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IN THE HIGH COURT OF NEW ZEALAND 13/5
AUCKLAND REGISTRY

CP 2455/89

532

HIGH PRIORITY

BETWEEN EQUITICORP INDUSTRIES GROUP LTD (IN STATUTORY MANAGEMENT) AND OTHERS
Plaintiffs

AND ALLAN ROBERT HAWKINS AND OTHERS
Defendants

Hearing: 24,25 November 1993, 21 March 1994

Counsel: Mathieson QC, A Tompkins (on 21.3.94) and Miss Clark for Crown
Farmer QC (on 21.3.94) and Miss Winkelmann for Plaintiff
Ms Gwyn for Elders

Judgment: ~~April 1994~~ ~~2-5-94~~ 28-4-94

JUDGMENT NO 14 OF SMELLIE J RE APPLICATIONS BY PLAINTIFFS AND ELDERS FOR DISCOVERY BY THE CROWN OF DISCOVERABLE DOCUMENTS IN THE POSSESSION OF SAMUEL MONTAGU

INTRODUCTION

The Plaintiffs seek orders against the Crown for supplementary lists of documents verified by affidavit giving discovery of two categories of documents identified as:-

(a) The time records of Rudd Watts & Stone (Wellington Office) so far as they are relevant to the proceedings.

(b) The files of Samuel Montagu and Co Ltd so far as they are relevant to the proceedings.

The Crown in its Notice of Opposition raised no opposition to the category of documents identified in para (a) above and there will be an order in respect of them.

There was opposition, however, to discovery of the documents in category (b) upon four grounds which were set out in the Notice of Opposition as follows:-

> "1. The Crown has given discovery of all documents in its possession, custody or power.
>
> 2. Any document held by or in the possession, custody or power of Samuel Montagu and Co Ltd, a company resident in England, are not documents within the possession, custody or power of the Crown.
>
> 3. The Crown has no presently enforceable rights to obtain from Samuel Montagu & Co Ltd inspection of or copies of any documents held by or in the possession, custody or power of that company without its consent.
>
> 4. The order is not necessary."

The background to the application is set out in the affidavit of Mr M P Lepine, filed in support of the Plaintiffs' application. In para 6 of that affidavit reference is made to some 19 documents which are exhibited. A perusal of the same shows that in December 1986 Treasury recommended that Consultants be appointed to effect the sale of the Crown's New Zealand Steel shares and that Samuel Montagu were approached and approved of as the Crown's financial adviser by Cabinet in March of 1987. An in depth investigation of the assignment was carried out by Samuel Montagu which also involved Buttle Wilson Ltd as a sub-contractor or on a joint basis and of course approval for the sale of the shares was given by Cabinet in June of 1987.

It appears from the documents and seemed to be accepted by Counsel at the hearing in November 1993 that as at 3rd June 1987 Samuel Montagu/Buttle Wilson Ltd ceased to be merely advisers to the Crown and became agents invested with the responsibility of seeking offers for purchase of the Crown's New Zealand Steel shareholding and negotiating with prospective purchasers. As the matter progressed and it became apparent that the most likely purchasers would be New Zealand based,

rather than international, Samuel Montagu stepped back and left most of the work and negotiation to Buttle Wilson Ltd. When in due course, however, Equiticorp's offer emerged as the front runner the final recommendation to Cabinet was the joint work of both Samuel Montagu and Buttle Wilson.

The final recommendation was apparently in the form of a report by Samuel Montagu and Buttle Wilson Ltd. That report is exhibit C18 to Mr Lepine's affidavit. On page 4 of the same item no 4 is headed as follows:-

> **"ISSUE OF EQUITICORP SHARES IN CONSIDERATION FOR THE PURCHASE OF THE NZ STEEL ORDINARY AND REDEEMABLE PREFERENCE SHARES AND THEIR SUBSEQUENT SALE FOR CASH"**

There are then subparagraphs, 4.1 dealing with the form of the offer, 4.2 dealing with Buttle Wilson's take-out facility, and the final paragraph of 4.2 reads:-

> "Montagu have had discussions with Buttle Wilson in relation to the take-out facility and the performance guarantee and have been advised on a confidential basis of the nature of the performance guarantee. Montagu requests immediate discussions with the Crown's solicitors to discuss the nature of the Buttle Wilson take-out facility and the related performance guarantee."

