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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

31/3

CP 2455/89 & CP 111/94

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

Plaintiffs

AND THE CROWN

12th Defendant

AND EQUITICORP AUSTRALIA LTD

14th Defendant

Counsel: S Grieve for plaintiffs
A I M Tompkins for Crown

Hearing: 6 & 7 March 1995

Judgment: 14 March 1995

JUDGMENT NO 30 OF SMELLIE J
re DISCLOSURE BY PLAINTIFFS OF NAMES OF WITNESSES SUBPOENAED

Introduction

This is an application by the Crown pursuant to R 438 of the High Court Rules, for a direction requiring the plaintiffs to name forthwith all the witnesses they intend to call at this trial. In paragraphs 2 and 3 of the outline of his submissions, Mr Tompkins elaborated on the application as follows:

> "2. For the avoidance of doubt, the directions sought would require the plaintiffs to name all the witnesses who are to be called, irrespective of whether or not any of those witnesses will be or have been subpoenaed to attend to give evidence for the plaintiffs, and irrespective of whether the plaintiffs have briefs (in draft or signed form) for any or all of those witnesses.
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> 3. The directions sought should also require the plaintiffs to specify the order in which the named witnesses are to be called, and approximate dates for each witnesses. Such information would have to be, for obvious reasons, subject to modifications as the trial unfolds. However, that would not prevent the Court requiring the plaintiffs to provide it in the first place."

The plaintiffs resist the application, but are prepared to undertake to the Court to advise as soon as they decide they are going to call any one of a number of potential witnesses whom they have subpoenaed and to provide statements from such witnesses if they are available. Additionally, upon my indicating that I proposed, pursuant R 438(3), to require precise disclosure from the plaintiffs as to the further voluntary witnesses that were to be called, Mr Grieve helpfully named all those whose briefs have been supplied but are not now to be called, and identified those remaining to be called in the voluntary category.

The Plaintiffs' Potential Witnesses

The plaintiffs acknowledge that they have issued and served a number of subpoenas. The names of the persons subpoenaed have not at this

juncture been disclosed, but Mr Grieve indicated that all of them are in the area of, and have to do with the issue of knowledge on the part of the Crown that the funding of the buy-back of the NZS/EHL parcel, was by EHL or its subsidiaries (the Equiticorp Group). Mr Grieve pointed to the plaintiffs' pleadings and submitted that given the circumstances of this case the Crown should have a fair idea of the individuals involved.

The pleadings referred to are in paras 168 169 170 and 171 of the Crown's fifth amended statement of claim. The other circumstances referred to by counsel are the fact that many of the issues being traversed in this trial have already been traversed in previous long running criminal proceedings. Additionally, before the settlement in September 1994, discovery had been afforded by some 16 other defendants originally joined, and interrogatories had been answered by many of them and many had also supplied prepared briefs.

Mr Tompkins, on the other hand, contended that the Crown should not be called upon to second-guess who the plaintiffs might call. He took me through the pleadings to demonstrate that a very large number of people might well be involved, and that the Crown in effect would be off on a wild goose chase if it tried to guess which of those many people might be subject to the subpoenas.

The Crown's Contentions in Support of the Application.

Mr Tompkins submitted that the requirements for the exchange of prepared briefs which were put in place as long ago as June 1993 and the philosophy behind the directions given at that time, should apply equally to subpoenaed witnesses. The orders counsel submitted had been made to ensure the fair and expeditious disposal of the case, including the

avoidance of surprise and the elimination of the opportunity for ambush. The cards, he said, should be on the table, rather than played close to the chest.

