NZLR

LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 326/96

BETWEEN **JEWEL OF INDIA LTD**

Intended Plaintiff

AND **JAYCEES CURRY CHARMERS LTD**

Intended First Defendant

AND **SEAHORSE INVESTMENTS LTD**

Intended Second Defendant

Hearing: 23 August 1996

Counsel: MJ McCartney for intended plaintiff
FJ Willis for intended second defendant

Judgment: 23 August 1996

(ORAL) JUDGMENT OF MASTER KENNEDY-GRANT

Solicitors for intended plaintiff:
Bruce K Dell & Hough
DX EP 80508

Solicitors for intended second defendant
Brookfields
DX CP 24134

This is an application by the intended plaintiff under Rule 299 of the High Court Rules for an order that the intended second defendant make limited discovery prior to the commencement of the proceeding.

The application arises in the context of the following facts. The intended plaintiff has for a number of years been a tenant of the intended second defendant in premises in Mission Bay. The intended first defendant has more recently become the tenant of another part of the complex owned by the intended second defendant. The intended plaintiff is a well-known Indian restaurant. When the intended first defendant first started business it did so as a Thai restaurant. It has now become an Indian restaurant. The intended plaintiff says it has been damaged by that change of use. The intended plaintiff claims that the intended second defendant must either have failed to include in the lease to the intended second defendant a clause limiting the use of the premises leased to the intended first defendant to use as a Thai restaurant or have agreed, subsequent to the lease, to varying the terms of the lease to permit the intended first defendant to conduct an Indian restaurant on the premises or, thirdly, have acquiesced in the intended first defendant's change of use.

Ms McCartney has filed a draft statement of claim which pleads as against the intended second defendant three causes of action:

a) breach of implied term of lease
b) derogation from grant of lease, and
c) estoppel.

The draft statement of claim was filed and served yesterday. Since its service the intended second defendant has accepted that it ought to make available to the intended plaintiff the lease between the intended first defendant and the intended second defendant. The intended first defendant may have had a different name at the time that lease was entered into. If that is so, this concession applies to

the lease to the party so-named. Obviously, also, the concession also relates to any formal amendment to the lease in question.

The intended plaintiff also seeks discovery of correspondence between the intended defendants relating to any change of use by the intended first defendant.

The intended second defendant has maintained today its opposition to this further category of document. I am satisfied, having heard argument, that Ms Macartney is right to argue that she cannot properly plead the case against the intended second defendant without have access also to the correspondence. This is because she cannot decide whether it is proper to plead the second cause of action which I referred to above, namely, that of derogation from the grant of the lease, nor how to plead the estoppel precisely.

I say again what I have said previously in *Finlay v Southland Building and Investment Society* (unreported, Auckland Registry, CP 758/93, 21 January 1994)

> *"Rules require not only the pleading of the bare cause of action, but a pleading of that cause of action with the required degree of particularity. The object of the Rules is to ensure so far as practicable, because it is not always practical, that causes of action are pleaded as accurately and as completely as possible the first time they are pleaded. It is not satisfactory to say 'plead as best you can and amend to plead better once you have the document which will provide you with all the particulars you need and all the particulars you should plead to meet the requirements of the Rules'."*

That comment was made, as is obvious, in the context of an argument as to the ability to particularise the claim, but the principle is the same. It is desirable that parties plead their cases fully and accurately at the commencement of the proceeding if that is practicable. With access to the correspondence I believe it will be practicable in this case.

For the avoidance of any doubt as to the width of the order in respect of the correspondence, I express it in these terms: correspondence demonstrating

either consent by the intended second defendant to change of use of its premises by the intended first defendant, in particular from use as a Thai restaurant to use as an Indian restaurant (of any form), or demonstrating knowledge on the part of the intended second defendant of the planned or actual change of use (as described above) by the intended first defendant and acquiescence in that change.

That leaves the question of costs. The intended second defendant seeks costs on the basis that until Ms McCartney filed and served a draft statement of claim it was not possible for the intended second defendant to determine its attitude to the application. While the Rule does not in terms require the filing of a draft pleading, I think it is desirable that such a course should be followed by parties seeking an order of this nature. To that extent I agree that the application was incomplete. However, I do not accept that the defendants have been put to any additional cost by this. The cost of their appearance today has been entirely because they have chosen to oppose the application for pre-proceeding discovery of the correspondence. In all the circumstances I fix the costs of the application at $350 and reserve them to the trial judge.

Discovery of the lease, any formal amendment to the lease and the correspondence which is described above is to take place within 7 days of today.

Master Kennedy-Grant