

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CP 128/91

NOT
RECOMMENDED

BETWEEN J & T CHRISTIE LIMITED
(In Receivership)

First Plaintiff

AND GEORGE WILLIAM TURNER CHRISTIE

Second Plaintiff

AND DAVID JOHN CHRISTIE

Third Plaintiff

AND WESTPAC MERCHANT FINANCE LTD,
WESTPAC FINANCE LTD and WESTPAC
SECURITIES LTD

First Defendants

AND LINDSAY JOHN BROWN

Second Defendant

AND LINDSAY JOHN BROWN & MURRAY
NEIL FROST

Third Defendants

AND NATHANIEL TOLLETH CRAIG

Fourth Defendant

AND COOPERS & LYBRAND

Fifth Defendant

Hearing: 4 December 1996

Judgment: - 4 DEC 1996

Counsel: D J More for Plaintiffs
 C J Doherty for First, Second, Third and Fourth Defendants
 L K Brook for Fifth Defendant

**DECISION OF MASTER VENNING RELATING
TO THE EXCHANGE OF BRIEFS**

The hearing in this matter concluded after 5 o'clock on 4 December. At the conclusion of the hearing I advised counsel of the orders that would be made and that reasons would follow.

The orders made are:

1. The Plaintiffs are to serve on the Defendants a written statement of the proposed evidence-in-chief of each witness to be called by the Plaintiffs by 21 March 1997.
2. The Defendants are to serve on the Plaintiffs and on each other a written statement of the proposed evidence-in-chief of each witness to be called by them by Friday, 2 May 1997.
3. Any supplementary briefs by the Plaintiffs are to be served by 28 May 1997.
4. The Plaintiffs are to be responsible for the preparation of a bundle of documents on the following terms:
 - (a) The Plaintiffs are to supply a list of the documents to be included in the bundle to all Defendants by 16 May 1997;
 - (b) The Defendants are to advise the Plaintiffs of any additions they require to be made to that list by 30 May 1997;
 - (c) The Plaintiffs are to prepare, file and serve copies of the bundle of documents properly indexed and numbered seven days prior to hearing.
5. Costs are reserved.

Reasons

The Plaintiffs have applied to the Court for directions in this matter. The proceeding was set down on the Plaintiffs' application on 18 September.

The Plaintiffs' application for directions as to the exchange of briefs of evidence was adjourned by consent to 4 December.

I am advised by counsel that even with an exchange of briefs the case is likely to take four weeks to be heard. Counsel have made inquiries from the Registrar and I am advised there is no likelihood of a hearing before mid-June 1997.

Whilst counsel are agreed that an exchange of briefs is appropriate in this case they cannot agree upon the form of such exchange. The Plaintiffs seek a simultaneous exchange of briefs. All Defendants oppose that and seek a sequential exchange of briefs.

The First Plaintiff is a company in receivership. The Second and Third Plaintiffs were shareholders and directors of the First Plaintiff. The First Defendant was the Plaintiff company's banker. The Second and Third Defendants are chartered accountants in practise in Dunedin who were appointed receivers by the bank. The Fourth Defendant is a company manager and director and acted in a consultancy capacity to the First Plaintiff pursuant to an agreement between the Bank and the First Plaintiff. The Fifth Defendant is a firm of chartered accountants who were the First Plaintiff's auditors.

The Plaintiffs' claim against the Bank is firstly in relation to advice given by the Bank regarding an overseas loan and the Bank's management of the overseas loan. The Plaintiffs also claim against the Bank on the basis it is responsible for the actions of Mr Brown, the Second Defendant, as a consultant appointed by the Bank. The Plaintiffs' claim breaches of fiduciary duty by the Bank, the Fourth Defendant and the Fifth Defendant. Finally, relief is claimed under the Credit Contracts Act. The claim against the Second Defendant is breach of contract and fiduciary duty. The claim against the Third Defendant is in negligence relating to their conduct of the receivership.

The basis of the claims relating to breach of fiduciary duty are that the Fifth Defendants, as auditors, owed a duty to the Plaintiffs but that they

assisted the Fourth Defendant in representing to the Bank that the Plaintiffs had not presented a full picture of the company's position to the Bank and suggesting an alternative form of restructuring the First Plaintiff company, effectively excluding the Second and Third Plaintiffs.

