Cn152

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND 29/4
AUCKLAND REGISTRY

CP 768/93

BETWEEN EUROPEAN PACIFIC BANKING CORPORATION and EUROPEAN PACIFIC TRUST COMPANY (COOK ISLANDS) LIMITED

Plaintiffs

A N D TELEVISION NEW ZEALAND LIMITED

First Defendant

A N D IAN WISHART

Second Defendant

Hearing: 11,12 April 1994

Counsel: R J Craddock QC, C J Allan and M J Gavin for Plaintiff
J G Miles QC, W Akel and H Wild for Defendants

Judgment: 12 April 1994

ORAL JUDGMENT (No 3) OF ROBERTSON J

On 23 March 1994 the defendants filed an application in this Court seeking "a discharge of the interim injunction made on 3 February 1994 and

any other restraining orders against the defendants made therein." I intend to take into and include as part of the judgment the totality of that original order because I have again been reminded by reading the five affidavits filed by Mr Wishart, of the extent to which any reporting of the proceeding appears to have failed to comprehend what the Court has done and said on the two occasions the matter has been before me. Whether it assists in elucidating the public about the truth of the proceeding would be only conjecture.

> *"1. Until Saturday, 30 April 1994 or until further order of the Court, the first and second defendants by themselves, their servants, agents or otherwise howsoever be restrained from :*
>
> *(a) screening, publishing or otherwise promoting for viewing, and/or disseminating to any other media in New Zealand or elsewhere, any television programme or part thereof sourced in whole or in part from documents confidential to the plaintiff companies which documents are more particularly described in the schedule annexed hereto and/or any other documents confidential to the plaintiff companies;*
>
> *(b) referring either directly or indirectly in New Zealand or elsewhere in any television programme or part thereof to information sourced in whole or in part from documents confidential to the plaintiff companies which documents are more particularly described in the schedule annexed hereto and/or any other documents confidential to the plaintiff companies;*
>
> *(c) screening, publishing or otherwise promoting for viewing and/or disseminating to other media in New*

Zealand or elsewhere, any television programme or part thereof sourced in whole or in part from information confidential to the plaintiff companies and relating to their business activities, obtained from employees, ex-employees, agents or servants of the plaintiff companies;

(d) *referring either directly or indirectly in New Zealand or elsewhere in any television programme or part thereof to information sourced in whole or in part from information confidential to the plaintiff companies and relating to their business activities, obtained from employees, ex-employees, agents or servants of the plaintiff companies;*

(e) *using, disseminating, disclosing, delivering, or in any other way howsoever distributing in New Zealand or elsewhere whether in any form of print or electronic media or otherwise confidential information the property of the plaintiffs sourced in whole or in part from documents confidential to the plaintiff companies which documents are more particularly described in the schedule annexed hereto and/or any other documents confidential to the plaintiff companies;*

(f) *using, disseminating, disclosing, delivering, or in any other way howsoever distributing in New Zealand or elsewhere whether in any form of print or electronic media or otherwise confidential information the property of the plaintiffs sourced in whole or in part from information confidential to the plaintiff companies and relating to their business activities, obtained from employees, ex-employees, agents or servants of the plaintiff companies.*

2. *Without restricting publication of this judgment, the Court file relating to this proceeding not be*

searched, inspected or copied other than by the parties or their representatives, without the leave of the Court.

3. *All question of costs of and incidental to the said application be reserved."*

Yesterday morning Mr Miles' argument (at least as I apprehended it) was that because of the entry into the public domain of information (what is conveniently described in shorthand as the total contents of the wine box) was now available, the restraint which applied to it should be removed. During the afternoon that position was restricted to documents relating to the "Jiff" and Magnum transactions. This morning counsel has confirmed that the application is not for a discharge of the existing order, but for a variation, by removing from its ambit some documents, copies of which were annexed to the affidavit of the second defendant which was sworn on 20 January 1994 in support of the notice of opposition to the relief initially sought. That is what the Court is asked to adjudicate upon and that is the only matter which the Court will address.

The initial order which I made related to the use of acknowledged stolen confidential property and on its face persists until 30 April. It was restricted to that date because I was concerned that in another proceeding, related to this proceeding (CP 1303/92) a restraint had been sought and obtained pending determination of the substantive matter in late 1992. Neither party to that original proceeding had in my judgment acted promptly or with vigour to obtain a substantive hearing and the interlocutory injunctions remain in force.

In the material placed before me there is much wringing of hands and lamenting that delay. But there is nothing which satisfies me that either party to that proceeding had acted with the despatch which the law would clearly permit a party which was genuinely concerned to obtain an early hearing. The more so for the learned Judge who granted the relief specifically reserved the right to any party to seek an early hearing date if they had been minded to do so. (See ***European Pacific Banking Corporation v Fourth Estate Publications Limited*** [1993] 1 NZLR 559,568).