The above is a brief broad-brush summary of the background circumstances that give rise to this application.

APPLICATION UNDER RULE 296 AND/OR RULE 300

Although Ms Winkelmann made it clear during the November 93 hearing that the Plaintiffs wished to retain her application under both rules, in fact her submissions were directed to R 300 and it, in my view, is the more appropriate in the circumstances. That rule reads as follows:-

> **"300. Order for particular discovery against party after proceeding commenced** - Where at any stage of the proceeding it appears to the Court from evidence or from the nature or circumstances of the case or from any document filed in the proceeding that there are grounds for a belief that some document or class of document relating to any matter in question in the proceeding may be or may have been in the possession, custody, or power of a party, the Court may order that party -

(a) To file an affidavit stating whether the document or (as the case may be) any document of that class is or has been in his possession, custody, or power and, if it has been but is no longer in his possession, custody, or power, when he parted with it and what has become of it; and

(b) To serve the affidavit on any other party."
(emphasis added)

As the commentary in McGechan at para 300.04 in the second paragraph states:-

> "An application under r 300 is one of the ways of circumventing the conclusiveness rule applicable to discovery affidavits (see para 297.04)."

The point there, of course, is that it has always been held under R 297 and its predecessors that the affidavit of documents is conclusive and the Courts are only prepared to go behind it if there is clear evidence to the contrary.

ORDER SOUGHT TOO WIDE

It was common ground between Counsel that when a party is engaged as an adviser, (and that was Samuel Montagu's status during the first stage of the matter), documents it accumulates or prepares for the purpose of giving that advice are not in the possession, power or custody of the party to be advised. Miss Winkelmann put it this way in para 12 of her submissions:-

> "The Courts have held that documents prepared by an independent professional adviser for him or herself for the purpose of giving advice (such as drafts and notes, internal memoranda) are not owned by the client but by the adviser unless the contract between them expressly or impliedly provides for ownership in the client. Such cases turn upon the absence of an agency relationship (see for example ***Leicestershire County Council v Michael Faraday and Ors*** (1941) 2 KB 205,216)."

Mr Mathieson in his submissions emphasised the same point. Both Counsel, however, relied upon the decision of the House of Lords in ***Lonrho Ltd v Shell Petroleum*** (1981) WLR 627 and in particular the statement of Lord Diplock at page 235 of that judgment where he said:-

> "The phrase, as the Court of Appeal pointed out, looks to the present and the past, not to the future. As a first stage in

> discovery, which is the stage with which the subsidiaries' appeal is concerned, it requires a party to provide a list identifying documents relating to any matter in question in the cause of (sic) matter in which discovery is ordered. Identification of documents requires that they must be or have at one time been available to be looked at by the person upon whom the duty lies to provide the list. Such is the case when they are or have been in the possession or custody of that person; and in the context of the phrase "possession, custody or power" the expression "power" must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection, would not prevent the document from being within his power; but in the absence of a presently enforceable right there is, in my view, nothing in order 24 to compel a party to a cause or matter to take steps that will enable him to acquire one in the future. *(emphasis added).*

As the matter proceeded it became apparent that the Applicants were not seeking more than discovery of documents that came into existence after 3rd June 1987 and that may be held by Montagu Samuel for the Crown as the Crown's agent.

