

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY  
COMMERCIAL LIST

30/7

C.L. 102/89

1195

BETWEEN EQUITICORP FINANCE GROUP  
LIMITED & OTHERS

Plaintiffs

AND CHEAH & OTHERS

Defendants

AND RUDD WATTS & STONE

Third Party

**LOW  
 PRIORITY**

Hearing: 16 July 1993 (In Chambers)

Counsel: M. Taylor for plaintiffs  
 No appearance for defendant Cheah Theam Swee  
 G.S.R. MacDonald for Third Party  
 K.W. Fulton for BNZ and the BNZ Nominees  
 Limited

Judgment: 16 July 1993

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(ORAL) JUDGMENT (NO 5) OF BARKER J

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This is an application for non-party discovery against the Bank of New Zealand and the BNZ Nominees Limited (collectively called 'the Bank') in this long-running litigation which seems no closer to disposition than when I last dealt with it in a judgment in September 1992.

The plaintiff does not oppose the applications. I am advised by Mr MacDonald, counsel for the third party, that counsel for Mr Cheah was aware of today's hearing

and does not wish to be heard. Indeed, the notice of opposition filed by the defendant specifically offers no opposition to the orders sought as to documents held by the Bank relating to that defendant.

The third party seeks discovery of Bank records relating to dealings by the Bank with: (a) Mr Cheah; (b) other defendants; (c) a company called Trinity Insurance Co Limited, an English company associated with Mr Cheah; and (d) a Mr Johns, a member of the Cheah consortium not been sued by Equiticorp. One of those against whom an order is sought, is a bankrupt, the defendant Mr Mulholland; the Official Assignee has consented to an order.

By consent, I therefore make an order in respect of Mr Mulholland in terms of paragraph 2.1 of Mr Fulton's memorandum. The effect of this order is to limit discovery to counsel, solicitors and their experts. It also provides for adequate payment of the non-parties and their advisers.

It might be said that the third party should have applied for discovery against these other parties in the normal course; my knowledge of the matter indicates there have been difficulties in obtaining discovery against Mr Cheah, some of which were the subject of earlier judgments. From my knowledge of the case, the application under S.7 of the Banking Act 1982 is

appropriate in the peculiar facts of this particular case.

I reviewed the occasions when the Court will make such an order in Allingham v Bank of New Zealand (1988) 2 PRNZ 616. I noted on the authority of James v Mabin (No 3) [1929] NZLR 899 that the power to order that Bank records be inspected should seldom be exercised except where the account sought to be inspected is in form or in substance the account of a party to the litigation.

Mr Fulton has helpfully indicated further authorities; the Bank is not in a position to consent to any order relating to any customer's affairs without the express permission of the customer or an order of the Court. The application must not be in the nature of a "fishing expedition". See Cycle Manufacturing Company Limited v Williamson & Ors (Auckland, C.P.1572/89, 7 July 1992); it is not usually made unless other ways of seeking the information have been exhausted; See Butler v Holden (1993), 3 PRNZ 660.

I am satisfied that this is one of those cases where orders should be made against both Mr Cheah and Mr and Mrs Joseph who are parties to the litigation. Orders will therefore be made in respect of their banking records on the same terms as the order made against Mr Mulholland set out in paragraph 2.1 of Mr Fulton's memorandum.

In respect of the applications against Trinity Insurance and Mr Johns, they might come within the exceptional situation referred to in James v Mabin. They are not parties to the litigation but previous experience has shown that Mr Cheah was so closely identified with Trinity Insurance that it might be appropriate to make the order against that company and possibly Mr Johns as well. Mr Fulton will need further information before he can make submissions on this point. Mr MacDonald will supply him with extracts of the relevant history of this matter.

I therefore adjourn the application against Trinity Insurance and Mr Johns until 10.30.a.m. on Friday 23 July 1993.

The applications against other non-parties are adjourned until 17 September 1993 at 10.30.a.m. Some of these persons are resident in New Zealand and might well be susceptible to normal non-party discovery procedures.

The question of costs is reserved; the normal Rule is of course a non-party providing discovery is entitled to solicitor and client costs and to reasonable overhead charges.

*M. J. Barker*

Solicitors: Phillips Fox, Auckland, for Equiticorp  
Morgan-Coakle Ryan & Bierre, Auckland,  
for Third Party  
Russell McVeagh McKenzie Bartleet & Co,  
Auckland, for BNZ  
Kensington Swan, Auckland, for Cheah

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