N2LR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

29/4

LOW PRIORITY

407

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

AND IAN WISHART

Second Defendant

Chambers Hearing: 28, 30 March 1994

Oral Judgment: 30 March 1994

Counsel: R J Craddock QC with C J Allan and M J Gavin for plaintiffs
J G Miles QC, with W Akel and Ms Helen Wild for defendants

[ORAL] JUDGMENT OF HENRY J.

This hearing concerned a number of interlocutory applications which I will consider separately.

1. Plaintiffs' application for variation of the interim injunction of 3 February 1994:

It has now come to the notice of the plaintiffs that the defendants are in possession of documents claimed as confidential by the plaintiffs but additional to those specified in the existing restraining order. Possession was disclosed by the defendants in their list of documents. There is no good reason why the confidentiality of those documents should not also be protected on an interim basis, and Mr Miles has not really argued to the contrary. He has queried the necessity for Court protection having regard to an assurance that the defendants do not presently propose to use or to disclose those documents or their contents to which the present injunction pertains. However, having regard to the history of this whole matter and the respective positions adopted by the parties I think it is appropriate to ensure that interim confidentiality be maintained. There will accordingly be orders in terms of the application of 24 March.

2. Plaintiffs' application to administer interrogatories:

The defendants have now provided answers to some of the proposed interrogatories. The remainder to which objection is taken relate to the source of defendants' possession of the confidential documents. A similar issue to that is already the subject of an appeal to the Court of Appeal against part of Robertson J's judgment of 4 February 1994, and that is due for hearing on 15 April. The issue was also covered briefly by me in associated proceedings. Counsel are agreed that the determination of the Court of Appeal will in all likelihood also be

determinative of these issues, although some additional aspects presently before the Court of Appeal may possibly arise. I think the practical course to adopt, which I now do, is to adjourn this application *sine die*, leave reserved to apply.

3. Plaintiffs' application for production of documents for inspection:

The documents in question are described as :

"(a) the written transcript of the *Frontline* television programme referred to in paragraph 7 of the second defendant's affidavit sworn on 20 January 1994;

(b) the video tape of such programme;

(c) notes, audio tapes and video tapes relating to interviews conducted by the first and second defendants with any person or persons in respect of matters relevant to the said television programme in the course of the investigations referred to in paragraphs 37-48 of the second defendant's said affidavit;"

The defendants have now provided a copy of the transcript and of the videotape of the *Frontline* programme as presently intended to be broadcast. This provision resulted from a decision to seek rescission of the interim injunction on the ground that any confidential information which would be disclosed by the screening of the programme is now in the public domain as a consequence of wide publication of certain parliamentary proceedings.

I record my ruling that the inspection of this material is to be confined to Messrs Craddock, Allan, and Gavin as counsel and Ms Blennerhassett as solicitor, and also Messrs Lloyd, Hay and Morgan as plaintiffs' representatives, as well as named and approved independent advisers, subject to suitable undertakings being provided where required.

Mr Miles indicated that the transcript and the video may not be in final form, and foreshadowed the possibility of amendment. It is appropriate that any amendment also be produced for inspection, and I propose to so order on the same terms.

Objection is taken to the production of documents referred to in the quoted sub-paragraph (c), primarily on the ground of absence of relevance to matters in issue. The thrust of the claim as presently pleaded is to prevent the use of confidential information, either by way of screening a television programme or by dissemination in any form of print or electronic media. Mr Craddock submitted that the documents now in question were relevant as showing details of the defendants' actual use of confidential information in the process of preparing the television programme sourced from it. He further submitted that the extent and manner of the use also went to the claim for damages, particularly that for exemplary damages. The amended statement of claim dated 21 March 1994 did not seem to me to spell out these issues, and in response to my observation to that effect Mr Craddock submitted in draft form an amendment by way of a proposed paragraph 21A. It reads as follows :

> "21A Since the receipt by them of the documents and confidential information referred to in paragraphs 9 to 21 hereof the defendants have used and disseminated the same by showing the documents or making the information contained in them available to persons unknown (but including experts and employees) and by using the same in connection with the preparation of one or more proposed television programmes."