IDENTIFICATION OF THE SPECIFIC DOCUMENTS THAT WOULD BE DISCOVERABLE IF THE ARE HELD BY MONTAGU SAMUEL

As already indicated there can be no documents in this category dated earlier than 3.6.87. Also clearly they are only discoverable if the Crown has a presently enforceable legal right to obtain them from Montagu Samuel without any other party's consent. On that basis there would appear to be four categories of possible documents which I identify as follows:-

1. Offers made by prospective purchasers and all papers associated with such offers.

2. All papers associated with responses to, or inquiries made by, prospective purchasers.

3. All notes of meetings, telephone calls or other negotiations with prospective purchasers.

4. Notes of meetings with the Crown's legal advisers when details of the terms of the sale were discussed between Samuel Montagu, Buttle Wilson Ltd and the Crown's legal advisers.

Miss Winkelmann sought to add a fifth category which she identified as instructions from and reports to the Crown. But all those must inevitably have been discovered by the Crown already and it does not seem necessary to make a further order in respect of that category.

THE REQUIREMENTS OF RULE 300 SATISFIED

As can be seen from the rule there are four requirements which I identify as follows:-

1. It must appear to the Court

2. from the nature or circumstances of the case

3. that there are grounds for a belief

4. that documents of some class or classes may be or may have been in the power of the Crown.

It is clear on the evidence and acknowledged in the submissions that Samuel Montagu was retained by the Crown to effect the sale. As earlier mentioned Samuel Montagu also introduced or engaged as a sub-contractor its Australian office and Buttle Wilson Ltd.

Accordingly it is clear that Samuel Montagu might well have, or have had, documents of the types referred to and identified in the preceding section of this judgment.

Initially Mr Mathieson for the Crown pointed out that Samuel Montagu owed to the Crown a fiduciary obligation to supply and disclose as the Crown's agent, any relevant document and that the Crown as at November 1993 had no reason to suspect that that obligation was not fully discharged.

Nonetheless Mr Mathieson advised from the bar as follows:-

(a) A Mr Holyman who ran the Australian branch of Samuel Montagu and was engaged has been interviewed and asked for a written confirmation that there are no relevant documents held by Samuel Montagu. Mr Mathieson disclosed that a reply had been received which he described as "inconclusive". Counsel offered a copy of the reply to the Court, indicating that he might also make it available to the Plaintiffs. I declined the invitation to look at the document but the fact that such an inquiry has been made and the response has been inconclusive is a relevant circumstances of the case which I take into account.

(b) In fact as at November 1993 no inquiry has been made of Samuel Montagu in the United Kingdom. So the Crown's assertion that there are no documents held at Head Office of Samuel Montagu, rests, not on firm advice to that effect, but on the Crown's confidence that all such documents have been handed over. Not surprisingly that did not satisfy the Plaintiffs and Elders and I have to say that when the matter was before me last year I considered it fell short of what was required also.

(c) Mr Mathieson also indicated problems that he anticipated the Crown might well have if required to make specific inquiries of Samuel Montagu regarding any such discoverable documents that it may have. Counsel advise that he had gained the distinct impression that Samuel Montagu had no wish to become involved in any way at all in this litigation. That sentiment is entirely understandable but, of course, is no basis for refusing the order if otherwise appropriate.

ADJOURNMENT 25TH NOVEMBER 1993

My Minute No 35 which is attached as a schedule to this judgment, sets out the circumstances under which I adjourned the matter on 25 November last in order to afford the Crown the opportunity of making specific enquiries of Samuel Montagu.

Since then the Crown has approached Samuel Montagu but without success. The correspondence that has passed is exhibited to the affidavit

of Ms L.N. Gallate sworn on 21 April 1994. It makes interesting reading. The Crown's correspondence making requests of Samuel Montagu is, in my view, temperate, courteous and accurate. The responses from Samuel Montagu were not regarded as satisfactory by the Crown and convey the impression that the English company is 'stonewalling'.

For example, in Exhibit D1 to the Gallate affidavit, the Crown Law Office on 14 February acknowledged that the first response was less than satisfactory. In Exhibit D3, the Crown wrote again to Samuel Montagu giving specific examples of documents that almost inevitably are upon the file and which are discoverable. Of those examples, Samuel Montagu commented in Exhibit F2 on 15 February this year:

> "The examples you cite in paragraph 4 of your fax are, I agree, instances where Samuel Montagu was involved in correspondence in its capacity as financial advisor but they are not evidence of any agency role."

