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NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

20/5

CP.1079/92

601

BETWEEN WORPLE INVESTMENTS LTD & OTHERS

Plaintiffs

A N D CHASEBOROUGH INVESTMENTS LIMITED & OTHERS

First Defendants

MEDIUM PRIORITY

Hearing: 11 May 1994

Counsel: Mr Dale for Defendants in support
Mr Russell for Plaintiffs in opposition

Judgment: 11 May 1994

(ORAL) JUDGMENT OF HILLYER J

Solicitors for Defendants in support:
Grove Darlow & Partners, DX 145, Auckland;

Solicitors for Plaintiffs in opposition:
JMT Wells, PO Box 28-390, Remuera.

This is an application for review of a decision of Master Kenney-Grant given on 16 March 1994. The learned Master had before him an application for particular discovery by the plaintiffs under R.300 of the High Court Rules. There were a number of documents involved in the application but the application for review before me has come down to quite a narrow point regarding one of the documents.

Prior to 4 October 1991 the parties were in partnership dealing with software and software companies. On that date the partnership was terminated and the parties have gone their respective ways still involved in the software industry.

The plaintiffs claim that the defendants have used assets of the partnership as their own including software, stock, licences and other assets and have refused to allow the plaintiffs access to or use of the same. In particular, the plaintiffs say that certain agency or distributorship agreements have been taken by the defendants and they claim damages in the loss of these documents. One was an agreement between JBA Software Products Ltd and Olympic Software NZ Ltd dated 20 November 1991. There was a disagreement between the parties as to whether that agreement was relevant because it was entered into after the dissolution of the partnership. The Master, however, held that the document was relevant because it was clear that prior to the dissolution, agreement had been reached for the parties to enter into such an agency agreement and that indeed the agency was already operating. That is now accepted by the defendants.

The particular point that has come before me is as to the restrictions on the plaintiff's access to that document, more particularly the access to be given to Mr Westwood who is the main operator of the plaintiffs' companies.

The defendants said that the contents of that document were highly confidential and would be valuable to competitors of the defendants. The learned Master said that the concern of the defendants as to the confidential nature of the documents had to be balanced against the need for Mr Westwood, as one of the plaintiffs and the driving force of the other two, to be able to inspect any documents discovered in order to instruct his legal advisers and to assess the validity of the valuation arrived at by the valuer appointed by the plaintiffs and, indeed, the valuation arrived at by any valuers appointed by the defendants.

From the affidavits filed by Mr Westwood, it appears that the valuation of this agreement is the real point that was involved. He said in his affidavit dated 15 October 1993 at para 10 -

> **"I believe that further discovery of the distribution agreements is necessary to enable the parties to be in a position to have the matter set down for trial. Once disclosure has taken place, valuations of the agreements will need to be undertaken by experts in the field. No doubt expert evidence will need to be given as to valuation unless agreement can be reached between the parties."**

In para 20.2 of an affidavit sworn on 23 November he said -

> **"Whilst I have no difficulty with an undertaking to be signed by the valuer, I am puzzled by the suggestion that neither I nor my solicitor can see the agreement that is the subject of the valuation. The valuation will be the subject of cross-examination at the trial. A basis for the valuation of the agreement will also need to be established and this is clearly impossible without my knowing what the agreement says."**

The learned Master ordered -

> **"1. That Mr Westwood and the valuer appointed by the plaintiffs sign an undertaking in the form proposed by the defendants (Exhibit B to Mr Burton's first affidavit)".**
>
> **That undertaking provided -**
>
> **"(i) All information I receive pursuant to the order of Master ..... dated ..... and any amendment thereto from and concerning Olympic Software NZ Ltd will be held, used, and kept by me in the strictest confidence;**
>
> **(ii) I will not make or allow to be made any copies of any documents or copies of documents made available to me;**
>
> **(iii) I will return any such documents or copies when this litigation is completed".**

The directions of the Master went on -

> **"Mr Westwood will be entitled to inspect any documents discovered pursuant to the order I am about to make, only in the presence of the plaintiffs' solicitor and/or counsel and not to take written notes on the contents of those documents, as well as being subject to the restrictions imposed by the undertaking just referred to."**

The defendants submit that if the document is being inspected, as the plaintiffs say it would be, solely for the purpose of ascertaining the value of that agreement, that could be done by the valuer and it would not be necessary for Mr Westwood to inspect the document. Further, the inspection by Mr Westwood pursuant to the order in the presence of his own solicitor or counsel and the prohibition on taking written notes on the contents of the documents would not protect the document. The real question is what the proper valuation of the

agreement is. The submission made by Mr Dale on behalf of the defendants is that the valuer could inspect the document in the presence of the defendants' solicitor or counsel for the purpose of valuing it. The valuer will, of course, be appointed by the plaintiffs. There will be no need, Mr Dale submitted, for Mr Westwood to inspect the document. He submitted that if the valuer, on inspecting the document, needed to take further instructions from Mr Westwood, and those instructions necessitated the disclosure of the document or part of the document to Mr Westwood, the matter should properly come back before the Court to determine whether that was necessary. It may well be that the valuer could make his valuation of the document if he was an expert in the field without the necessity for disclosing confidential information to Mr Westwood.

This topic has recently been discussed by the Court of Appeal in a case **Port Nelson Ltd v. Commercial Commission**, (CA.262/93, 13 April 1994). In delivering the judgment of the Court, McKay J stated -

> **"Sometimes, however, relevant documents which are not privileged may be commercially sensitive. Examples would be documents showing the detailed costings of products or services which are provided in a competitive market..."**

And further -

> **"In other cases, the Courts have directed that particular documents are to be shown only to nominated persons, typically solicitors, counsel and**

> **expert witnesses. How to limit access in this way arises from the inherent jurisdiction of the Court to prevent the abuse of its process."**

The only question that will be before the Court is as to the value of that agreement and the amount therefore that the plaintiffs should pay the defendants if it is held that they have wrongly taken it. I am of the view that having regard to the accepted commercial sensitivity of the document, it will be sufficient initially if the document is inspected only by the valuer, subject to the undertaking referred to. If the valuer then needed to disclose confidential aspects of the document to the plaintiffs, a further application could be made to this Court to have that question determined. It may well be that it will not be necessary; counsel would be able to confer and may well be able to arrive at a solution to any problem that may arise. I make it clear that the prohibition on viewing the documents is not to apply to counsel for the plaintiffs who will be well aware of the confidential nature of the document and will be able to inspect the document, if necessary, subject to that confidentiality. Mr Dale advised that he would have no objection to Mr Phillipps, as counsel, seeing the document on that basis.

The motion for review is therefore allowed to that limited extent. In lieu of the directions given by the Master, there will simply be a direction that the valuer appointed by the plaintiffs inspect the document in the

presence of the defendants' solicitor after he has signed the undertaking. If necessary, the matter can come back to this Court for further directions. Mr Dale, on Mr Phillipps suggestion, advises further that he would have no problem with Mr Wells, the solicitor on the record, inspecting the document subject to the same understanding as to confidentiality.

The question of costs will be reserved.