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WZLR

**LOW  
PRIORITY**

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

C.P.514/96

BETWEEN      FIRST MOBILE LIMITED

Plaintiff

AND            CAROLINE BIRD

First Defendant

AND            WILLIAM KNAPE

Second Defendant

AND            DYETEX HOLDINGS LTD

Third Defendant

AND            THE NATIONAL BANK OF  
NEW ZEALAND LIMITED

Fourth Defendant

12 AUG 1998

Counsel:      H.C. Keyte Q.C. and J. Murphy for plaintiff  
                    J. Foster for second and third defendants  
                    C.R. Gwyn for fourth defendant

Judgment: 26 August 1998

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**JUDGMENT OF POTTER J**

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Solicitors: Lowndes Jordan, DX CP 21511, Auckland  
                    Malloy Hart, CX CP 31010, Auckland  
                    Russell McVeagh McKenzie Bartleet, DX SX 11189, Wellington

## **Introduction**

The plaintiff makes application for further and better discovery/disclosure by the fourth defendant and for inspection of the fourth defendant's documents. The plaintiff's application is supported by the second and third defendants but opposed by the fourth defendant. There was no appearance and no steps were taken in the matter on behalf of the first defendant.

The plaintiff's statement of claim alleges a breach by the fourth defendant of the express or implied terms of a banking contract between the plaintiff and the fourth defendant, namely that the fourth defendant would honour only those of the plaintiff's cheques drawn by authorised signatories and that the fourth defendant would exercise reasonable care and skill to protect the plaintiff's interests. The plaintiff claims judgment for \$737,666 plus interest and costs in relation to cheques drawn by the first defendant against the plaintiff's bank account with the fourth defendant, which the plaintiff alleges were drawn unlawfully, without authority, and thereby fraudulently.

Pursuant to an order made under r.311 High Court Rules at the conclusion of argument on the plaintiff's application, counsel for the fourth defendant has produced to me and I have perused the paragraph 2.1 documents (as herein defined). I record the consent of all counsel concerned that my perusal should extend only to the paragraph 2.1 documents as defined, and not to all the documents listed in paragraph 2.1 of the fourth defendant's list of documents.

## Definitions

In this judgment I adopt the following definitions:

*Plaintiff's application* means the plaintiff's application for further and better discovery/disclosure by the fourth defendant and for inspection of the fourth defendant's documents, dated 10 July 1998 and filed 13 July 1998.

The *18 March 1997 list* means the fourth defendant's list of documents verified by Michael San Nyein, dated 18 March 1997.

The *11 August 1998 list* means the fourth defendant's second supplementary list of documents verified by Michael San Nyein, dated 11 August 1998.

The *paragraph 2.1 documents* means the documents listed as numbers 211-229 in paragraph 2.1 of the 18 March 1997 list and as numbers 213-238 of the 11 August 1997 list.

*Exhibit A* means exhibit A to the affidavit of Kevin Patrick House sworn 10 July 1998 being a memorandum dated 15 November 1996 to John Boyd from Hugh Boyle re Fraud - First Mobile Limited.

## Background Facts

For the purposes of the plaintiff's application, the background facts may be summarised as follows -

The plaintiff notified the fourth defendant of impending litigation on 1 November 1996 and filed its statement of claim on 8 November 1996.

The fourth defendant filed and served the 18 March 1997 list, and inspection duly followed.

On or about 12 May 1998, the plaintiff's solicitor ("Lowndes Jordan") received a fax letter of that date with attached memorandum dated 15 November 1996 from the fourth defendant's solicitors Russell McVeagh McKenzie Bartleet & Co ("Russell McVeagh"). Lowndes Jordan in accordance with their normal procedure immediately faxed the letter and attachment to their client, the plaintiff.

The plaintiff recognised that the attachment (which was a copy of exhibit A) was not the attachment referred to in the 12 May 1998 letter. The plaintiff ascertained from the 18 March 1997 list that no claim to privilege was made in respect of exhibit A.

On 19 May 1998, Lowndes Jordan confirmed the error to Russell McVeagh and raised queries in respect of discovery.

Russell McVeagh, by fax of 19 May 1998, advised that exhibit A had been provided inadvertently, that it was privileged, and that privilege had not been waived.

By fax of 20 May 1998, Russell McVeagh advised Lowndes Jordan that exhibit A "forms part of document 228, that the date of document of document 228 was erroneously listed as 25 November 1996 and that the list would be amended". The claim to privilege was reiterated. They requested return of exhibit A.

By fax of 21 May 1998, Lowndes Jordan advised that exhibit A was forwarded to the plaintiff immediately upon its receipt and was therefore in the hands of

the plaintiff. They stated that in their view the document had been handed to them without privilege being claimed; they had properly referred the document to the plaintiff; it was not a situation in which a document for which privilege had been claimed, had been inadvertently revealed during inspection. They queried why the document was privileged.

By fax of 25 May 1998, Russell McVeagh repeated its request for return of exhibit A, and expressed the view that the document attracted litigation privilege which had not been waived.

The correspondence continued in this vein. The fourth defendant filed a supplementary list dated 30 July 1998 and then filed a second supplementary list, the 11 August 1998 list. In the supplementary lists, exhibit A was separately identified and numbered. The memorandum which was document 228 in the 18 March 1997 list, was correctly dated 15 November 1996, and became document 236 in the 11 August 1998 list.

#### Application under r.432

Counsel for the plaintiff made a verbal application under r.432 to bring the plaintiff's application notwithstanding that the proceedings have been set down for hearing in the week commencing 2 November 1998.