Mr Tompkins went on to submit that the spirit of those rules had already been broken and that the plaintiffs had sprung two major and important surprises already which had resulted in wasted effort on the one hand and an unsatisfactorily short lead time for preparation of cross-examination on the other. That the Crown should take that view is perhaps not surprising and its anxiety to avoid further uncertainty understandable. But as I made clear during the course of the hearing I am not prepared to ascribe to the plaintiffs' unfair or deliberate tactical manoeuvring. In my view, such difficulties as have occurred so far are the consequence of the disjointed way in which evidence is currently being called in the case, while various procedural wrangles in this Court are sorted out, and decisions are awaited from the Court of Appeal. I discouraged Mr Grieve from responding to the portion of Mr Tompkins' submissions just referred to and I expressly put the criticism to one side and do not take it into account.

In support of his submissions Mr Tompkins relied upon the decisions in ***Commerce Commission v Port Nelson Ltd*** both in the High Court (1994) 7PRNZ 476 and the Court of Appeal (1994) 7 PRNZ 487. They are considered later in this judgment.

In response to an inquiry from the Bench as to whether the Crown would be content with adequate notice before such witnesses were called, rather than disclosure of the full list of names at this point; Mr Tompkins advised that the Crown preferred to have the full list at this stage, despite the

obvious disadvantage that it might then expend considerable effort in preparing for cross-examination that would never eventuate.

The Plaintiffs' Response

From the bar, Mr Grieve advised that all the persons who had been subpoenaed were either uncooperative or hostile. Given the earlier criminal proceedings and the part that some of the potential knowledge witnesses appear to have played in the factual scenario, I do not find that surprising.

Counsel further advised that no decision had yet been made to call any of them, save for one only in respect of whom it has been decided he will not be called. The plaintiffs' advisers say they want to see what they can establish by evidence voluntarily given before they make an assessment of which, if any, of the subpoenaed witnesses they should call. Next the point was made that because all the witnesses are in the area of Crown knowledge, the Crown should be able to discern substantially who they are. I was advised also that there is an anxiety that the Crown is positioning itself to make a submission at a later stage, that following ***Jones v Dunkell*** (1959) 101 CLR 298, if witnesses are not called the inference can be drawn that they would not assist the plaintiffs' case. I can understand that anxiety, but I do not at this stage see much, if any, room for the application of that principle.

Mr Grieve went on to submit that the decision as to whether potential but uncooperative witnesses are to be called on subpoena, is part of a party's preparation for trial, not affecting the trial itself. Counsel submitted that we still do have an adversarial system, and that professional privilege in this area is still part of it. On the other hand, counsel accepted that once a decision is made to call a subpoenaed witness the trial is then affected and

R 438 becomes operative, opening the way to the exercise of the Court's discretion if justice so requires.

A further point made, was that confidentiality is still protected by R 497(3) although counsel acknowledged that to the extent that confidentiality is a hedge against tampering, in this case there is no risk of that. Furthermore, counsel fairly acknowledged that there is no property in witnesses and the plaintiffs cannot complain if, upon learning who the subpoenaed witnesses are, the Crown decides to approach them.

Although initially in respect of what the plaintiffs offer by way of disclosure, Mr Grieve sought to make a distinction between those witnesses who provide a brief and those who do not, in debate with the bench, he properly in my view, abandoned that distinction. Clearly, the plaintiffs will not make their decision, (as to which subpoenaed witnesses they will call), without first reviewing all the evidence available as to what the witnesses have said on previous occasions, and without endeavouring to obtain from them a signed statement confirming the stance earlier taken. To that extent, the plaintiffs must inevitably be well ahead of the Crown, who after notice will only have a limited time before being called upon to assess the evidence in chief and embark upon cross-examination.