Even accepting an amendment in that or similar form, subject to one exception I do not think that there has been identified an issue or issues to which this category of documents could be relevant. Use by the defendants for the purpose of preparation of a television programme presently prohibited from being screened is admitted and therefore is not in issue. The way in which the preparation has been carried out as an evolving process, and internal data generated for that purpose, seem to me to bear no relationship to the cause of action pleaded or the relief sought except insofar as they have involved disclosure to others. Discovery relevant to the extent of that disclosure, which in some respects is already deposed to on behalf of the defendants, can be covered by the orders I propose to make. Documents which do not touch on the extent of disclosure, but merely evidence such matters as the steps in compilation of the final programme, or the conclusions reached at various times as to the inferences to be drawn from a consideration of the confidential information are not in my view relevant for the purposes of this claim. I note that knowledge of the confidential nature of the documents in question when received by the defendants is not an issue.

Accordingly there will be orders requiring the defendants to produce for inspection :

1. A written transcript and videotape of any amendments intended to be made to the programme presently proposed to be broadcast as contained in the transcript and videotape provided to the plaintiffs. Production is to be made as soon as reasonably possible following the decision to amend having been taken.

2. All documents or parts of documents which may serve to identify any person to whom disclosure of the confidential information has been made, being a person not already formally identified as such by the defendants in the course of this proceeding.

3. All documents or parts of documents which may serve to establish the extent of disclosure of confidential information to any person, insofar as that disclosure has not already been formally deposed to by the defendants in the course of this proceeding.

4. All documents or parts of documents referring to the terms or conditions as to confidentiality or further dissemination imposed on any person to whom disclosure has been made.

5. Inspection of the above is to be limited, as earlier recorded in respect of the transcript and videotapes already produced; leave to apply generally is reserved.

4. Defendants' application for discovery and inspection:

This relates to what are known as the *Magnum* and *JIF* transactions, which are put directly in issue by the defendants in their defence that the public interest overrides any confidentiality attaching to the documents. It was submitted that these documents, which are additional to those already in possession of the defendants, are not relevant. The basis of the submission, as I understood it, was that the issue of iniquity or public interest will fall to be determined on what if anything the documents now in the possession of the defendants disclose, it being stressed that it was those and those alone which form the basis of the proposed television programme.

That is not how I view the matter. Included in the public interest claim in this respect is what is alleged to be evasion and intended evasion of New Zealand income tax, breach of s.62 of the Companies Act 1955, conspiring to defraud the Japanese revenue, and the deprivation of the Cook Islands Government of tax revenue payable to it. Other allegations of iniquitous conduct are also made. Whether those claims or any of them are sustainable as establishing an iniquity or a public interest so as to destroy confidentiality is of course not for present determination. What the allegations do however is to put in issue the impropriety, if I can use that term as covering the public interest defence, of those transactions. Impropriety is alleged by the

defendants, and propriety is claimed by the plaintiffs. It is not just a question of whether the documents in question establish the former, but rather whether they have lost their protection by reason of the improper purpose to which they are said to relate. It is that broader question, namely the existence of the improper purpose, which is pleaded and is at issue. This contention cannot be classed as a mere roving suggestion, and used in the pleading without foundation. It has existing evidential support in this proceeding, although in dispute and yet to be tested.

The defendants are in my view, according to established principle, entitled to inspection of documents which may assist in promoting their own case or in destroying that of the plaintiffs, and it seems to me that these documents fall within that accepted general description. The principles enunciated in earlier cases such as the ***Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co.*** (1882) 11 QBD 55, 63 and ***Gartside v Outram*** (1856) 26 LJ Ch 113 should I think here be applied. The plaintiffs clearly have the right to and must be seen as likely to produce at trial documentation to rebut the inference or imputations claimed by the defendants. That to my mind demonstrates the relevance of all documents which impinge on the specific allegation of impropriety. To refuse production could result in a major issue at trial being determined without reference to documentation possibly bearing on it in a significant way.

The need to preserve confidentiality, important as it is, does not in my view here override the need for production in order to ensure a

fair and just trial. Adequate safeguards can be put in place to ensure that the protection is not unduly eroded.

Reference was made under the head of "a high degree of confidentiality" to Cook Islands legislation creating an offence for disclosure of off-shore banking information. While this Court must be mindful of it should not be deterred by overseas legislative provisions when considering its own judicial procedures and the proper control of litigation before it.

Reference was also made to the large number of documents involved, and the oppression which would result if they had to be collated and listed. In the absence of further particularisation of this aspect, I am not persuaded to refrain from making an order which is otherwise appropriate. Discovery where commercial transactions of substance are at issue is commonly onerous by reason of the volume of documentation which currently seems to proliferate, but that is an accepted facet of present-day litigation.

