NZLR

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CP8/02

	BETWEEN	PHILIP HILTON JONES AND KPMG FINANCIAL SERVICES LIMITED Plaintiff
	AND	ROYAL PALM BEACH ESTATE LIMITED Defendant

Hearing: 14 September 2004

Appearances: N D Smith for Plaintiffs
M McKechnie for Defendant

Judgment: 17 September 2004

JUDGMENT OF ASSOCIATE JUDGE GENDALL

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Introduction

[1] The defendant applies for further and better discovery against the plaintiffs and for third party discovery against Hawridge Development Limited.

[2] The plaintiffs oppose the further and better discovery application. According to an affidavit of John Graham Clarke, a consultant to the defendant, tendered at the hearing of this application on 14 September 2004, Hawridge Development Limited opposes the third party discovery application.

[3] I will deal with each of these applications in turn.

Further and better discovery application

[4] As background to the current application, the plaintiffs had filed an earlier application for further and better discovery against the defendant and this was considered in a judgment issued in this proceeding by Master Lang (as he then was) on 17 December 2003.

[5] In that 17 December 2003 judgment, the plaintiffs succeeded in obtaining discovery orders with respect to most of a wide range of documents for which discovery was sought.

[6] The present application seeks discovery of additional documents consequent upon a recent report and assessment provided to the plaintiffs by John Morris Leonard, a chartered accountant and forensic accounting specialist. Mr Leonard's past experience apparently includes employment as a forensic accountant for the Serious Fraud Office.

[7] The plaintiffs note that Mr Leonard has considered the material obtained from the earlier discovery exercise and deposes that the further and better discovery now sought is required as being both relevant and necessary for the plaintiffs to progress their claim against the defendants and in particular for Mr Leonard to be able to properly assess the quantum of that claim.

[8] This application is made broadly in terms of Rules 300 and 312 of the High Court Rules. The third party discovery application is made pursuant to Rule 301. These all require discovery of documents relating to any matter in question in the proceeding, that is the discovered documents must be relevant.

[9] The long established test of relevance is that of Brett LJ in *Compagnie Financiere du Pacifique v Peruvian Guano Company* (1882) 11 QBD55 (CA) at page 63;

> It seems to me that every document relates to the matters in question in the action, which not only be evidence upon any issue but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.
>
> I have put in the words "either directly or indirectly" because it seems to me the document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences....

[10] This "train of inquiry" approach from the *Peruvian Guano* test has been the subject of some criticism by a number of Judges and commentators over the years. Some have suggested that the test results in a "monumentally inefficient" process and indeed the test has been the subject of recent judicial criticism in New Zealand in *Air New Zealand Limited v Auckland International Airport Limited* (High Court Auckland, Priestley J, 30 April 2001, MP 1634-SD00). In this case Priestley J noted that the documents under scrutiny in the *Peruvian Guano* case were few in number and significantly fewer than were likely to be involved in the case before him.

[11] Notwithstanding this, the Court of Appeal in *M.V.L.* [1999] 1 NZLR 747 at page 750 have referred to and implicitly adopted this test for relevance in New Zealand as set out in *Peruvian Guano* although in doing so it was noted that it is an "expansive" test.

[12] The plaintiffs' position here is that the further discovery sought is both relevant and necessary.

[13] Under Rule 312 a discovery order must be "necessary at the time when the order is made." As to the term "necessary", this has been interpreted to mean "reasonably necessary" – *F and L Valks Ltd v BNZ Officers Provident Association* [1996] 1 NZLR 735.

[14] The defendant's objection to the present application is upon the basis that it is both a "fishing" expedition and that the discovery sought is oppressive.

[15] In *AMP v Architectural Windows Limited* (1986) 2 PRNZ 510, Chilwell J in dealing with the suggestion that the exercise in that case was a fishing expedition stated at p.515:

> ... an applicant is "fishing" when he seeks to obtain information or documents by interrogatories or discovery in order to discover a cause of action different from that pleaded or in order to discovery circumstances which may or may not support a baseless or speculative cause of action.

[16] As to what may constitute an oppressive request for discovery, this was also considered in *AMP v Architectural Windows Limited* and in *Government Life Insurance v Unigroup Pacific Limited* (1988) 2 PRNZ 589.

[17] In the *AMP* decision Chilwell J at page 516 quoting the publication *Discovery* (1984) by the author, Bernard Cairns noted:

> Production of documents may be oppressive when a large bulk has to be produced and the work is not justified by the benefit that will be derived.

[18] It is the defendant's contention that this is precisely the situation here, particularly with respect to the request for a range of ledgers which I will deal with later in this judgment.