I am now advised that the hearing of the substantive matter in the proceeding before me has been allocated 2 weeks commencing on 23 May. The issue is still the holding of the balance pending the determination of the substantive hearing. I am told that despite some rumblings by me that there could be some advantage in all matters involving the plaintiff's documents being heard together, the 1992 proceeding will continue in a limbo state. No fixture has been sought or obtained for its final disposal.

This present application involves a consideration of three important factors. The first is the community recognition, as reflected in our legal system, of any individual's right to its own property. Secondly, the community's recognition, as reflected in the law, of the importance of confidence. That can arise in respect of business or commercial activity. It arises in respect of certain relationships and it arises in respect of activities in areas where the community acknowledges that rights of privacy are of importance. Finally, this case involved the public's right to know and interest in activities which have a bearing beyond the immediate realm of the individuals.

There has never been any dispute in respect of this proceeding that this case is about stolen property. The documents in the wine box belonged to the plaintiff. They were taken unlawfully from the plaintiff. Secondly, when the matter was before me in January and February there was no question but that what the Court was concerned with were documents which involved confidential matters. They were documents which related to business and commercial activities of individuals and entities which had arisen in confidence and which in the absence of good reason would remain confidential. An amended statement of defence since filed now challenges that confidence, although as I read the document there is not any challenge to the fact that they were in their inception, confidential, or that they related to matters of confidence. Rather, they are said now to have been robbed of that confidentiality by other factors.

As I discussed in the earlier judgment, the Courts have for at least 130 odd years, since ***Gartside v Outram*** (1856) 26 LJ Ch 113, recognised that the particular community interest in confidence may at times be outweighed, where what the law quaintly described as "iniquity" is established. That was the critical issue in the three day hearing at the beginning of the year.

That leads into the third issue and that is the public interest ir. activities which indicate wrong doing. As I said in the second interim judgment in March, this Court has never placed any prohibition or restriction on any organ of the media producing or disseminating any programme report or article which they desire. But while this proceeding is unresolved they cannot have recourse to the stolen confidential material.

The present application is to amend that in a very limited way as it turns out. The application is advanced on the basis that since the order was made there have been significant and substantial changes in circumstance which materially affect the position.

First it is contended that all the material matters referred to in the programme are now in the public domain. Now I pause at that point to again underline what is before the Court. Mr Miles' body language of shock/horror, when I suggested that he was inviting the Court to place some imprimatur on this programme has to be seen to be understood. But with respect to him, whatever his words, the focus of his submission has been upon the Frontline programme. That is not what the Court's restraint is about. The Court's intervention was to maintain the confidentiality of the documents, until a calm, independent and objective enquiry could be made within this Court as to whether the stolen confidential documents were to be available for public use. So the crucial issue is not whether the material in the programme is now in the public domain.

I was provided with some enlightening discussion on the difference or distinction between "documents" and "information". As I apprehend the cases which have dealt with this issue, the matter which has exercised Courts has been the information which may be contained in documents getting into the public domain. It is the information which is critical and in which the public has an interest.

Mr Miles' contention is that as a result of reporting of the proceedings of the House of Representatives, there is now in the public domain, information which is contained in the restricted area of documents that we are now talking about. Consequently the information being in the public

domain, the protection which the stolen confidential documents have had is now gone.

He argues by the same process (but I accept it is a different legal issue) that the confidence has now been exhausted as a result of the entry into the public domain. What he contends is that because Mr Peters has made speeches in the Parliament in which he has referred to documents, then the documents are now in the public domain. I note that is not what I am told the ruling of the Speaker says but it is not for this Court to comment upon or interpret in any way the actions of Parliament.

I am satisfied on the evidence placed before me that what is now in the public domain is some book which has been published as a result of the reporting of the proceedings of Parliament.

Mr Miles relied heavily on the decisions of our Court of Appeal in the ***Spycatcher*** case [1988] 1 NZLR 129 and to various passages in the English cases dealing with the same book which make clear that the courts will not involve themselves in an exercise in futility. Where there is a clear dissemination of information, it would be as the learned President said at page 165 :

> *"incongruous and not far short of absurd to endeavour to stop an irreversible process."*

But there the Court was dealing with the fact that not only the information, but the documents in which the information was contained, were readily available. Anybody had immediate access to them. That is not the position in this case. A reading of the transcripts provided to me of what was said

in the House (and rather more importantly from the question of the public domain) the reporting of those proceedings indicate that various assertions have been made with regard to the contents of some documents. There has not been a reading of the documents as such in the House. But even if there had been, I am not satisfied that by that activity the document enters the public domain. Unquestionably some information which is said to be contained in those documents has now gone into the public domain and I am of the view that despite the vigorous submission of Mr Craddock, such information is available and can be used. It is not restricted by this Court's restraint.