After that, on 28 March of this year, the Crown considered that it had taken the matter as far as it could but nonetheless provided a copy of a further letter written on 25 March 1994 in which it was contended that although the nature of the agency might be limited, nonetheless it did exist and further documentary information including the letter of appointment of 19th March 1987 from Treasury to Samuel Montagu was attached in support of that proposition. But it was all to no avail. The final letter exhibited is from Samuel Montagu on 30th March 1994, the body of which reads:-

> "The letter dated 19th March 1987 enclosed with your fax is a letter prepared by the Treasury to the New Zealand Government and I am not of the view that Samuel Montagu could act as "agent" for the purposes of Stage I and II. I do not see how preparing a valuation and strategy report could be carried out on an agency basis.
>
> I do not intend to give the impression that I am being obstructive but I really do not think that Samuel Montagu was acting as agent when providing the financial advisory services to the Crown and this is reiterated by the fact that, to use your words, Samuel Montagu had no authority to bind the Crown."

WAS SAMUEL MONTAGU AN AGENT OF THE CROWN

Samuel Montagu was described as an agent of the Crown in the letter of appointment of 19th March 1987 and in respect of stage II on page 2 of that letter the following appears:-

> "Stage II: If the Crown decides to proceed with Stage II, Samuel Montagu will, on behalf of the Crown, implement the selling strategies recommended by Samuel Montagu and approved by the Crown. Samuel Montagu shall prepare such documents as it reasonably requires but Samuel Montagu shall not make any binding representations on behalf of the Crown without express prior written consent."

It is apparent that what happened was that Samuel Montagu, in conjunction with Buttle Wilson Ltd, acted as the Crown's agents to find a buyer, receive offers from buyers, check those offers out and report to the Crown. It was just that that was being done in the "Report on Share Purchase Offer" from which I quoted a paragraph on page 3 of this judgment.

I am satisfied that there was an agency relationship here and that if Samuel Montagu, for example, has any notes or records of any confidential discussions regarding the performance guarantee and the take out facility with either Buttle Wilson Ltd or the Crown's Solicitors, then those documents came into existence as a result of Samuel Montagu's relationship with the Crown as the Crown's agent.

AGENT'S DUTY

The relationship between principal and agent is, of course, a fiduciary one.

The duties owed by Samuel Montagu to the Crown therefore are governed by equitable principles which today are recognised in all common law jurisdictions as being sufficiently flexible to do justice in appropriate circumstances.

In the 15th Edition of Bowstead on Agency, Article 51, page 191, the learned authors state:-

> "It is the duty of an agent
>
> (a) to keep the money and property of his principal separate from his own and from that of other persons;

(b) to preserve and be constantly ready with correct accounts of all his dealings and transactions in the course of his agency;

(c) to produce to the principal, or to a proper person appointed by the principal, all books and documents in his hands relating to the principal's affairs."

Commenting upon (c) at pages 192 to 193 the learned authors say:-

"(c) *Documents.* The principal is entitled to have delivered up to him at the termination of the agency all documents concerning his affairs which have been prepared by the agent for him. In each case it is necessary to decide whether the document in question came into existence for the purpose of the agency relationship or for some other purpose, e.g. in pursuance of a duty to give professional advice. Thus land agents have been ordered to hand over memorandum books, a private rental and cash book and a field book; an architect was ordered to deliver up the plans of a house after the work had been completed and paid for. Both the land agents and the architect were considered to be agents. But memoranda prepared by quantity surveyors for their own use in measuring up buildings were held to be their own property; and documents, books, maps and plans prepared by rating valuers employed to give advice and assistance to a county council remained the property of the valuers. In ***Chantrey Martin v Martin*** [1953] 2 QB 286, the Court of Appeal held that working papers, draft and final accounts, notes and calculations and draft tax computations, brought into being by chartered accountants in the course of auditing a company's accounts, were the property of the accountants, the relationship being that of professional man and client; while correspondence between the accountants and the Inland Revenue relating to the company's tax liability was conducted by the accountants as the company's agents, so that original and copy letters comprising such correspondence belonged to the company."