[19] Further, counsel for the defendant before me endeavoured to argue that the merits of the plaintiffs' substantive claim are thin and this, coupled with the plaintiffs' delay in seeking this further discovery must militate against the order for further and better discovery sought here.

[20] I now turn to deal with each of the seven categories for which the discovery order is sought.

Interest calculation documents

[21] Under paragraph 1(a) of their current application, the plaintiffs seek discovery of "documents recording the basis for the calculation of interest on the inter-company loans for the years 31/3/2000 – 31/3/2003 inclusive."

[22] As to this, the plaintiffs note at the outset that significantly, it was only as a result of the plaintiffs issuing these proceedings that the defendant then proceeded to calculate and charge interest on a range of inter-company loans it had made to other related entities in which the plaintiffs had no interest. Apparently the defendant had not previously done so.

[23] That interest has quite recently been charged and the plaintiffs submit that the documents sought are clearly relevant to their fourth cause of action relating to those inter-company loans.

[24] In particular, Mr Leonard, for the plaintiffs notes in his affidavit that the interest charge has not been compounded, nor has it been capitalised on an annual basis. To properly assess the quantum of the plaintiff's claim he suggests there should be further discovery of documentation recording the interest calculation dates and amounts and details of repayments made on the inter-company loans.

[25] In opposition, before me counsel for the defendant noted first that these interest charges have been the subject of audit by the company's auditors and that secondly, in any event the amount of any interest in question would be trivial in the general scheme of things, given the substantial benefits which the plaintiff has already obtained from its 10.5% minority shareholding in the defendant company. As to this counsel for the defendant suggested that over the years since their initial relatively modest investment in the company the plaintiffs had received gross dividend income from the defendant company of something approaching $2.6 million and the plaintiffs' current complaints must be seen in the light of this.

[26] Notwithstanding these factors, I am satisfied that in terms of the established *Peruvian Guano* test that the interest calculation documents sought are relevant in

that they may contain information that advances the plaintiff's case and they should therefore be disclosed. This source documentation will enable the plaintiffs to advance their quantum calculations relative to the fourth cause of action relating to the inter-company loans, given particularly that the interest calculations were made by the defendant retrospectively and perhaps only as a result of this proceeding being issued.

[27] Further, Master Lang (as he then was) at paragraph 14 of his 17 December 2003 judgment appeared to accept that details of these interest calculations were to be made available in any event with the accounts for the 2003 year.

[28] The plaintiff's application in so far as it seeks the documentation described in para 1(a) of the application therefore succeeds. An order is made that the defendant provide further and better discovery of documents recording the basis for the calculation of interest on the inter-company loans for the years 31/3/2000 – 31/3/2003 inclusive.

Dates, amounts and repayments made on inter-company loans

[29] Under paragraph 1(b) of the plaintiffs' application documentation illustrating the dates, amounts and repayments made on inter-company loans including loans made and repaid during any one annual period is sought.

[30] Again, the plaintiffs seek the source documentation as to these inter-company loans and contend that it is clearly relevant to their fourth cause of action relating to those loans made between the defendant and the other entities in which Mr Gregory Clarke was involved.

[31] Mr Leonard deposes (at paragraph 14) of his affidavit of 9 August 2004 that he requires the source documents to analyse and form his own view as to the loans and the various interest calculations.

[32] As I understand it, the defendant's opposition to discovering this material is that the decisions made concerning the loans were purely management decisions and in any event the financial consequences are generally insignificant.

[33] Notwithstanding this for similar reasons to those outlined in paras [26] and [27] above relating to the interest calculation documents and for the sake of providing to the plaintiffs a complete picture, I am satisfied that this source documentation in relation to the inter-company loans should be discovered.

[34] That said, the plaintiff's application seeking the documentation described in para 1(b) of the application also succeeds.

[35] An order is made that the defendant provides further and better discovery of documentation illustrating the dates, amounts and repayments made on inter-company loans including during any specific annual period (i.e. loans advanced and repaid during any one annual period).

Financial statements for the year ending 31 March 2003

[36] Before me, counsel for the defendant indicated that these accounts were available and would be provided. An order is now made pursuant to r307 of the High Court Rules for provision of these financial statements for the year ending 31 March 2003 to the plaintiffs for inspection.

Ledgers

[37] Under paragraph 1(d) of the plaintiffs' application discovery is sought of part of the defendant's ledgers for the periods 1/4/95 – 31/3/96 and 1/4/96 – 31/3/97 and the defendant's entire ledgers for the period from 1/4/98 – 31/3/03 inclusive.

