IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-2735

BETWEEN	RICHARD JOHN CURTIS First Plaintiff
AND	CURTIS HOLDINGS LIMITED Second Plaintiff
AND	RODNEY MARK GIBSON First Defendant
AND	HABODE IP LIMITED Second Defendant

Appearances: D.D. Vincent - Plaintiff
C. LaHatte - Defendant

Judgment: 2 November 2009 at 3.30 pm

JUDGMENT AS TO COSTS OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 2 November 2009 at 3.30 pm pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] On 17 August 2009 the plaintiffs, Richard John Curtis and Curtis Holdings Ltd, filed an amended application for orders first for further and better discovery against the first and second defendants, Rodney Mark Gibson and Habode IP Limited and secondly for orders for particular discovery against non-parties to the proceeding, namely Pindan Pty Limited and Formas Australia Pty Limited.

[2] The matter came before me on 6 October 2009, at which time the parties indicated that the discovery issues had been resolved for present purposes, but that issues of costs arose with respect to the application. I directed the parties to file memoranda on the costs question.

[3] Memoranda have now been filed. Counsel for the plaintiffs first, seeks scale costs for the application and for the two appearances on this matter and secondly, that the defendants, rather than the plaintiffs, pay the costs of the non-party. Counsel for the defendants argues that the plaintiffs' submissions are misconceived, and he seeks costs for opposing and responding to the plaintiffs' costs submissions.

Application for further and better discovery

[4] The substantive dispute in this proceeding concerns alleged breaches of fiduciary duties and copyright following a breakdown in a business relationship between the parties. The business relationship involved the design, manufacture, and marketing of a type of modular building system known as Habode. The factual background is traversed in detail in the judgment of Associate Judge Abbott dated 4 July 2008, and it is not necessary to repeat it here.

[5] In May 2009 the plaintiffs' solicitors requested further discovery in relation to the "Pindan" deal. Pindan Pty Limited is an Australian company. The defendants' solicitors advised that documentation held by Chapman Tripp in relation to this matter was being sought. In response, the plaintiffs' solicitors expressed concern that further documents were being sought from Chapman Tripp in light of previous discovery applications. By letter dated 30 June 2009 the defendants' solicitors wrote

to the plaintiffs' solicitors explaining the nature of the "Pindan" deal in the following way:

- The second defendant licences the international distribution rights for Habode to International Housing Solutions Limited ("IHSL").

- IHSL entered into an Australian distribution agreement with the Australian "Pindan" companies. Those companies sell and distribute Habode in Australia and pay a licensing fee to IHSL.

- IHSL then pays a licensing fee to the second defendant.

[6] The defendants' solicitors explained that the defendants had no control over IHSL or the Pindan companies, and so any documents which would be disclosed by the defendants would relate only to the second defendant's dealings with IHSL, and not IHSL's dealings with the Pindan companies.

[7] Pursuant to this correspondence, the defendants' solicitors provided a supplementary list of documents with copies of the documents on 28 July 2009. These documents detailed the amount of money paid by IHSL to the second defendant.

[8] The plaintiffs then formally applied for further discovery. In its amended application the plaintiffs relevantly sought discovery of:

- All documents relating to money received by the first and second defendants out of the Australian venture with Pindan Pty Limited and Habode (Australia) Pty Limited;

- All documents in relation to commercial transactions between the first and second defendants IHSL, IHOUZ, Pindan Pty Limited, and Habode Australia Pty Limited;

- Any further documents held by Chapman Tripp not yet included and arising subsequent to the previous affidavits of documents.

[9] The defendants filed a notice of opposition. They opposed the application on the basis that they had already provided the supplementary list of documents

showing the money paid from IHSL to the second defendant, and that the documents sought by the plaintiffs were between IHSL and the Pindan companies. The defendants were not in control of those documents, as had already been found by Associate Judge Abbott in his 4 July 2008 decision.

[10] Following further discussions with Chapman Tripp, the defendants then agreed to voluntarily provide some additional documentation concerning the first defendant's shareholding in IHSL. This apparently settled the matter as counsel for the parties indicated to me on 6 October 2009 that these discovery issues had been resolved.

[11] In his submission, counsel for the plaintiffs notes that there have been a long sequence of discovery applications in these proceedings, and that the latest application led to the disclosure of a substantial quantity of documents. Counsel says that this must indicate that the documents in question should have been disclosed without the need for an application. He argues they should have been provided in the original list, the supplementary list, or under the continuing disclosure obligations.

[12] Counsel for the defendants in his submission, argues that the plaintiffs have not succeeded in their application, and he contends that they had sought a wide range of documents in their application which they have not received from the defendants. Counsel further submits that the defendants acted reasonably in providing the voluntary disclosure that they did both before and after the plaintiffs filed the application. It is argued that the plaintiffs' application sought to reopen an issue already ruled on by Associate Judge Abbott on 4 July 2008. In that decision at para. 24, His Honour accepted that documents held by IHSL are not within the defendants' control, and that the defendants have no authority to disclose those documents.

[13] The subsequent disclosure was said to be made in order to further matters, and without prejudice to the defendants' opposition to the plaintiffs' application. Counsel for the defendants states that the defendants remain confident that if the matter went to argument, their grounds of opposition to the further discovery would be successful.

Application for particular discovery from non-parties

[14] The defendants were invited to consent to this application on 4 August 2009. Counsel for the plaintiff notes that instead, a notice of opposition was filed. It was not until several days before the matter was called on 6 October that the defendants advised the non-party that the documents could be disclosed. The plaintiffs contend they needed the documents to provide to their expert witness, a forensic accountant. Counsel submits that consent could have been provided when requested, or at the first call for this matter on 25 August 2009.

