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NZLR

IN THE HIGH COURT OF NEW ZEALAND 31/3
AUCKLAND REGISTRY

CP 2455/89 & CP 111/94

251

BETWEEN EQUITICORP INDUSTRIES GROUP LTD (IN STATUTORY MANAGEMENT) & Anor

Plaintiffs

AND THE CROWN

12th Defendant

AND EQUITICORP AUSTRALIA LTD

14th Defendant

Counsel: Sian Elias QC, W G Manning, for plaintiffs

DL Mathieson QC, Arthur Tompkins
Ms K L Clark for Crown

NOT RECOMMENDED

Hearing: 27 28 February and 6 March 1995

Judgment: 14 March 1995

JUDGMENT NO 29 OF SMELLIE J
re SUPPLEMENTARY EVIDENCE OF GARTH IRELAND

Introduction

This Judgment concerns the plaintiffs' application to adduce further evidence by way of written brief from Mr Garth Ireland on four topics which were not covered in his original statement.

The Crown opposes, first because it contends the plaintiffs have not complied with the ground rules for written briefs established at a Judicial Conference as long ago as 25 June 1993. Secondly, on principle, because the Crown says Mr Ireland is not qualified to speak as an expert on the topics addressed, and further that the proposed evidence is inadmissible because it is not helpful and identifies no standards or general practice, against which courses of conduct commented upon can be measured.

The Ground Rules Point

This is a case in which, at a very early stage, counsel agreed and the Court directed that evidence in chief and in particular the evidence of expert witnesses was to be adduced by way of written statement, which statements were to be exchanged between the parties well in advance of the hearing date. At about the time that the ground rules were established, a comprehensive timetable was also set in place. That timetable went through 9 or 10 editions before the trial started, and although the deadlines in it frequently have not been precisely observed, my impression is that all parties have adhered to the spirit of it, with the consequence that I have only been required occasionally to remind counsel of the necessity to comply with it.

The ground rules themselves are set out in nine paragraphs. The first six deal with the form of the statements and their content. Rule 7 reads as follows:

> "7. Statements should be prepared on the basis that supplementary viva voce evidence will be allowed to:-
> (a) bring the statement up to date if necessary,
> (b) answer material raised in statements made available either contemporaneously or subsequently and in respect of which there has been no opportunity to comment
> (c) by leave granted only on application attaching a supplementary brief, which application must be served 24 hours before the evidence is to be given, upon all parties affected, supplementary written evidence may be adduced."

Within the timetable, Mr Ireland's first brief, which was to have been delivered on 1 May 1994 was delivered on 19th of that month without objection. Subsequent to that there was the September settlement with most of the defendants, my Judgment No.20 of 20 October 1994, dealing with the admissibility of the Gerrard brief, and amendments to the Crown's defence in November, December and January, introducing affirmative defences based upon inter alia the Illegal Contracts Act and estoppel. Judgment 20 was the subject of an appeal heard at the beginning of February. The trial commenced on 21 November and in due course Mr Ireland's evidence was scheduled to be called on 23 February 1995. At 7.30 pm on 22 February, the supplementary brief was delivered to the Crown.

I directed that the evidence in the original statement was to be given and cross-examined upon and I required the plaintiffs formally to apply for leave to call the supplementary evidence. The argument on the point was then fitted in around witnesses then being called, and other matters that had to be disposed of. The effect has been, however, that the Crown now has had

the supplementary brief for some time and if the evidence in it is to be adduced, the Crown, through Mr Mathieson, has indicated an ability to deal with it in the week commencing 13 March..

Mr Mathieson submitted strongly that the four topics which Mr Ireland seeks to address in the supplementary brief, are not supplementary to his original statement, but are in fact new topics. And that to allow R7(c) to be used as a means for introducing those topics, would be to subvert the underlying purpose of the rules themselves, which is "to facilitate the orderly conduct of trial, to prevent trial by ambush, and more particularly to enable the Crown's experts to prepared their briefs after receipt of the plaintiffs' expert briefs on disputed matters..." (para 4 Mr Mathieson's outline of submissions).

Ms Elias responded that to use the rules in that way is to treat them as a straitjacket which would prevent the plaintiff from placing before the Court helpful evidence which will, or may assist it to reach the right decision.