There is a marked difference of opinion between counsel as to whether there is any connection between the defendants before me and what has occurred in the House of Representatives. Mr Craddock contends that there are a number of coincidences which should not be ignored and which upon further enquiry in the substantive proceeding, may be productive of conclusive evidence. Mr Miles argues that it is mere conjecture without any form of evidential base. He complains at the fact that it is a building of an argument from the Bar rather than from any firm evidential foundation. He contends that the Court should treat the matter as one in which there is no connection between the dissemination into the public domain and the activity of the defendant. I specifically refrain from making any finding or reaching any conclusion on that matter. For the purposes of this interim hearing I am of the view that the matter is irrelevant. The sole reality which I must face is that there is now information in the public domain and this Court has not at any time hitherto, nor will now try to restrain or interfere with that in any way. The issue is whether the conclusion which Mr Miles seeks to draw, namely that because

there is some information now available, means that the document itself is available.

It became apparent in the course of yesterday's argument that the programme which the defendants wish to broadcast is to an overwhelming extent capable of being sourced from information which is now in the public domain as a result of the reporting of speeches made by Mr Peters. In fairness to Mr Craddock I note from a helpful document with which I was provided, dealing with the script and references back to Mr Peters' speech, on a few occasions a direct correlation did not exist. But Mr Miles' argument was that they were necessarily inferential matters which flowed and are not of any substance. Mr Craddock has a rather different view of that submission but his argument is directed away from that focus entirely. When pushed on the matter Mr Miles accepted that the programme could be run by reference to the information in the public domain. However he indicated that that was not what his clients wanted to do for reasons which I need not rehearse in this judgment.

In my view the critical question on an application to amend an interlocutory application is whether the information which is now in the public domain in respect of these identified documents (and I think there are something less than 30 of them) is such that the documents themselves should be treated as being in the public domain. I am unwilling to reach that conclusion on this application.

Having taken the time again to read those documents (and they are the critical matters) although some information which has entered the public domain can be found in there, those 30 documents (out of the hundreds which are in the wine box) contain other information which is nowhere to be

found in the reports before me as demonstrating what is now public knowledge.

The position therefore as I apprehend it, is that the question of whether the stolen confidential documents should now become public because of iniquity has not altered since the determination of this Court in February. I remain of the view (which I have expressed on two previous occasions) that the restraint does not interfere with information. All that it does is stop the use of stolen documents until there can be an enquiry as to whether that is appropriate. But there is no curb, there is no restraint, there is no hindrance on the use of information which is already in the public domain.

I will hear counsel on the question of whether there is a need for some further paragraph to be added to the pre-existing orders to make that clear. I would have thought that the words of the documents are clear and unambiguous that the restraint is not on information. It is on the use of particular documents. Despite a submission to the contrary by Mr Craddock, I hold that information which may initially have been sourced from stolen material and therefore could not be used, can now unquestionably be used when the self-same information is available and can be sourced from other material. In other words I adopt what I apprehend to be the thrust of the ***Spycatcher*** case by saying that information which is available can be used by anybody if it is already in the public domain. But that does not in my judgment lead to Mr Miles' conclusion that the source material (about which a judicial determination is awaited) goes into the public domain because some part of some of the information therein has moved into the public domain.

As far as the subsidiary argument is concerned that the damage has already been exhausted, I simply hold that not to be the case. I have taken the time to read the documents which are annexed to Mr Wishart's first affidavit. They contain a great deal of information which is not anywhere in any of the exhibits which are contained in his subsequent affidavits which exhibit the newspaper and media reports. Whether that is of overwhelming importance I know not. But it is still by definition the personal property of the plaintiff. It is property which is acknowledged to have been stolen. It is property which arose in a confidential relationship. In my judgment until such time as that cloak has been removed (after proper enquiry) then I do not see the fact that some relatively small portions of it have by some mechanism gone into the public domain means that the protection has been totally exhausted so as to make the material available without restraint.

There will be an order (I think more appropriately made without opposition rather than by consent) for the continuation of the interim orders restraining the use of the confidential stolen documents until Monday, 23 May. That is the date on which the substantive hearing between these parties is due for hearing.

The application for amendment in respect of the pre-existing order (for that is what I now treat it as) is accordingly dismissed.

The question of costs in respect of this matter is reserved.

J.

Solicitors
Rudd Watts & Stone, Auckland for Plaintiffs
Simpson Grierson Butler White, Auckland for Defendants

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 768/93

BETWEEN EUROPEAN PACIFIC BANKING CORPORATION and EUROPEAN PACIFIC TRUST COMPANY (COOK ISLANDS) LIMITED

Plaintiffs

A N D TELEVISION NEW ZEALAND LIMITED

First Defendant

A N D IAN WISHART

Second Defendant

ORAL JUDGMENT (No 3) OF ROBERTSON J
