IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2011-470-997
[2013] NZHC 1685

BETWEEN		SUISSE INTERNATIONAL LIMITED Plaintiff
AND		BEVERLEY JEAN MONK Defendant

Hearing: 18 June 2013

Appearances: Mr A M Swan for Plaintiff
Mr Dalkie for Defendant

Judgment: 3 July 2013

JUDGMENT OF ASSOCIATE JUDGE J P DOOGE

This judgment was delivered by me on
***3.07.13 at 5 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

[1] This judgment concerns applications made by the defendant, Ms Monk. The defendant applies for particular discovery and seeks discovery from third parties. The plaintiff has not paid the third tranche of security for costs and the defendant seeks an order that that be paid. The plaintiff, Suisse International Limited, applies to inspect the defendant's documents. I will deal with the plaintiff's application first.

Application of the plaintiff to inspect defendant's documents

[2] I gave a direction that inspection of documents was to be completed by 5 April 2013. The plaintiff has been attempting to inspect the defendant's documents but the defendant has attached conditions to that activity. The defendant requires the plaintiff to pay the costs of photocopying the inspection documents before she will provide them. This is notwithstanding that counsel for the plaintiff has given an undertaking to meet payment of any reasonable charges.

[3] The position that the defendant takes is that the plaintiff is financially unreliable and is impecunious. The defendant apparently relies upon the fact that the plaintiff has yet to complete payment of the security for costs which has been ordered in the proceeding. The defendant does not assert that she does not have the means to fund the photocopying of the documents to get the inspection underway. Rather, her anxiety is that if she pays for the photocopying, she will not be able to recover from the plaintiff.

[4] I think it would be regrettable if the point was reached where counsel's undertakings to meet costs of this kind would not be seen to provide adequate protection to the opposite party. I have no doubt that in the circumstances of this case the fact that Mr Swan has given an undertaking will protect the position of the defendant.

[5] On the other hand, there does not seem to be any justification for requiring that the plaintiff be given, in effect, credit, or any significant time to meet the costs of photocopying. I regret that it is necessary for the Court to involve itself in the

detail of these arrangements but unless that is done it would seem that the parties will be deadlocked. The orders I make are these:

a) counsel for the defendant is to advise what the photocopying cost is within two days of the date of this judgment;

b) counsel for the plaintiff is to either pay that amount on uplifting the documents or is to undertake that the exact amount sought by the defendant will be paid within seven days of uplifting the documents;

c) any dispute about the reasonableness of the photocopying charges will not be a matter excusing non-compliance with the undertaking to meet the photocopying costs;

d) if there is any dispute about the reasonableness of the photocopying costs it is to be referred to the registrar within 14 days of payment being made and the registrar is to make a determination on the issue. In the event of such a determination being made, it is to be complied with within a further seven days from the date when the registrar notifies the parties of what the determination is. By way of explanation, if the registrar concludes that the amount which has been charged for photocopying is not reasonable having regard to current rates charged for photocopying by commercial operators in Auckland, the defendant is to forthwith refund to the plaintiff the amount of any such excess charges.

Application of defendant for particular discovery

Particular discovery

[6] The defendant seeks particular discovery and the application which she has filed is in the following terms:

A. that the plaintiff make further and better discovery of:-

(i) all of its solicitor's files in connexion with the purchase and subsequent sale of real property at Willis Street in Wellington;

(ii) its bank statements for the period January 1, 2001 until March 31, 2003;

(iii) the gst returns and income tax returns of the plaintiff from March 31, 2001 until March 31, 2003;

(iv) the financial statement of the plaintiff for the years ended March 31, 2001 until March 31, 2003.

[7] In this regard, I accept the submission that Mr Swan made for the plaintiff that applications of this kind must be justified in terms of r 8.19 High Court Rules which is to the following effect:

> [8.19 Order for particular discovery against party after proceeding commenced
>
> If at any stage of the proceeding it appears to a Judge, from evidence or from the nature or circumstances of the case or from any document filed in the proceeding, that there are grounds for believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered, the Judge may order that party—
>
> (a) to file an affidavit stating—
> (i) whether the documents are or have been in the party's control; and
> (ii) if they have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control and who now has control of them; and
> (b) to serve the affidavit on the other party or parties; and
> (c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the other party or parties.**]**

[8] The plaintiff has given discovery but the defendant considers the discovery to have been insufficient.

[9] I do not intend to rehearse the factual background to the dispute between the parties. A sufficient account of the matters in dispute can be found in the judgment that I issued 19 September 2012 concerning the summary judgment application.[1]

[10] The basis of the plaintiff's claim is straightforward enough. It says that in 2002, the plaintiff company, then under the control of a third party, Mr Sharma,

[1] *Suisse International Limited v Monk* [2012] NZHC 2416.

made a payment to the defendant of $500,000 to which she was not entitled. That payment was made out of the trust account of the solicitor's then acting for the plaintiff and was paid out of the deposit which had been lodged in relation to the sale of the property which was located in Wellington. The plaintiff's position is that the defendant had no entitlement to be paid those amounts.