The proceedings were set down on 10 March 1998. Exhibit A which alerted the plaintiff to question the privilege claimed by the fourth defendant in respect of the paragraph 2.1 documents, was not received by the plaintiff until 12 May 1998. Since then the issue has been the subject of correspondence and negotiation between the parties, culminating in the filing of the plaintiff's

application when the parties could not resolve the issue. The Court should exercise its discretion to achieve the interests of justice but there should be some basis or material on which it is appropriate for the Court to exercise its discretion in favour of the plaintiff (Fordham v XCentrex Communications Ltd (1996) 9 PRNZ 682. The issues which give rise to the plaintiff's application are issues which for the proper conduct of the proceedings and in the interests of justice should be determined by the Court and there are no circumstances or conduct of the plaintiff that would disentitle the plaintiff to the relief sought.

Leave is accordingly granted to bring the plaintiff's application.

### The Paragraph 2.1 documents

I have perused these documents which include exhibit A. I rule that the paragraph 2.1 documents (excluding exhibit A) are privileged. They attract privilege under the "dominant purpose" test for litigation privilege adopted by the Court of Appeal in Guardian Royal Exchange Assurance of New Zealand Limited v Stuart [1985] 1 NZLR 596. They all came into existence after litigation was notified by the plaintiff on 1 November 1996, and some post-date the filing of the proceedings on 8 November 1996. I consider the dominant purpose for their preparation to be the enabling of the fourth defendant's legal advisers both external and internal to conduct the litigation or advise the fourth defendant regarding litigation.

However, they do not attract solicitor/client privilege as claimed in paragraph 2.1 of the 18 March 1997 list and paragraph 2 of the 11 August 1998 list.

Leave is granted to the fourth defendant to file and serve within 7 days of the date of this judgment an amended supplementary list of documents duly verified claiming privilege in respect of the paragraph 2.1 documents (other than exhibit A) on the grounds of litigation privilege.

### Exhibit A

I do not consider the fourth defendant is entitled to maintain a claim to privilege in relation to exhibit A. I reach that conclusion on two grounds -

- (a) Privilege was not claimed in respect of exhibit A in the 18 March 1997 list. Exhibit A was not referred to in that list; it was not referred to or included as an attachment or note to any listed document. This is in contrast to other numbered documents in that list which referred to attachments or enclosures. I do not accept the claim of the fourth defendant that exhibit A forms part of, or is included in, or is an attachment to document 228 in the 18 March 1997 list (document 228 being incorrectly dated 25 November 1996 in the 18 March 1997 list and subsequently corrected by letter from Russell McVeagh to Lowndes Jordan to 15 November 1996). The 18 March 1997 list gave no indication of the existence of exhibit A by express or implied reference. My perusal of the paragraph 2.1 documents and in particular document 228/236 to which it is claimed exhibit A was an attachment, does not support that claim.

Consequently, when exhibit A was forwarded in error to counsel for the plaintiff and the second and third defendants on 12 May 1998, they would have had no way of knowing by reference to the 18 March 1997 list that the document existed or was claimed to be privileged. Furthermore, on its

face the document does not support the claim for privilege. It is an internal memorandum of the fourth defendant from Hugh Boyle to John Boyd, Chief Manager Audit and Security for the fourth defendant, reporting on bank audit procedures in relation to the First Mobile Limited account and the forged cheques. It reviews internal bank procedures.

When Lowndes Jordan for the plaintiff received Exhibit A, they sent it directly to the plaintiff. It thus came into the domain of the plaintiff without any claim to privilege. It was subsequently perused by counsel for the plaintiff who realised it was not the correct attachment to Russell McVeagh's letter of 12 May 1998 and brought the matter to the attention of Russell McVeagh.

This is not a case of a document to which privilege has been claimed, is agreed, or is clearly apparent from the document itself, being released by mistake. The situation differs from that in National Insurance Co Limited v Whirlybird Holdings Limited [1994] 2 NZLR 513 where a privileged document was made available to the opposing side by mistake. The document was acknowledged to be a privileged document. The Court made appropriate orders to protect the privilege of the document. While such a course of action was entirely appropriate on the facts of that case, I consider that here the facts differ in important respects. The fourth defendant failed to make known to the plaintiff and the second and third defendants the claim for privilege it now maintains in respect of exhibit A, before that document was inadvertently placed in the hands of the plaintiff and their counsel. In KPMG Peat Marwick v Cory-Wright & Salmon Ltd (In Receivership and Liquidation) (1994) 7 PRNZ 549, where the Court was considering inadvertent disclosure of a privileged document, Cooke J said -



... in the end what the Court must search for is a just solution.

It does not seem to me a just solution that a party to litigation who releases a document to an opposing party without notifying a claim to privilege, where the document on its face is not one which would attract privilege, and the parties do not agree that it is privileged, can subsequently maintain and seek to have upheld a claim to privilege in respect of the document. That would undermine the integrity of the disclosure process. Any privilege that might have been maintained in respect of Exhibit A, was lost when it passed into the hands of the plaintiff.

- (b) I do not consider that exhibit A is a document which attracts litigation privilege. I do not regard that the document as falling within that category of documents prepared for the dominant purpose of enabling the fourth defendant's legal advisers to conduct or advise regarding the litigation. My perusal of the paragraph 2.1 documents and particularly document 228/236, the memorandum to Sir John Anderson, Chief Executive of the fourth defendant from John Boyd Chief Manager Audit and Security, to which it is claimed exhibit A was an attachment, confirms that exhibit A does not attract privilege under this head or any other head.

### **Inspection**

Exhibit A, having passed into the hands of the plaintiff and other parties in the circumstances outlined above, privilege has been lost. The plaintiff and other parties to the proceedings are entitled to inspect Exhibit A.

The fourth defendant is to make available for inspection by the plaintiff and other parties to the proceedings, exhibit A.

Costs

Costs are reserved.

Judith Patten, J