I can discern no other policy requirements which should operate to defeat the general rule to which I have referred. Mr Craddock, in the course of addressing under this general head, placed reliance on s.297 of the Income Tax Act 1976 which deems a determination by the Commissioner as correct and as being unable to be disputed in Court proceedings. He submitted that the section precludes the Court from enquiring into any question of tax evasion or entitlement to a foreign tax credit where, as here, the Commissioner has made relevant determinations. I do not see how s.297 impinges on discovery and in particular on the question of relevance. The pleadings as they stand

disclose these matters as issues and discovery must be governed by those pleadings. I express a doubt, without having had an opportunity to properly consider the matter, whether placed in context s.297 could possibly operate to exclude consideration of the present defence as it is framed to meet the plaintiffs' pleaded claim.

There will accordingly be an order that the plaintiffs by 21 April 1994 file a list of documents which are or may be relevant to the allegation of iniquity in respect of the *Magnum* and *JIF* transactions, as that is particularised in the statement of defence dated 16 February 1994. The list is not to be available for search without the leave of the Court, and it is to be made available only to named and approved counsel, solicitors and independent advisers subject to confidentiality undertakings as may be agreed by the parties or fixed by the Court. This order does not apply to any information which is subject to interrogatory no.1 in the defendants' application for leave to administer interrogatories.

There will be a further order for the production of such documents with inspection being limited in the same terms. That order for production is subject to all just exceptions. Leave to apply generally is reserved.

5. Defendants' application for security for costs:

Rule 60 (1) (a) (ii) is relied upon - the plaintiffs are admittedly incorporated without New Zealand. Factors in favour of the making of a discretionary order are :

(a) nothing is known as to the capital, shareholding or financial position of the plaintiffs. I am advised that public records relevant to such matters were destroyed by fire some time ago and have not been replaced

(b) the plaintiffs have no place of business and no known assets within New Zealand.

(c) there is uncertainty as to the availability of enforcement procedures being successfully employed.

(d) the plaintiffs acknowledge an ability to provide security.

Factors against making an order are :

(e) the defendants concede the use and intended further use by the defendants of confidential information which was initially apparently stolen by others from the plaintiffs; that use has caused this proceeding to be issued.

(f) there are existing orders prohibiting dissemination of the information which in the substantive hearing is sought to be protected permanently

(g) the primary issues for trial appear to be whether the admitted confidentiality has been lost, either because the information is now in the public domain or because of the public interest in disclosure of an iniquity. Both are positive defences to what is

essentially an otherwise admitted claim of breach of private rights of the plaintiffs.

On balance I have reached the conclusion that an order is appropriate. The defendants are in the circumstances I have outlined entitled to some protection in the event they are ultimately successful. Although relevant, I do not consider that the fact that positive defences appear to constitute the primary issues is determinative. The general rule that costs follow the event is not necessarily displaced for that reason. The plaintiffs seek relief, and if that relief is at the end of the day found to be inappropriate and the claim fails then the defendants' actions and proposed actions could be said to be justified.

I take into account that a two week trial is envisaged, scheduled to commence on 23 May 1994. I take into account also that this application was not brought until 16 February 1994, with the result that any order should not in my view reflect costs incurred prior to that time.

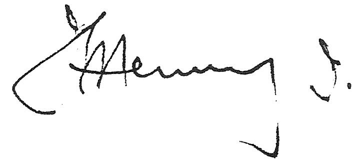
The plaintiffs are ordered to provide security for costs in the sum of $60,000, to be paid into Court by 21 April 1994 and to be held by the Registrar in an interest-bearing account.

6. <u>Defendants' application to administer interrogatories</u>:

This application will stand adjourned *sine die*. The Registrar to allocate a further fixture before me, but not before 18 April. I will then hear argument in respect of interrogatory no.1 as it relates to the companies identified in interrogatory no.2 as amended and also

interrogatory no.9. Those amendments as I recorded them were to add to the list of companies the second-named plaintiff, European Pacific Investments S.A., European Pacific New Zealand Limited being a Cook Islands registered company. The primary inquiry then , as I apprehend it, will be as to whether the questions can be classed as being possibly relevant to determine that foreign tax credits were not properly allowed, thus constituting the iniquity or public interest as alleged in the statement of defence.

Costs on these applications are reserved.



Solicitors:

Rudd Watts & Stone, Auckland, for plaintiffs
Simpson Grierson Butler White, Auckland, for defendants