Mr More's submission in support of a simultaneous exchange of briefs was based largely on the decision of C C Bottlers Ltd v Lion Nathan Ltd 6 PRNZ 242. In that decision Thomas J stated that the usual rule should be that exchange of briefs of evidence would be simultaneous. Mr More submitted that R441A et seq were default rules only and once an application was made to the Court regarding a variation of briefs there was no presumption that the default rules would apply.

After referring to that decision, the learned authors of 'McGechan' note at HR 441B.04 that:

"This rule therefore represents a major departure from the well established practice, for the plaintiff is now obliged to serve its statements not later than 21 days after the date on which the praecipe has been filed ..."

Rule 441A provides for a departure from the default provisions in subclauses (3) and (4) to that rule. Those subclauses read:

- "(3) Nothing in this rule or in rules 441B to 441J prevents a party from applying for and obtaining an order directing the exchange of evidence before trial by a date earlier than that prescribed by R441B(1) or on terms that are more appropriate to the particular case.
- (4) The Court may in its discretion make an order directing that R441B to 441L shall not apply to the evidence or any part of the evidence to be given at the trial of a proceeding and shall make an order where in its opinion such an order is necessary to secure the just, speed and inexpensive determination of a proceeding."

Rule 441A(3) appears to be directed at orders directing an early exchange of evidence or for a simultaneous exchange of briefs on the basis such would be more appropriate to the particular case, whereas R441A(4) appears to

be rather more directed at an order that written briefs not apply at all, or at least in relation to some witnesses.

Despite Mr More's submission, in my view the effect of the rules is plainly to provide for a sequential exchange of briefs unless in the particular case a simultaneous exchange is more appropriate. To that extent the ordinary rule as stated in the C C Bottlers v Lion Nathan case that statements of evidence are to be exchanged simultaneously has been affected by R441A et seq. However, I accept that the rules are default rules and that at the end of the day the question the Court must determine is what is appropriate to meet the requirements of the particular proceeding.

Mr More submitted that the pleadings were quite detailed, that the evidence would be based upon a considerable volume of documents and that the Defendants would be well aware of the case they had to meet. He also submitted that parts of the pleading made allegations in the nature of fraud and it was appropriate that the briefs be exchanged simultaneously to avoid any suggestion the Defendants may structure their evidence in reply.

It is apparent from the pleadings that the allegations are largely based upon historical records and documents. That is consistent with Mr More's acceptance that the documentary record will play an important part in the case. It is also of note that the allegations relate to actions that took place in 1986, some ten years ago. In my view those factors are more supportive of a sequential exchange of briefs rather than a simultaneous one.

Despite Mr More's submission relating to fraud, it is apparent from the pleadings that the only reference to fraud is a fraudulent breach of trust for the purposes of avoiding the provisions of the Limitation Act. That pleading is against the Fourth Defendant and is in the nature of an equitable fraud. It is not a matter which, of itself, would justify a simultaneous exchange of briefs.

In my view there would be advantages in this case in a sequential exchange of briefs in accordance with the rules. There are a number of parties to

the proceeding. There will be a large number of witnesses. If there is a simultaneous exchange of briefs it is inevitable that the initial briefs will not be as focused as would occur if the Defendants' briefs follow the Plaintiffs' briefs. That is not to say that the Defendants will formulate or concoct evidence to answer the Plaintiffs' case. Given the extent and nature of the documentary records involved in the case that would be unlikely. It is simply that the Defendants will be able to structure their evidence to meet the briefs presented by the Plaintiffs. A sequential exchange is likely to reduce the need for a multiplicity of briefs in reply which would be required to focus the briefs if a simultaneous exchange applied. If a sequential exchange applies, only the Plaintiffs will have a right of response.

The pleadings are closed. The case is set down for hearing. The reality is that if briefs were not exchanged the Plaintiffs would have to present their case first and even with an order excluding witnesses, the Defendants would only have to answer the case presented by the Plaintiffs. That is the effect of a sequential exchange of briefs in this case.

For the foregoing reasons I am satisfied that in the circumstances of this case the rules provided are appropriate and there is no reason to depart from them.


MASTER VENNING

Solicitors:

Solomons, Dunedin for Plaintiff

Cook Allan Gibson, Dunedin for First, Second, Third and Fourth Defendants

Caudwells, Dunedin for Fifth Dunedin