[11] The defendant, on the other hand, says that her entitlement to be paid the $500,000 arose from other transactions which she entered into with either the plaintiff or other companies in the same group of companies to which the plaintiff belongs. Those companies are what were called the "Watt Group" group of companies.

[12] The defendant wants to obtain copies of a wide group of documents (set out at [6] above) which relate to transactions which she says justified the payment of the $500,000 to her. Because this is an application for particular discovery, and because the starting point is always to examine the relevance of the documents in respect of which discovery is sought, attention was directed to the pleadings. It is at this point that the application by the defendant runs into serious difficulties. The amended statement of defence states at paragraph 4(b):

> (b) ... The money was paid in reduction of loan advances made to the plaintiff and or companies associated with the plaintiff and controlled by Mr Reginald Watt and collaterally secured by the plaintiff.

[13] The pleading lacks the following basic elements:

a) amounts and dates of advances and the terms upon which they were to be repaid;

b) who it was that made the advances;

c) the necessary linkage to establish how it is the case that the plaintiff came to be repaying the loan of another party.

[14] An unparticularised pleading of the kind which the defendant puts forward in this case is unsatisfactory. It does not comply with HCR 5.48(5). In order to comply with the rule, the pleading ought as a minimum to have set out what advances were made.

[15] The position of the defendant is that the circumstances of the payment of the $500,000, which is the kernel of the claim which the plaintiff brings, must have been evidenced by documents. It was submitted that a payment made out of the lawyers' trust account of this scale must have generated some documents, and it is those documents which the defendant is entitled to have discovery of. I accept that this inference of fact which the defendant relies upon is a valid one. The question of its strength is however another issue. That is to say, while the defendant is entitled to rely upon an inference of this kind, it can be overcome by other evidence including inferences to the opposite effect.

[16] Quite apart from the fact that the pleadings of the defendant are vague and uncommunicative to the point where it is impossible to decide issues of relevance, there are other grounds upon which I would decline the application. It is possible that the solicitors' records from acting in connection with the Willis Street transaction, which is the subject of the application for particular discovery, may have some relevance to the defendant's claim that she was entitled to the $500,000 in reduction of claims that she had made to the company. However, while the applicant does not need to prove that there are such documents in existence, there must be grounds for belief that there are such documents. I do not accept that it is anything more than a bare possibility that there are documents which the plaintiff ought to have discovered.

[17] The application for particular discovery is therefore declined.

Application as it relates to the third party Watt companies

[18] Paragraph 1A(i) of the defendant's application contains the first order which the defendant seeks and it is in the following terms:

> <u>Australasian Investments Proprietary Limited</u>

> The solicitor's and other files relating to and concerning the funding for 138 Victoria Street, and its subsequent sale, including the payout of the mortgagors to Harts Contributory Mortgages Nominee Ltd and Gold Band Finance Ltd.

[19] The other subparagraphs of the application relate to other companies in the Watt Group of companies and solicitor's files relating to funding for various properties and loans in a similar vein to the above. Ms Monk's affidavit says that her companies, MTI and RIL, did business with the Watt companies. While recording that the payment of $500,000 was made to her in November 2002 she says that she has:

> No recollection whatsoever of this payment anymore than any other I received at the time for repayment of the loan monies lent out by one or other of the companies I controlled as director. By 2002 and for some time afterwards my companies would have lent out between 25-30 loans at any one time.

[20] She makes numerous complaints about the inadequacy of the discovery which the plaintiff has provided.

[21] The Court is invited to infer on the basis of this evidence that it is likely that there will be discoverable documents which are relevant to the pleading concerning the $500,000 being in repayment of one of the loans. It is also apparently implied that Australasian Investments Proprietary Limited and six of the Watt companies ended with an overall liability of $500,000 owing to the defendant through their dealings with her.

[22] I do not consider that the necessary relevance to a matter in issue in the case has been established. The question of relevance is not to be assessed by the applicant giving an affidavit containing the opinion that such discovery as is sought would be relevant. Another way of looking at the application is that it is fishing for a defence which has not yet been identified and pleaded.

[23] Counsel for the defendant emphasised the difficulties that his client faces in opposing an application brought in respect of a transaction which took place 11 years ago. While it may be true that the defendant does face difficulties, an application for non-party discovery can only be granted in cases where the

applicant is able to bring him/herself within the requirements of the rules and principles which govern such applications. I do not consider that she is able to do so.