The ground rules have served their purpose in providing a framework, which in conjunction with the trial timetable has provided substantially the orderly and timely supply of prepared statements by both sides. But as I had occasion to point out in Judgment No.20 I do not regard the rules as preventing me from exercising my discretion to ensure that both sides receive a fair hearing, and that includes my having the opportunity of hearing such evidence as is available to assist me to reach the right conclusion. In that regard there is a significant paragraph in the judgment of Cooke P in ***Commerce Commission v Port Nelson Ltd*** [1944] 3NZLR 435 on the final page. In the third to last paragraph, the President discusses the circumstances in which a Judge in the exercise of his discretion might

approve a departure from an established regime. That paragraph reads as follows:

> "There is another potentially quite important respect in which the discretionary inherent jurisdiction of the trial Judge may become relevant. It may be that a situation will arise, perhaps not reasonably foreseeable, in which the defendant may wish to call evidence at the trial notwithstanding that the defendant has failed to furnish a brief of that evidence to the plaintiff in advance of the trial. We do not attempt any exhaustive envisaging of the type of circumstances in which such a question could arise. Suffice it that it is not by any means an inconceivable situation. In such a situation we consider that the trial Judge would have discretion, if he thought the interests of justice so required, to allow the evidence to be called. In making that observation we do not wish to be understood as encouraging anything like a regular departure from the scheme and purpose of an order for the exchange of briefs in advance. It is only that exceptional cases may require exceptional measures."

As will be seen in due course, I have reached the conclusion that this is just such an exceptional case.

Without having so far read the supplementary brief, I tend to agree with Mr Mathieson that it is not truly supplementary of the original statement and does in fact, address fresh topics. I therefore consider that the issue here is not whether the circumstances are appropriate for the utilisation of R7(c) of the ground rules, but rather whether the plaintiffs should be allowed now to address these additional matters in view of the fact they were not included in the statement filed on 19 May 1994.

Were the Four Additional Topics in the Further Statement in Issue in May 1994.

In the outline of her submissions in support of the application, Ms Elias identified the four topics covered by Mr Ireland's supplementary brief in para 1.1 as follows:

> "1.1 Mr Ireland's supplementary brief covers:
> (i) The inquiries to be expected of a vendor of shares in relation to an undertaking commitment such as that provided by BWL to the Crown.
> (ii) The prospects in the period 15-19 October 1989 (sic) for arranging alternative sub-underwriting for BWL's underwriting commitment, in place of the original sub-underwriting arrangements which had entailed EHL being the ultimately supplier of finance.
> (iii) The security arrangements usually required by commercial lenders at the time in relation to the financing of share purchases.
> (iv) The market circumstances surrounding the EHL cash issue announced in February 1987."

I can dispose of item number (iv) immediately. That topic was not in issue until the Crown's first witness Mr Paton, was cross-examined upon it (see the Realtime record pp1626-1627). Mr Mathieson accepted that irrespective of the outcome regarding the other three topics, number 4 could probably be dealt with under R 7(c) and counsel argued but faintly that it should be excluded.

The real issue in this part of the case therefore, is whether the plaintiffs are justified in saying that the remaining three topics have only come to light since the original statement was filed, or whether as Mr Mathieson contends, they have been clearly in issue throughout.

Mr Elias put it this way in para 1.3 of her outline:

> "1.3 The other three topics covered in the Ireland draft brief are relevant to Crown defences which are now pleaded or which have been foreshadowed in submissions to the Court. They are inter-related because directed to the usual practice of a provider of credit (as the Crown was in the deferred settlement of the sale of the NZS/EHL parcel). These issues have appeared as distinct elements on the pleadings only since the trial began. The evidence is clearly relevant and expert opinion from a witness experienced in commercial transactions involving underwriting and sub-underwriting arrangements and the security for them is necessary if the Court is to be properly informed."

Ms Elias also submitted that the draft brief responds in part to evidence to be given by the Crown's expert, Dr Wheeler, at a later stage. I interpolate to say that when ordering an exchange of briefs, I deliberately did not order them to be filed in Court because I did not anticipate I would have time to read them before the evidence was called. In any event, I would have reservations about pre-reading briefs that are to be presented viva voce by the witnesses themselves. (it is for this reason I have not read the Ireland supplementary brief.) Strictly speaking, any comments in reply to Dr Wheeler's brief, should have been dealt with viva voce under R7(a) & (b) or by way of a supplementary brief under R7(c). Accordingly, I put that point made by Ms Elias to one side as being of limited or no significance.

Additionally, Ms Elias submitted that in the Court of Appeal when my Judgment No.20 on the admissibility of the Gerrard evidence was considered at the beginning of February this year, the Crown had stressed that a major plank of its defence is that in the context of an agreement for sale and purchase of shares, it is not for the vendor to inquire as to the source of the purchaser's funding. For the plaintiffs it was submitted that that was not apparent previously and is an added reason why the further evidence from Mr Ireland is required.

Mr Mathieson in his submissions emphasised first that the Crown rejects the contention that it was "a provider of credit" but at this stage it is out of the question for me to decide which party is right on that point, and the dispute in respect of it cannot of itself be a factor in this decision.

