge, Kupe and Ariadne shares on which he, Mr Austad, relied, those statements being pleaded to be inaccurate and to be in breach of a claimed duty by Mr Johnson to Mr Austad.

During her submissions, counsel for the defendants refined the discovery sought to contract notes, share certificates for shares neither bought nor sold during that period and share certificates or dockets for shares issued in lieu of dividend or by bonus issue, each for the ten year period.

The principal point of contention between the parties in relation to this application was whether the documents sought are relevant to any issue in the proceeding. The test of relevance in this court's view remains that enunciated by Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63 (cited with approval in *McGechan on Procedure* para 293(5), p3.375):

> "It seems to me that every document relates to matters in question in the action which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary if it is a document which may fairly lead him to a train of inquiry which may have either of those two consequences."

To that should be added the comment that "much discovery is essentially 'fishing'" (*T D Haulage Ltd v NZ Railways Corp* (1986) 1 PRNZ 668, 673 per Barker J). The "train of inquiry test" is also adopted in Australia (*Mulley v Manifold* (1959) 103 CLR 341, 345; Simpson Bailey & Evans Discovery and Interrogatories 2nd ed, (1990) p42).

In this case, Mr Austad pleads that he relied on the advice given him by Jarden Morgan and Mr Johnson and that he was induced to enter into the agreement

with Jarden Morgan Securities by oppressive means or as a result of misrepresentations. The defendants deny giving Mr Austad the advice and his reliance and deny his being induced to buy. Plainly, whether or not the advice was given or the representations made and whether or not Mr Austad relied on them or was induced by them to enter into the transactions will be an issue - perhaps one of the principal issues - at trial. The likelihood of a person relying on advice or being induced to take certain actions obviously differs between a share buying ingénue and a share buying habitué. Mr Austad's experience in the area is therefore plainly relevant to one of the matters in issue between the parties.

It therefore becomes a question of the ambit of the required discovery. This comes down to a question of what transactions should be discovered, in what companies, over what period and what documents are required.

As far as the transactions are concerned, this court is of the view that there should be no requirement on Mr Austad to disclose details of holdings of shares or other securities in respect of which there were no purchases or sales over the period in question since that can have no relevance to his reliance on advice or to his being induced to borrow. However, details of all changes in those holdings arising out of decisions by Mr Austad, alone or jointly with others, should be discovered and that whether those changes arose from shares issued in lieu of dividends, bonus issues offered or in any other way.

The next question as to this aspect of the matter is whether the further discovery should be limited to transactions relating to Kupe, Judge and Ariadne. However, the likelihood of reliance on advice is a matter of experience. It is obvious that that experience is unlikely to have been gained by purchases relating only to those three companies. It follows that the documents relating to the transactions the subject of further discovery should relate to all companies as all are relevant to the issue earlier described. Discovery should, nonetheless, be limited to all transactions relating to shares or other securities only in publicly-listed companies whether in New Zealand or elsewhere but should relate to all transactions whether effected through a sharebroker or not.

For the sake of completeness, the court records that it is its view that all documents which fall within the ambit of the discovery just ordered should be discovered and not merely those which have not already been discovered by the

defendants. The reason for that is that Mr Austad's documents concerning particular transactions may not be identical with those held by the defendants either in number or in content.

The next, and one of the more difficult questions in relation to this application, is the period over which further discovery should be ordered. The few months covering the period of the share purchases in question is plainly too short since Mr Austad's experience must have been built up over a much longer period. Against that, the court is of the view that to require discovery by Mr Austad for the whole of the decade 1977-87 is too onerous (R.295(2)) and is unnecessary (R.312) to indicate the likelihood of reliance or susceptibility to inducement. Having considered the matter carefully, the court takes the view that the period of five years October 1982-October 1987 is the appropriate period. The liberalisation and opening up of the New Zealand economy occurred about half way through that period. It follows that discovery of documents relating to transactions during that period should, when coupled with the defendant's other knowledge of the plaintiff's experience, provide a sufficient documentary indicator of the likelihood of reliance or susceptibility to inducement earlier referred to.

It is acknowledged that there may be difficulties in the implementation of this order or that further orders may be required. In those circumstances, the court adjourns the application part-heard with leave to the parties to bring the same on at 14 days' notice if further directions or orders are required on that topic.

The costs of the application are reserved (hearing time 4.35-5.10pm).

Master Williams QC

Solicitors: Foot & Co, Wellington for Plaintiff
Bell Gully Buddle Weir, Wellington for Defendants

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