Finally, counsel for the plaintiffs reminded the Court of the disclosure that has already been made, regarding non-subpoenaed witnesses and the undertakings given regarding subpoenaed witnesses, and expressed the hope that in due course the plaintiffs would receive a similar courtesy from the Crown. I interpolate to say that I anticipate that that courtesy will be forthcoming, but just as I would have been prepared to order what has been disclosed and undertaken by the plaintiffs, I shall equally be prepared

> lightly. This is a major departure from the traditional adversary system, and a significant inroad into practice and legal professional privilege relating to prior identification of witnesses and content of contemplated evidence in civil cases. However, there is no escaping the fact of specific statutory authority for directed disclosure not less than 24 hours before tender of evidence. Those traditional rights plainly have been overridden... The rule is to be interpreted so as to promote 'just, speedy, and inexpensive' resolution of proceedings. The question of justice in relation to early prior disclosure can be dealt with by careful use of discretion. As to other aspects, it will often be the case that the earlier pretrial disclosure occurs, the more such will assist with speedy and inexpensive resolution of cases. It will reduce ambush, and allow focus on real issues at trial. I consider the '24 hour' rule was simply to ensure that a party had at least a minimum practicable period to assess and prepare for opposing evidence. It was a minimum. It was not intended to prescribe a maximum. The Court has jurisdiction to direct earlier disclosure, where circumstances so justify."

Having dealt with that matter of principle, later in the judgment McGechan J applied the principle to the case before him and made some interesting observations on p 484, some of which have relevance to this case. In particular in points (1) and (2) noted on that page, the Judge reaffirmed that simply exchanging a brief does not commit a party to call the witness - *a fortiori* the issue of a subpoena is even less binding. And that any "perceived unfair advantage," can be balanced by a like requirement of disclosure by the other side and is less compelling where (as in this case) tampering with the witnesses can be dismissed as a possibility.

When the matter came to the Court of Appeal - [1994] 3NZLR 435, the Court said commencing at p 437 :

> "In principle we can see no ground for limiting the Court's power by reference to the privilege to which reference has been made. All that happens when there is an order for the exchange of briefs before trial is that each party has the advantage of seeing evidence that may be called by the other party. Neither party,

to make such an order against other parties when they commence to call evidence, if the necessity arises.

Rule 438 and Commerce Commission v Port Nelson Ltd

The provisions of R 438 are well-known. They deal with directions affecting the trial, and by means of R 441 the Court can, during the trial, make any of the orders that could have been made under 438. Neither party was inclined to be pedantic about the application of the Rules to this matter, and nor am I, but as McGechan J put it in the High Court in the ***Commerce Commission*** litigation, if necessary, this application could be "...transmogrified into a concurrent R441 conference..."

R 438(3) is the important one because it provides a wide and all-embracing jurisdiction and the capacity to give directions, whether sought or not by the party applying. Its precise terms are:-

> "(3) On the hearing of the application the Court may make such orders and give such directions (whether sought by the party applying or not) as appear best adapted to secure the just, expeditious and economical disposal of the proceeding."

For the sake of completeness I refer also to the "just, speedy, and inexpensive" interpretation principles contained in R 4 which further enhance the scope of the subrule quoted above.

In the High Court, in the ***Commerce Commission*** litigation, McGechan J said at p 482, dealing with the question of jurisdiction and the directions which the Court is empowered to give pursuant to R 438:

> "I do not doubt that the latter empowers the Court to direct such delivery of prerecorded statements at a considerably earlier time than 24 hours before tender of evidence. I do not say that

> however, is bound to call evidence in terms of the brief or otherwise."

On p 438 at l.11 the Court addressed the possibility of circumstances developing where some further orders might be required during the course of the trial, and said:

> "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."

I interpolate to say that in that sense the question of disclosure of the names of the subpoenaed potential witnesses in this case, in my view, falls into the category of an exceptional circumstance.

The Court then went on to say at l.23 on p438:

> "In general of course an exchange of briefs in advance is consonant with the policy embodied in R 438, designed as it is to secure the just, expeditious and economical disposal of the proceeding, as has been recognised often enough in contemporary judgments. The old philosophy of litigation involving keeping one's cards close to one's chest does not enjoy the currency which it once had: it has been to a significant extent replaced by an approach laying emphasis on the desirability of obtaining a just result of each particular case. Sometimes this new approach may be less advantageous to one side or the other than the old philosophy but, if so, it is a consequence which has to be tolerated.
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> Those reasons are substantially the same as the main reasons given by McGechan J. Other points are made by him, with none

> of which we differ. In our view he had the jurisdiction to order as he did and he exercised his discretion in a way with which this Court would be wrong to interfere."