[38] It appears that up to now the defendant has provided some complete ledgers and some incomplete ledgers. Mr Leonard in his 9 August 2004 affidavit deposes that this material is important source documentation and he requires to consider a full set of all the defendant's ledgers dating back to 1/4/95.

[39] The plaintiffs note that in terms of s22 Tax Administration Act, the defendant will have retained these records as source accounting records must be retained under that provision for a period of at least 7 years after the end of the income year to which they relate.

[40] In spite of this, the defendant opposes this part of the plaintiff's application on the basis that it would be "onerous" to provide.

[41] What is clear however is that the defendant has already provided certain ledger material including some ledger accounts for the years ending 31 March 1996 and 31 March 1997.

[42] Mr Leonard states that he requires the ledger information to assist with identification of any other inter-company loans or transactions made by the defendant. He notes in his affidavit that ledgers differ from cash books and that as a result they enable a different analysis and identification of information to be undertaken.

[43] Significantly, Master Lang (as he then was) in his 17 December 2003 judgment required the defendant to make available to the plaintiff its cash books as source documentation for the defendant's annual financial statements.

[44] In passing, the plaintiffs note that the cash books for the years 1 April 1997 to 31 March 1998 and 1 April 1998 to 2 September 1998 have still not been provided by the defendant despite being included in the December 2003 discovery orders. For the sake of completeness an order is now made pursuant to Rule 307 of the High Court Rules for production of these cash books.

[45] Given that the cash book material has been provided and that Mr Leonard as expert forensic accountant deposes to the need in addition to consider the ledgers as source material, again in applying the expansive *Peruvian Guano* test I am satisfied that an order should be made for discovery of the ledgers in question.

[46] Accordingly, an order is made that the defendant provide discovery of its ledgers for the periods:

i) 01/04/95 to 31/03/96 – ledger accounts for #278 006 to the end of the ledger;

ii) 01/04/96 to 31/03/97 – ledger accounts #685 & 686;

iii) 01/04/98 to 31/03/99 All ledgers;

iv) 01/04/99 to 31/03/00 All ledgers;

v) 01/04/00 to 31/03/01 All ledgers;

vi) 01/04/01 to 31/03/02 All ledgers;

vii) 01/04/02 to 31/03/03 All ledgers.

Losses suffered due to Mr Smith's actions

[47] In paragraph 1(e) of the plaintiffs' application they seek documentation illustrating the quantum and nature of losses suffered due to Mr Gareth Smith's actions together with any recoveries received by the defendant.

[48] Mr Smith was an employee of the defendant convicted for various fraud offences following misappropriation of funds belonging to the defendant.

[49] The plaintiffs note that they are not endeavouring to resurrect a fifth cause of action in their original Statement of Claim involving Mr Smith's conduct which, it is accepted, has been withdrawn. Under the present application rather they seek to obtain documentation to assess the treatment of any recovery of misappropriated moneys or compensation from the BNZ or the Sports Club as a result of Mr Smith's actions.

[50] The plaintiffs contend that this documentation is required so that they can properly assess whether or not there has been an equitable apportionment of any recoveries which have been received. In particular, the plaintiffs' position is that it would clearly have disadvantaged the minority shareholders of the defendant if sums that had been recovered were paid into Hawridge Development Limited or other entities in which Mr Clarke is involved instead of into the account of the defendant. As I see it there is merit in this argument.

[51] Again I accept that in terms of the *Peruvian Guano* test the documentation sought under this category may well lead the plaintiffs on a train of inquiry which could advance their own case or damage the case of the defendant and that accordingly discovery should be ordered.

[52] The plaintiff's application in so far as it seeks the documentation described in para 1(e) of the application therefore succeeds.

[53] An order is now made that the defendant discover documentation illustrating the quantum and nature of losses suffered due to Mr Gareth Smith's actions together with any recoveries received by the defendant.

Documents evidencing other transactions between the defendant and other Greg Clarke companies or entities

[54] In paragraph 1(f) of the plaintiffs' application they seek discovery of any documents evidencing any other transactions between the defendant and any other companies in which Mr Gregory Clarke has an interest, including Catalyst Condominiums Ltd, Catalyst (Highrise) Limited, Hawridge Developments Ltd, Game Tackle Supplies Ltd, Catalyst (Villages) Ltd, Catalyst Holdings Ltd, and Catalyst (Commercial) Ltd or any trust in which Mr Clarke or his family are beneficiaries.