[24] Apart from the application relating to the Australasian Investments Proprietary Limited file, some of the applications relate to specific loans which the defendant apparently alleges she made to one of the Watt companies. But in the end, individual loan transactions would not be enough to assist the defendant in establishing what I understand to be her defence. She effectively seeks that a wide range of documents evidencing the overall trading history between two groups of companies should be disclosed so that the resulting balance can be proved which was owing to her and which justified her receiving and retaining the $500,000. In addition to problems of relevance as measured against the present form of the pleadings, there must be real concerns about the extent of the discovery required and the difficulty of accessing the documents so long after the event.

[25] But the main reason why I intend to decline the application is the difficulty in establishing relevance against the backdrop of vague and bland pleadings which do not comply with the rules. There is a responsibility on an applicant who wishes to obtain discovery to present to the Court a clear factual narrative which would result in the Court being justified in granting the legal remedies sought. There is insufficient particularisation of the defendant's affirmative defence to enable the Court to decide in a rational way whether there are relevant documents under the control of the plaintiff which have not been discovered. There are also other difficulties which stand in the way of granting the application as the following discussion indicates.

[26] I accept that it is not necessary for the defendant/applicant to establish on the balance of probabilities that there are relevant documents which have not been discovered. There need only be some ground upon which it might reasonably be supposed that there could be documents in that category. The defendant has not established that there are grounds for a belief that there are relevant documents which would assist the defendant to establish her defence which have not been discovered.

[27] There are additional grounds of opposition advanced by the plaintiff and they have to do with the plaintiff's assertion that, in any event, it is not in control of the relevant documents.

[28] Mr Watt has filed an affidavit setting out opposition to the making of the order sought. He recounts in his affidavit that during the period when he was bankrupt from about 2001 to July 2004, the Watt companies were under the control of a Mr Sharma who, while not a director, effectively managed their affairs. Mr Watt takes the position that the payment of $500,000 which was made to the defendant in 2002 was made with the cooperation of, or at the instigation of, Mr Sharma and that as he, Mr Sharma, had no authority to approve such a payment, the plaintiff company was under no obligation to make the payment that it did.

[29] Mr Watt brought litigation against Mr Sharma in 2005. In the course of those proceedings the Court appointed an expert from the accounting firm Grant Thornton to investigate the accounts of the companies. As part of that litigation, Mr Watt sought copies of the companies' documents from Dyer Whitechurch ("Dyer"), and from Mr Sharma. Some documents were forthcoming from those two entities and also from the defendant. The produced documents were passed on by Mr Watt to his new solicitors, Ellis Gould. He says that those documents were, in turn, provided to Grant Thornton to enable them to carry out their tasks. He says that both Ellis Gould and Grant Thornton made further attempts to recover additional documents with limited success. He says that he does not have access to the documents which the defendant seeks discovery of. Mr Watt says that Grant Thornton never completed its "audit" of the company accounts because the funds that were required for that work were not supplied.

[30] Mr Lyne, a partner in Grant Thornton, gave an affidavit in the proceeding that Mr Watt brought against Mr Sharma. His affidavit broadly confirms that Grant Thornton declined to provide the report that was required of it because of the fact that it was unpaid. Mr Lyne said that there were no existing financial accounts or records other than the primary records and that it was going to be necessary to compile new financial statements from scratch. He said that he had been trying to obtain additional documents from Mr Sharma, Dyer, and the defendant. He

described the defendant as being one of the main sources of finance for the property transactions which the 18 "entities" controlled by Mr Watt carried out. He said that his progress had been hindered by the lack of response from third parties from whom he had sought documents including the parties whose names I have already mentioned.

[31] There was a dispute about the documents that had been left with Ellis Gould. There is little doubt that Ellis Gould at one stage held the documents belonging to Mr Watt and some of the Watt entities. The defendant asserts that Mr Watt picked up all the documents from Ellis Gould in 2012. That is disputed by the plaintiff. It is correct that affidavit evidence has been given that the defendant's counsel made an enquiry of Ellis Gould but the response to the enquiry was not put in evidence. Therefore the position with respect to the Ellis Gould documents is that there is some evidence available that documents were uplifted from Dyer and given into the possession of Ellis Gould, where they were held subject to an undertaking which that firm gave to the Court.

[32] Counsel for the defendant produced at the hearing before me on 18 June 2013 a letter from Dyer in which it was explained that:

> Between April and July 2007 all files held by the firm in respect of companies/entities controlled by Mr Watt were given to the school and the school had provided an undertaking to the court on 21 February 2007 in relation to retention of those files. We believe those files would still be with Ellis Gould.

[33] The applications for particular discovery and non-party discovery were brought on the grounds that the documents sought were in the possession of Mr Watt. Mr Swan submitted that Mr Watt had established that the plaintiff does not have control over any of the documents sought. However, Mr Dalkie submitted that documents did not need to be in the actual possession of Mr Watt in order for the application to be granted. All that was required was that the documents be under his control. Mr Dalkie tended to use that concept of the documents being under the control of Mr Watt interchangeably with the documents being under the control of the plaintiff. Given that Mr Watt is the sole director of the plaintiff that assumption would be reasonable.