The commentary in Halsbury 4th Edition, Vol 1 Reissue, para 90, dealing with the use of information and materials acquired during the agency is to similar effect.

I have no doubt that if Samuel Montagu holds documents of the kind earlier referred to in this judgment which were acquired during Stage II when it was acting as the Crown's agents, then it has a duty to hold them for the Crown and hand them over when the Crown calls for them.

THE CROWN'S OPPOSITION

I have already recorded Mr Mathieson QC's argument advanced in November 1993. When the matter resumed before me, however, in April of this year the Crown was represented by Mr Tompkins.

It was Mr Tompkins' submission that the Crown has now done all that it can. Counsel asked rhetorically, to what lengths does the Crown have to go? He submitted that there was no case showing that the Court had ever ordered a party to start proceedings overseas in order to make discovery. Mr Tompkins submitted that I did not have jurisdiction to require the Crown to take that step.

Furthermore it was argued that the Court should look for the least onerous way of getting access to any documents held by Samuel Montagu. On that basis it was submitted that the Plaintiff ought to have joined Samuel Montagu as a Defendant, or alternatively that even now letters of request enabling the Plaintiff to examine the appropriate officer of Samuel Montagu in the United Kingdom would be more appropriate than the order being sought with its inevitable concomitant that the Crown would have to sue in London.

Finally it was contended that this application requiring the Crown to discover documents in the possession of Samuel Montagu was made very late in the piece. It is true that proceedings have been on foot since 1989 and I was not specifically told when discovery was required from the Crown, but obviously it must have been at the very latest, early in 1993 because by mid 1993 the Plaintiffs had conducted a review of the Crown's discovery and were pressing for further items, including those held by Samuel Montagu.

In reply to those submissions Mr Farmer QC, who ran the argument for the Plaintiffs this year, submitted first that all the indications are that discoverable documents may well exist. I agree. He submitted that if the Plaintiffs had sued Samuel Montagu simply to get discovery against them, that would have been an abuse of process, and he pointed out that were it not for the fact that the company is domiciled in the United Kingdom, an order requiring it as a non-party to make discovery would almost certainly have been made. That seems to me to be the case. Counsel further submitted that a letter of credit would not be appropriate because, although requiring Samuel Montagu's

appropriate officer to attend to answer questions and produce documents, none of the documents to be produced could be identified because discovery of the same has not yet been made. So far as the lateness argument is concerned, Counsel submitted that when the Plaintiffs had taken the appropriate steps, at least by the beginning of 1993 for an action which is to commence on 3rd October 1994, no valid objection on that basis could be sustained. Furthermore the Crown has to concede that as at November of last year it had not even written to Samuel Montagu, either in Australia or in the United Kingdom, requiring a search to be made, whereas on the view I take of the matter, those steps should have been taken by the Crown without the Plaintiffs having to make an application such as this to force the Crown's hand.

Mr Farmer acknowledged that the Plaintiffs research had not turned up any case in which the Court had ordered an action to be commenced in a foreign jurisdiction as part of an order for discovery but submitted that in principle, all the High Court of New Zealand would be doing would be ordering the Crown to make discovery of documents in its power and that it is not necessary to go beyond that. Nonetheless Counsel realistically recognised that unless Samuel Montagu will now produce the documents as a result of this judgment, the Crown is left with no alternative but to pursue its contractual and equitable rights to obtain them. Counsel submitted, however, that the Court should not shrink from making the order simply because compliance with it might require such action. I have deliberately used the words "might require" because I would expect that when presented with a copy of this judgment Samuel Montagu will reconsider its position carefully, take Counsel's advice, and disclose.