[55] Mr Leonard, for the plaintiffs, in his affidavit deposes that, in his view, again this information is both relevant and necessary for advancing the plaintiffs' second

and fourth causes of action in their Statement of Claim. These relate to alleged undervalued property sales and the inter-company loans

[56] Mr John Clarke for the defendant responds in his September 2004 affidavit stating that "there are no further transactions of the kind described".

[57] The plaintiffs comment that this is difficult to accept given that Mr John Clarke has indicated that his involvement with the defendant started only in 1999 and that Mr Clarke is not himself a director of the defendant.

[58] If Mr Clarke's statement is accurate then, indeed, a discovery order to this effect would be complied with simply and quickly.

[59] In my view, given the allegations in the second and fourth causes of action in the Statement of Claim, the documents sought under this head must be seen as both necessary and relevant in terms of the *Peruvian Guano* test and should be the subject of a discovery order.

[60] Accordingly, an order is made that the defendant discover any documents evidencing any other transactions between the defendant and any other companies in which Mr Gregory Clarke has an interest include Catalyst Condominiums Ltd, Catalyst (Highrise) Ltd, Hawridge Developments Ltd, Game Tackle Supplies Ltd, Catalyst (Villages) Ltd, Catalyst Holdings Ltd and Catalyst (Commercial) Ltd or any trust in which Mr Clarke or his family are beneficiaries.

Cash books for the period 1/4/02 – 31/3/03

[61] As I understand the position the defendant notes that these cash books are available although the plaintiffs indicate they have not as yet been provided. An order for their production is now made pursuant to Rule 307 of the High Court Rules.

[62] I now turn to consider the second application before the Court which is an application by the plaintiff for third party discovery.

Third party discovery

[63] In paragraph 2 of the plaintiffs' application the plaintiffs seek a third party discovery order requiring Hawridge Development Limited to discover all documentation illustrating the quantum and nature of losses suffered due to Mr Smith's actions together with any recoveries received.

[64] On 16 August 2004, Hawridge Developments Limited was served with this application by the plaintiffs together with Mr Leonard's affidavit.

[65] No formal opposition to the application was filed.

[66] As I have noted at para [2] above, at the hearing on 14 September 2004 Mr Graham Clarke tendered a brief affidavit which stated "Hawridge opposes the application directed against it." As I understand it, this was the first indication that the third party discovery application was opposed. No other material or real explanation of this opposition was provided.

[67] Again, the plaintiffs contend that this part of their application had nothing to do with the previous cause of action with regard to Mr Gareth Smith which was discontinued. The plaintiffs seek this information here as they understand that settlement of the Smith misappropriations was also received by Hawridge Developments Limited and their expert, Mr Leonard, wishes to be in a position to analyse the apportionment of any settlement proceeds between the defendant and Hawridge Developments Ltd.

[68] First, given that Hawridge Developments Ltd, as I understand it, is a closely connected company to Mr Greg Clarke, and secondly, bearing in mind the lack of any real formal opposition to this application by Hawridge Developments Limited, and thirdly, for reasons similar to those outlined at paras [50] and [51] of this judgment relating to the further discovery order against the defendant in this area, I am satisfied that the plaintiff's third party discovery application here must succeed.

[69] A third party discovery order is made therefore that Hawridge Developments Ltd discover all documentation illustrating the quantum and nature of losses suffered due to Mr Smith's actions together with any recoveries received.

Conclusion

[70] It will be apparent that the plaintiffs' applications have been successful.

[71] Orders for further and better discovery were made at paragraphs [28], [35], [46], [53] and [60] of this judgment.

[72] Orders for production pursuant to Rule 307 of the High Court Rules were made at paragraphs [36], [44] and [61] of this judgment.

[73] An order for third party discovery against Hawridge Development Ltd was made at paragraph [69] of this judgment.

[74] As to costs, under the circumstances here, in my view it is appropriate that costs should lie where they fall. No order for costs is made.

[75] I say this because as Associate Judge Lang noted in a Minute he made in this proceeding on 19 July 2004 at paragraph 5:

> The plaintiffs also need to be aware that the affidavit (supporting this application) should also explain why the various categories of documents were not sought in the application that was filed in September 2003. This will have obvious relevance in relation to the issue of costs.

[76] It is clear to me that this further discovery has been necessitated by the late instruction of Mr Leonard as the plaintiffs' expert forensic accountant. This is notwithstanding that these proceedings were first issued against the defendant, as I understand it in April 2002.

[77] The plaintiff has put nothing before me to provide a real explanation and justification as to why the documents now sought were not part of the original discovery application filed one year ago.

[78] For these reasons, although the plaintiffs have succeeded here costs are to lie where they fall.

D I Gendall

Delivered at 12.30 pm on 17 September 2004