Responding to the suggestion that it was only during the argument in the Court of Appeal on the Gerrard evidence that an aspect of the Crown's defence was drawn out, Mr Mathieson said at para 10 of his submissions that:

> "....an issue as to whether the Crown as a vendor of shares should have conducted inquiries as to the source of the purchaser's funding did NOT emerge for the first time in the hearings related to the admissibility of Mr Gerrard's evidence. The Crown's argument is inherent in the Crown's denial of the plaintiffs' allegations - the fourth amended statement of claim and earlier - of the Crown's constructive knowledge of the sources, or proposed sources of funding for the NZS or EHL parcel. At all times the plaintiffs have contended for the widest possible theory of constructive knowledge, including the theory that knowledge will be imputed whenever circumstances arise, which would make it reasonable for a person in the stranger's position, to make reasonable inquiries. CF ***Baden v Societe Generale SA*** [1993] 1 WLR 575-576 to which Mr Farmer QC has repeatedly referred."

Mr Mathieson also made detailed submissions to show that in the plaintiffs' opening there were constant references showing that the plaintiffs clearly understood that the issue between them and the Crown about non-inquiry was central to the case. He contended at the end of para 13 of his submissions as follows:

> "It is submitted that plaintiffs are not entitled to say that the Crown's consistent denial of the constructive knowledge pleading does not involve a rejection of the proposition that a vendor in the Crown's position ought in many situations (where he was not fully informed about his purchase's funding) to make inquires on that point."

While a number of Mr Mathieson's points appear to have substance and would require careful examination if the issue were only whether the plaintiffs should have come forward with the additional brief at an earlier stage, my conclusion is that as at 19 May 1994 when the first brief was filed, these three topics were not clearly in issue in the way that they are now. Since if the further evidence is to be admitted the Crown will be afforded an opportunity not only to consider it before it is given and it has to cross-examine, but also to file a supplementary brief of its own expert, the strength of the Crown's opposition in this area is not sufficient to persuade me to exclude the evidence, if otherwise it is admissible and helpful.

Is Mr Ireland Qualified to Give the Evidence.

Attached to his first statement is appendix 1 containing Mr Ireland's curriculum vitae. He gained a BCA in Economics from Victoria University in 1967 and for the next 20 years was engaged as an executive accountant, investment banking adviser, money market and security tradings manager, and member of the Stock Exchange. Throughout that period he gained experience with UDC Group Holdings (1966-70), United Dominion Trust London (1970-72), UDC Mercantile Securities (1972-74), Challenge Corporation, (1974-78), and then joined the New Zealand Stock Exchange and was a partner in a leading stockbrokers partnership until 1987 when he formed his own partnership, Ireland Wallace & Associates Ltd.

In an affidavit filed in support of this application, Mr Ireland amplified his qualifications and experience. The fact that he was a member of the NZ Stock Exchange from 1978 to 1987 is significant, because it was in 1987 that the crash occurred. The affidavit shows that up to 1987 he had had a

very wide experience in the control, investment and management of substantial funds and the investigation of large corporations and the potential risks and rewards associated with taking up shares in proposed floats.

Furthermore, he deposes that since 1987 the primary focus of his work has been in the field of business and corporate valuations. By way of example he adverts to the fact that he advised Lion Nathan, in forming its pricing acquisition of Bond Brewing and similarly Independent Newspapers' acquisition of Gordon & Gotch. He has also been engaged by major international investors to advise about pricing of shares in Telecom Corporation, and National Gas Corporation. In para 21 of his affidavit he points out that the valuation of a business entails three stages. First a forecast of the cashflow, secondly establishment of the appropriate opportunity cost, or the investors' required rate of return on capital, thirdly the rate of return as applied to cashflows by way of discounted cashflow analysis to arrive at a valuation. That procedure, Mr Ireland deposes, includes an assessment of the financial and business risks of the business, which in turn involves an assessment of the quality of assets and risk exposure, and the adequacy of security underlying any loans made.

Bearing in mind that the three disputed topics upon which the Crown says Mr Ireland is not qualified to comment concern inquiries to be expected of the Crown regarding the BWL underwriting commitment, the prospects of arranging alternative sub-underwriting in the period 15-19 October 1987 and the security arrangements usually required by commercial lenders, my conclusion is that Mr Ireland is sufficiently qualified as an expert to give evidence on those topics which would assist the Court.

Is the Proposed Evidence Admissible?

For the reasons set out in my Judgment 20 which have been considered and refined in the Judgment of the Court of Appeal (CA 213/94 9.3.95) I hold that the evidence in Mr Ireland's additional brief is admissible.

There will be no order as to costs, the major issue in the case having been resolved by the decision of the Court of Appeal referred to above.

Robert Smellie

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R P Smellie J