Mr Farmer reinforced his argument by submitting that as is shown by the passage quoted from the report, such documents as do exist go right to the heart of the s 62 issue and therefore are of considerable significance in this case.

ORDERS

Despite the absence of a precedent for a case such as this I am of the clear view that there are documents in the possession of Samuel Montagu as agent of the Crown which are discoverable. Whether, as a matter of principle, the importance or significance of those documents should be a factor taken into account where compliance with an Order may involve taking action in another jurisdiction, I need not decide. Because in my view Mr Farmer's description of the documents as being "at the heart of the s 62 issue" is accurate.

The Crown is ordered to discover the documents in the possession of Samuel Montagu and I make that order recognising that if the overseas merchant banker concerned is not prepared to yield up the documents as a result of this judgment then proceedings will have to be taken in the United Kingdom. The order is to be satisfied by the 31st of August of this year. Leave is reserved to both parties to apply further relative to compliance with that date.

Clearly the Plaintiffs are entitled to costs. The obdurate attitude taken by the Crown's agent has added significantly to the costs here but that is no reason why I should not make an appropriate award in favour of the Plaintiffs. The Plaintiffs shall have costs in the sum of $2,000, plus disbursements.

Robert Smellie J.

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The Hon Justice Smellie

S C H E D U L E

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 2455/89

BETWEEN EQUITICORP INDUSTRIES GROUP LTD (IN STATUTORY MANAGEMENT) AND OTHERS
Plaintiffs

AND ALLAN ROBERT HAWKINS AND OTHERS
Defendants

Date: 25 November 1993

COUNSEL: Mr Mathieson QC and Miss Clark for Crown
Miss Winkelmann and Miss Cook for Plaintiffs
Ms Gwynn for Elders

MINUTE NO 35 OF SMELLIE J REGARDING ADJOURNMENT OF APPLICATIONS BY PLAINTIFFS AND ELDERS REGARDING POSSIBLE DISCOVERABLE DOCUMENTS IN THE POSSESSION OF SAMUEL MONTAGUE

Yesterday, 24th, I heard argument by the applicants and argument in opposition by the Crown but adjourned at 5.30 pm to hear the reply by the applicants this morning.

This morning, however, Mr Mathieson was able to advise me that Counsel had conferred and that the application could be adjourned upon terms that have been agreed between the parties.

The substance of what Mr Mathieson said to me I now set out in this Minute in order that there may be a court record of what has transpired so that there will be no misunderstanding of how the

matter will be dealt with if in fact it is not resolved in the manner envisaged by Counsel.

The Crown agrees to write to Samuel Montague in both London and Sydney asking for a further search to be instituted. The letter will narate the background and will remind Samuel Montague of the agency relationship. Relevant dates will be set out as will agreed categories of documents to be looked for. Those categories are basically as discussed and defined during the hearing yesterday and in particular during the presentation by Miss Winkelmann. The letter will make it clear, however, that there is no inquiry regarding documents which Samuel Montague holds in its own right. The request will also involve details of any files destroyed and when they were destroyed and if files cannot be located, what has happened to them. A response to the letter in the form of a notarised list dealing with the specific categories will be requested.

Obviously the letter will have to be drafted with care but copies of it will be sent to the Solicitors for the Applicants and if the procedure outlined above produces any discoverable documents then the Crown undertakes to discover them in the ordinary way.

In the mean time the application is adjourned for mention at the Conference on 18th February 1994 but with leave to any party on three days notice to bring the matter on again and with liberty in such event to file fresh affidavits. Such affidavits could deal with any relevant matters but are primarily envisaged as potentially exhibiting correspondence generated as a result of yesterday's hearing and today's adjournment.

If the matter cannot be resolved in the way suggested, as I have heard the argument, all except the reply by the Applicants, the hearing can be completed by receiving the applicants' replies in writing whereupon I will be in a position to deliver a judgment should that be necessary. In the mean time, however, the matter is adjourned on the basis recorded in this Minute.

Robert Smellie J