Clearly then I have a wide jurisdiction, one which I should have thought was sufficient to enable me to over-ride any element of confidentiality which attaches to the issuing of a subpoena if that was necessary to secure the just, expeditious and economical disposal of this litigation.

Should the Court in this Case Require Disclosure before a Decision is made to Call

I have reached the decision that my discretion should not be exercised in that way in this case for the following reasons:

1. That would be beyond what the Crown originally sought.
2. It would be of limited advantage to the Crown in that what has been offered combined with what I intend to order, will provide the Crown with certainty and adequate time to investigate.
3. It would effectively eliminate the confidentiality element which R 497 impliedly recognises so far as subpoenas are concerned, and in my view that should not be done unless justice so requires, and I am not persuaded that that is the case here.
4. Disclosure might assist the Crown to seek the drawing of an inference adverse to the plaintiffs on the "***Dunkell***" approach, but again that is not necessary or appropriate. The Crown can make its own inquiries as to the availability of any potential witnesses and call evidence in that regard if it sees fit. Justice does not require that the plaintiffs deliver that information on a plate to the Crown.
5. The issuing of subpoenas in this case to ensure that witnesses will be available if required, but well in advance of any decision to call, is entirely understandable. Given the length and complexity of the case,

it comes as no surprise that the plaintiffs have not yet decided which, if any of the subpoenaed potential knowledge witnesses (a) is necessary, or (b) if called will advance rather than damage their case. That is a decision for counsel engaged, which is both sophisticated and demanding of anxious consideration. In that sense it is clearly part of the preparation and trial tactics, preserves protected by privilege and into which, in this case at least (and it may be in most others as well) there is no justification for intrusion by either the Court or the Crown.

6. Finally, what has been offered, subject to the length of notice and the possible opportunity for the Crown to apply for further time to prepare cross-examination in exceptional circumstances, comes close to, and is more specific than, what the Crown originally sought.

Length of Notice before Witness called and other Consequential Orders

I indicated to Mr Grieve that the times of 24 hours and three days suggested by him were in my view too short, during the exchanges between Bench and counsel. Mr Grieve failed to persuade me otherwise, and as earlier mentioned, he also abandoned the argument that there should be a distinction between those witnesses who have provided a brief and those who have not.

As earlier indicated, the plaintiffs have undertaken to the Court to advise the Crown as soon as the decision is made to call any particular witness who has been served with a subpoena. I accept that undertaking, and accordingly there is no necessity for me to make an order or issue a direction in that regard. The Crown of course can apply for an order if at a later stage it considers the undertaking is not being complied with.

Additionally, the plaintiffs have now fully disclosed which of the voluntary witnesses in respect of whom briefs have been supplied, are not to be called. The names supplied are found on p.2867 of the Realtime record.

The formal orders/directions are as follows:-

1. Once formal advice is given that a witness will be called, six clear days must elapse before the witness is sworn and the evidence given unless the Crown consents to a shorter period.
2. If a statement of the witness's evidence, either signed or in draft is available, that also is to be provided to the Crown at the time that advice is given under 1. above.
3. Leave is reserved to the Crown to apply for more time to prepare for cross-examinaton in exceptional cases.
4. Where notices of intention to call are given under 1. above, the order in which the witnesses are to be called, in relation to other evidence, the estimated time of calling and the estimated duration of the evidence, are also to be advised. Notice is to be to the parties and the Court by faxed letter.
5. Orders 1-4 above, apply mutatis mutandis to the Crown and EAL, (additionally unless the last mentioned parties when commencing to call evidence undertake and disclose as the plaintiffs have now done, oral application can be made for additional orders which almost inevitably will be made.)

As the honours are fairly evenly shared, there will be no award as to costs.

Robert Smellie J.

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R P Smellie J