[15] As noted by counsel for the defendants, however, the defendants did not at any time oppose the application for non-party discovery. The notice of opposition filed by the defendants opposed the orders in relation to further discovery against them, as I have discussed above. Counsel for the defendants argues that there was no need to consent to the application when they did not oppose it, which is essentially the same thing, and that in any event, nothing the defendants did caused the matter to be called in Court more often than it had to be. The defendants' position is that they confirmed they had no opposition at the first call.

[16] Counsel for the defendants submits that in terms of consenting to disclosure, the only issue that the defendants were involved in was the waiving of confidentiality in relation to certain documents. He submits that his office liased constructively with Chapman Tripp on behalf of the non-party for that purpose. A specific request to waive confidentiality was received on 1 October 2009, responded to on Friday 2 October 2009, and confirmation that confidentiality was waived was provided on Monday 5 October 2009. This is confirmed by email correspondence attached to the defendants' memorandum. As such, it is apparent that there was no delay from the date of request to the date of providing the waiver of confidentiality.

[17] A jurisdictional argument has also been raised by the defendants on this matter. It is understood that the non-party, who is voluntarily providing documents, maintains that the New Zealand High Court does not have the jurisdiction to order it, as an Australian company, to produce the documents. Counsel for the defendants states that this issue has not been tested. However, if there was no jurisdiction to grant the order for discovery against the non-party, then, counsel argues, there is

similarly no jurisdiction for the court to order the defendants to pay any costs in respect of it. As to this argument counsel for the plaintiffs contends:

> "However, they have chosen to consent or waive confidentiality to enable the discovery to take place. They are therefore stuck with the decision to oppose, and the additional work required of the plaintiffs in the absence of consent."

[18] Counsel for the defendants notes that r 8.27 of the High Court Rules provides that the Court may, if it thinks just, order the applicant to pay the expenses of the party from whom the order is sought. He submits that there is no rule, and no authority counsel discovered, such that the other party to a proceeding can be ordered to pay the expenses of a discovery process commenced against a non-party by the applicant. It is said that the Court's inherent jurisdiction does not empower the Court to make an order against the defendants in these circumstances. Further, r 8.27 requires an order of the Court first. The disclosure here he notes is voluntary. Counsel submits that where there is no order for discovery there is, arguably, no jurisdiction for an order as to how expenses are to be met.

[19] Counsel for the defendants submits that the plaintiffs' argument with regard to this matter is completely misconceived, and he contends that the plaintiffs should be ordered to pay a modest sum as costs in favour of the defendants, for the expense of opposing and responding to this issue.

Discussion

[20] As to the application for discovery against the defendants, as I see the position it cannot be said that it is clearly the case that the defendants opposition to discovery was without merit. The defendants voluntarily provided additional disclosure without prejudice to their opposition to the plaintiffs' application, apparently in the interests of moving matters along. This disclosure appears to have settled the matter and prevented the need for argument on the issue. In these circumstances I am not convinced that the defendants' disclosure is necessarily evidence of the weakness of their opposition. The plaintiff has not succeeded in any application and in my view, it would not be appropriate to award the plaintiffs costs on the basis of the defendants' voluntary disclosure.

[21] The defendants at no point opposed the application for third party discovery. Counsel for the plaintiffs states at para 4 of his memorandum:

> "… the plaintiff seeks the costs in relation to the nonparty discovery. The defendant protests, suggesting that they could have consented to the provision of the documents from the nonparty, but it was not until the solicitor for the nonparty contacted them, that they actually agreed to waive the confidentiality provisions and permit the nonparty to make disclosure."

[22] The application for non-party discovery was primarily a matter between the plaintiffs and the non-party. The application was never opposed by the defendants. The correspondence indicates that the plaintiffs and the non-party reached an agreement on this matter between themselves on 1 October 2009, which was then sent to the defendants' solicitors, who immediately provided the requested waiver of confidentiality. The plaintiffs wrongly characterise the notice of opposition as being in response to the application for non-party discovery. It is not clear that a failure to "consent" is of any significance in circumstances where the defendants did not oppose the application and provided a waiver of confidentiality when asked, nor that a consent by the defendants would have prevented the non-party from incurring any costs or consulting a lawyer. The first plaintiff in his 3 August 2009 affidavit exhibits a letter from a solicitor for the non-party dated 23 July 2009 stating that for reasons of confidentiality, they were unable to assist with the plaintiffs' enquiry. However, it was not until 6 October 2009 that the Court was notified that the non-party had agreed to disclosure subject to the defendants' agreement; and it was not until 1 October 2009 that an agreement between the non-party and the plaintiffs was forwarded to the defendants' solicitors with a request for a waiver of confidentiality. In these circumstances it is not necessary to consider the defendants' jurisdictional arguments.

[23] I am satisfied that the plaintiffs' submissions in this regard were misconceived. However, in my view these have not involved the argument of any complex issues and no appearances on costs have been required. In those circumstances, I find it is not necessary to award costs to the defendant on the present costs application.

Result

[24] Costs between the parties on this matter are to lie where they fall. The non-party has voluntarily provided disclosure to the plaintiffs' on the condition that its

reasonable costs are paid. That is a matter between the plaintiffs and the non-party, and I reject the plaintiffs' submission that the defendant should be responsible for any part of those costs.

'Associate Judge D.I. Gendall'