31/86

SUPREME COURT OF VICTORIA

PALMDALE INSURANCE LTD (in liq.) v L GROLLO & Co PTY LTD & ORS

Marks J

26 May, 27 June 1986 — [1987] VicRp 8; [1987] VR 113

PROCEDURE – CIVIL PROCEEDINGS – REQUEST FOR DISCOVERY OF DOCUMENTS – DOCUMENTS HELD BY GOVERNMENT DEPARTMENTS – WHETHER IN "POSSESSION, CUSTODY OR POWER" OF DEFENDANT – MEANING OF "POWER" – EXTENT OF OBLIGATION TO DISCOVER: *RULES OF SUPREME COURT*, Ch I, O31, R12; Ch II, O14, RR5, 6.

(1) In answer to a request for discovery a party is obliged to identify precisely what documents are, and have been that party's possession or power.

(2) Where documents brought into existence by a party have been lodged with a Government Department, and that party has a legal enforceable right to inspect them, the documents may be said to be within that party's "power".

***Lonrho Ltd v Shell Petroleum Co Ltd & Anor* (1980) 1 WLR 627, distinguished.**

(3) In the affidavit of discovery, a party is required to state what attempts have been made to obtain the documents requested by the other party for inspection.

MARKS J: [1] In the action the plaintiff seeks to recover from the defendants shortfalls in premiums alleged to be due under an employer's indemnity policy of insurance current between 30th March 1976 and 30th March 1979. Under the policy the premiums were to be calculated by reference to a percentage of wages and salaries, the percentage varying according to specified classes of employees, for example, 1.32% in relation to managerial and clerical staff, 9.33% in relation to paviors, etc. etc.

[2] Issues include the existence of any shortfall alternatively the quantum. Their resolution depends on ascertainment of what the defendants actually paid their employees in each such specified class. It is obvious that the records of the defendants bearing on these issues are critical and that such records might reasonably include, in the absence of other more satisfactory material, the income tax and payroll tax returns of the defendants during the relevant period.

In paragraph 5 of his affidavit upon 19th May 1986 Geoffrey David Boret, a manager in the employ of the defendant companies, said:-

> "That as appears in the Second Schedule the defendants referred to therein have had, but have not now in their possession or power the documents with the said categories. The factual assertions contained in the schedule are to the best of my knowledge information and belief true and correct."

Paragraph 1 of the Second Schedule states:-

> "Originals of taxation returns and payroll tax records referred to in the First Schedule were submitted to the Departments concerned and are believed to be in the possession power and control of those Departments."

Otherwise the deponent discovered and made available some copy records in relation to two defendants for the period between 1st July 1978 and 30th June 1980 and copy returns in relation to another defendant for the period 1st July 1979 to 30th June 1980. The Second Schedule otherwise contains a substantial description of an unsuccessful search for other copy taxation and payroll returns.

[3] Pursuant to a direction I gave on 14th February 1986, the solicitors for the plaintiff requested the defendants by letter dated 17th February 1986 that they give discovery (*inter alia*) of their payroll tax records and taxation returns including income tax returns, group certificates

and group certificates and reconciliation statements for periods covering those referred to in the statement of claim.

It is common ground that the affidavit of Boret to which I have referred did not give the discovery sought. It was submitted on behalf of the plaintiff that the affidavit was deficient in failing firstly, to identify precisely the returns of each defendant said to have been lodged with the relevant Department and secondly, to disclose the result of any enquiry and inspection of the original documents said to be "in the possession, power and control" of those Departments.

The entire argument revolved around the payroll and income tax returns, originals of which may be presently held by the relevant Commonwealth and State Departments. It was submitted by Mr Phipps, of counsel that the defendants were not obliged to take any step to make available to the plaintiff copies of the returns over which they say they have no power or control. Mr Jopling, for the plaintiff, submitted that by virtue of the provisions of the *Freedom of Information Acts*, State and Commonwealth, the defendants could obtain inspection of the returns by **[4]** exercise of the enforceable rights given thereunder, make copies and provide them to the plaintiff.

The sole issue which was argued before me related to my power to make orders in respect of documents or records held by the Government departments concerned.

It must be said at the outset that on any view the Affidavit of Discovery on behalf of the defendants fails to comply strictly with what is required by Order 31, Rule 12, in that it does not identify precisely what payroll and taxation returns at what time, in respect of what defendants, were furnished to the appropriate Commissioners. It is conceded that the defendants are obliged by the Rules to state in the first place what documents have been in their possession or power. This has not meaningfully been done in relation to the subject returns. The substantial argument however, was based on the assumption that the originals of all the relevant returns are with the departments concerned but that no order can be made against the defendants to discover them or provide inspection. It was this matter by and large which was debated. It was submitted on behalf of the plaintiff that the obligation of the defendants is to make discovery, alternatively, to state on oath results of any application for access to the relevant documents. It was submitted on behalf of the defendants that no such orders were available and the defendants owed no such obligation.

[5] Substantial argument turned on what was said by Lord Diplock speaking in the House of Lords in *Lonrho Ltd v Shell Petroleum Co Ltd & Anor* [1980] QB 358; (1980) 1 WLR 627 at pp635 and following. Mr Phipps on behalf of the defendants, submitted that the obligation of his clients was merely to discover documents in its "possession, custody or power". Documents with Government Departments were certainly not in their possession or custody and there remained only the question of determining what was meant by the word "power" in the Rules of Court. In that regard he relied on the words of Lord Diplock to the effect that the expression "power" must mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else (p635). Mr Phipps contended that no such enforceable right has been demonstrated and denied that his clients were given such right under the *Freedom of Information Act*.