[34] Mr Swan did not disagree with that approach. Strictly speaking, it is not necessary for me to go on and consider the question of whether the classes of documents in regard to which discovery is sought were under the control of the plaintiff.

[35] The evidence which has been produced to the Court concerned documents in the possession of Ellis Gould, Dyer and Grant Thornton. In case it is of assistance to the parties when contemplating their future obligations to make discovery in this proceeding, I will set out my views briefly.

[36] There can be little doubt that as the former solicitor acting for the plaintiff, Dyer must hold any documents that are actually in its possession at the direction of the company. To that extent, any documents held by Dyer would be under the control of the plaintiff. However, because there is no adequate evidence that documents relevant to the present dispute are held by Dyer, the issue of control does not arise.

[37] So far as Ellis Gould is concerned, documents held by the firm as the former solicitors acting for the plaintiff would relevantly be under the control of the plaintiff. But there is no reasonable basis upon which the Court could conclude that there are relevant documents in that group that have not been discovered. That is to say, even if it were relevant to establishing the course of trading between the parties which gave rise to the overall alleged liability owing to the plaintiff, it does not follow that because the solicitors at some point held documents on behalf of the clients that they must be documents which have a bearing upon the present dispute. A mere possibility that there might be some additional documents is not sufficient.[2]

[38] The next category is the documents held by Grant Thornton. Even though Grant Thornton's status was that of a court-appointed expert, that does not necessarily displace the possibility that a party such as the plaintiff which had provided funding for the expert's collection of the documents cannot seek original documents produced as the product of such collected documents be made available.

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[2] *Southborne Investments Ltd v Greenmount Manufacturing Ltd* HC Auckland CIV-2005-404-6675, 12 June 2008 at [42].

It would not be inconsistent with the obligations of the expert to make the documents available subject to the following considerations.

[39] The court-appointed expert ought not to take any steps that would impede it in carrying out its obligations to the Court. It may be the case that there are restrictions upon how the party in possession of the documents can deal with them. Just as there are limitations upon documents obtained by compulsion under the Court's discovery process,[3] it may be arguable that documents which a party provides to a court expert are similarly provided on an involuntary basis and ought not to be made available for collateral purposes. However in the absence of argument that that is the case, I will not consider that element further. A more real problem is the fact that Grant Thornton have asserted a lien over the documents and that it is not practicable for the plaintiff, given its impecuniosity, to meet the terms of the liability owed to Grant Thornton and so obtain the release of the documents. I am told that the amount charged by Grant Thornton for what turned into a complex and time-consuming job was in the order of $200,000. It is not clear just how much of those invoiced amounts remain unpaid. But any substantial amount would constitute a barrier to the plaintiff being able to obtain copies of documents by securing their release from the lien. Documents in that category therefore cannot be viewed as being under the control of the plaintiff.

Security for costs

[40] The third tranche of the security for costs has yet to be paid. I reserved the question of the date upon which that payment was to be made when I made the original order. The plaintiff's counsel, Mr Swan, submitted that the final payment should not be required until the defendant was obliged to provide briefs of evidence for trial. It would not be until then, Mr Swan submitted, that the defendant would be required to carry out any further steps in the proceedings.

[41] On the other hand, given that there have been delays in providing the earlier two tranches of security (being delays of between a month and two months) I think

[3] See for example r 8.30(4) High Court Rules, which states that a party who obtains a document for inspection may use that document only for the purposes of the proceeding and *Hunter Grain Limited v Price* HC Tauranga CIV-2008-470-192, 23 April 2010 at [35] – [38].

it would be unwise to leave the provision of the final tranche until close to the trial. There is a substantial risk that the plaintiff will again be in arrears based upon performance to date. For that reason I direct that the third tranche of security is to be made available by 2 August 2013.

Conclusions

[42] The conclusions I have reached and orders are as follows:

a) The plaintiff must pay the costs of photocopying on the terms specified at [5].

b) The defendant's pleading lacks the necessary particularisation for the Court to determine whether the documents sought in the application for particular discovery and those sought from third party Watt companies are relevant to a matter in issue in the case. The application for particular discovery is dismissed. In addition, there are concerns about the extent of discovery required and the difficulty of accessing the documents so long after the event.

c) The application for non-party discovery is dismissed. The defendant has not established that there are grounds for believing that relevant documents exist which have not been discovered.

d) The third tranche of security for costs is to be paid by 2 August 2013

Costs

[43] The parties should confer on the matter of costs. If they are not able to agree they should file memoranda not exceeding four pages on each side within 10 working days of the date of this judgment.

J.P. Doogue
Associate Judge