After the close of argument, counsel for the plaintiff alerted me to a number of Federal Court and Administrative Appeals Tribunal decisions which suggested that such an enforceable right might indeed exist. I refer to *Kavvadias v The Commonwealth Ombudsman (No. 1)* [1984] FCA 55; (1984) 1 FCR 80; (1984) 52 ALR 728; (1984) 6 ALD 47; *News Corporation Limited v The National Companies and Securities Commission* [1984] FCA 36; (1984) 52 ALR 277; 8 ACLR 593; 2 ACLC 202; 6 ALD 83; (1984) 1 FCR 64; *Kavvadias v The Commonwealth Ombudsman (No.2)* [1984] FCA 179; (1984) 2 FCR 64; 54 ALR 285; 6 ALD 198; *Re Mann v Australian Taxation Office* (1985) 3 AAR 261; (1985) 16 ATR 630; (1985) 7 ALD 698; *Re Swiss Aluminium Australia Limited v The Commissioner of Taxation* (1985) 8 ALD 159; (1985) 3 AAR 466; 16 ATR 880. It is unnecessary to discuss these authorities as in my view they show sufficiently that there is a real likelihood that the defendants would be provided access to the subject records should they request it. It is not to the point whether I think these authorities are good law.

Similarly, I do not consider it is to the point, as was submitted by Mr Phipps, that an

order by this Court would have the effect of compelling the defendants to make applications at its expense under the *Freedom of Information Act*. Matters of expense can be taken care of by appropriate order. The question is whether the defendants are obliged to do more than they have to give discovery of documents that they admit have been in their possession.

The matter must, in my view, be considered in stages. Firstly, the defendants are obliged to make an Affidavit of Discovery in accordance with the Rules. Its first task is to identify precisely what documents were in their possession and now are not. It is obvious that originals of returns are not now in their possession. Each defendant however, must identify what returns it lodged in relation to the subject period and the times of lodging. Next, the defendants must state, or it must be stated on their behalf; whether any and what attempts have been made to obtain the documents for inspection by the plaintiff. **[7]** These attempts must include seeking permission to inspect the records and take copies which might be made available to the plaintiff.

In my view the full reach of the meaning of the word "power" has not been settled by what was said by Lord Diplock in *Lonrho*. His Lordship's observations are to be understood in the context of the particular facts with which the House was there concerned. The subject documents had never been in the possession of the defendants. They belonged to subsidiaries the majority of which were in countries where the local law made it a criminal offence to disclose them. In the one instance where a subsidiary was not so constrained it would have been necessary to achieve "power" over the documents by alteration of the articles of the head company.

Lord Diplock, with whom the other members of the House agreed, emphasized that he was not concerned with the law generally of discovery but with the special facts of that case. In pages 636-7, His Lordship said:–

> "In dismissing the subsidiary's appeal on its own special facts, I expressly decline any invitation to roam any further into the general law of discovery. In particular, I say nothing about one man companies in which a natural person and/or his nominees are the sole shareholders and directors. It may be that, depending upon their own particular facts, different considerations may apply to these."

Here, indeed, the facts are very different from those of *Lonrho*. The documents in question were brought into existence by the defendants. They were their documents and necessarily in their possession before **[8]** lodgement. *Prima facie* they have a legal enforceable right to inspect them.

In the 19th century case of *Taylor v Rundell* [1841] EngR 256; 41 ER 429 at p433; [1841] Cr & Ph 104 Lyndhurst LC said:-

> "If it is in your power to give the discovery you must give it; if not, you must show that you have done your best to produce the means of giving it."

And later –

> "The facts may be such as to make it impossible for the defendants to give discovery; because they may, in applying for an inspection of the documents, be refused, but they have not said so; and as to the answer being full, it is made not full by the defendants own statement. It is full in terms; but the defendants state that which they obviously state for the purpose of explaining what they mean when they say that they cannot make discovery, namely, that there are documents in the possession of a company of which the defendants are members and trustees, and also in the hands of the company's agent in America. They do not say that they ever applied for an inspection of those documents and were refused. They merely say somebody else has got the documents."

There is however, another aspect. In my opinion my powers to make orders in relation to discovery in relation to cases in the Commercial List are not confined to Chapter I, Order 31. There are also powers in Chapter II, Order 14 particularly Rule 5(3) which is as follows:–

> "Upon the hearing or further hearing of a summons for directions the judge in charge may give such directions with respect to any interlocutory step or proceeding and otherwise as in his opinion are expedient for the just and speedy determination of the matters in issue in the action."

I also refer to Order 14, Rule 6(1)(d) which gives a general discretion as to directions in relation to discovery.

[9] It is convenient that relevant documents be revealed before trial. If not, the plaintiff may well have to proceed to trial if only to achieve the subpoena of witnesses from the departments concerned to produce them. In that way unnecessary expense and delay may well occur. In my opinion, the circumstances of this case call for the exercise of the discretion conferred particularly under Chapter II, Order 14 to make orders and give directions somewhat unusual in nature but which increase the chance of "just and speedy determination of the matters in issue".

In my opinion, there is clear power under Chapter I, Order 31 to make the order contained in paragraph 1 hereunder. Otherwise if the power to make the remaining orders and directions is not to be found in Chapter I, I make them nevertheless in reliance on the powers to which I have referred to Chapter II, Order 14. There will be orders and directions.

Solicitors for the plaintiff: Phillips Fox.
Solicitors for the defendants: Keith Hercules and Sons.
