

judgment 1.1113

IN THE PRIVY COUNCIL No.21 of 1972

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N:

NEW ZEALAND NETHERLANDS SOCIETY
" ORANJE" INCORPORATED Appellant

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
28 MAY 1974
25 RUSSELL SQUARE
LONDON W.C.1

- and -

LAURENTIUS CORNELIS KUYSS and
THE WINDMILL POST LIMITED Respondents

CASE FOR THE RESPONDENTS

Record

10 1. This is an appeal from the Judgment of the Court p. 150
of Appeal of New Zealand given on the 7th April,
1971, dismissing an appeal against the Judgment
of the Honourable Mr. Justice Speight delivered in the
Supreme Court at Auckland, New Zealand, on the 22nd
day of December, 1969. On the Judgment of the p.130
Honourable Mr. Justice Speight the following Order:
was made:

20 "It is ordered and adjudged that a Writ of p.135 Line 13
Injunction do issue to the Co-Plaintiffs to to Line 18
restrain the Defendant by itself or its
agents or any of them perpetually from
publishing, distributing or selling a
newspaper under the name or style of The
Windmill Post or any of the words "Windmill"
or "Post" or from the use of the large
Windmill device on the front page."

2. The Respondents were the Co-Plaintiffs in the
original Supreme Court proceedings and the Appellant
was the Defendant in the proceedings.

30 3. The Respondents in the Supreme Court had issued
proceedings for injunction using the special procedure
contained in Rules 466 and 467 of the Code of Civil
Procedure which provide as follows:

466: "Any person claiming the issue of a Writ of
Mandamus or a Writ of Injunction or a Writ of
Prohibition or an order under Rule 464 or
Rule 465 shall without issuing a Writ of
Summons file in the Court a statement of claim
setting out the facts upon which he bases his
claim to the relief sought to be obtained."

40 467: "The person filing any statement of claim under
Rules 466 and 466A may at any time thereafter
move upon his statement of claim, and any
affidavits filed in support thereof, for an order
in terms of the prayer of his statement, or for
such other order as the Court may consider him
entitled to."

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- p.9 to p.37 4. As the proceedings for injunction were on Notice of Motion, affidavits in support and in opposition to the proceedings were filed. Subsequently at the substantive hearing before Mr. Justice Speight the evidence was in large measure repeated and extended, and all deponents' were available for cross-examination.
- p.50 to p.128
- p.2
Line 21 to
Line 26 5. The Respondents comprise Laurentius Cornelis Kuys of Auckland, Company Director who is the Managing Director of The Windmill Post Limited, and the Windmill Post Limited. 10
- p.5 Line 5
to Line 6
p.97 to p.98
(Part II) The Appellant is a duly incorporated Society under The Incorporated Societies Act 1908 and its principal aims and objects are the "keeping alive of Dutch tradition and to maintain the cultural ties between The Netherlands and New Zealand."
- p.2 Line 32 6. The Respondent Kuy , alleged that some time in 1966 he took to himself the name "The Windmill Post" and that in December 1966 or January 1967 under that name he commenced an independent Dutch newspaper called "The Windmill Post" and commenced publication and circulation of this newspaper. 20
- p.55
Line 42 to
Line 60 7. That at the time of the newspaper coming into being the Respondent Kuys entered into an arrangement with the Appellant for the purchase of copies of the newspaper for distribution to members of the Appellant at a price of one shilling a copy and in return the Respondent Kuys agreed to publish items of news relevant to the Defendant's organisation and activities. 30
- p.60 Line 20
to Line 30
p.97
(Part II) 8. That at the time the agreement to supply and purchase copies of the newspaper was made, the Respondent Kuys was the Secretary of the proposed Society and later its official Secretary when it was incorporated on the 27th January 1967.
- p.60 Line 13
to Line 18 9. That between the months of January 1967 and July 1967 serious differences developed between the officers of the Appellant leading to the resignation of the Respondent Kuys from the Defendant Society in June 1967. 40
- p.1 and p.4
(Part II)
Exhibit "A"
and Exhibit
"B" 10. That in July 1967 and thereafter monthly to the date of the hearing before the Honourable Mr. Justice Speight, the Appellant commenced to publish a newspaper under the name "The Windmill Post" and in all material respects the Respondents' newspaper and the Appellant's newspaper were identical in style and format. 50
- p.2 11. As a result of the contemporaneous publication of such identical newspapers, the Respondents commenced proceedings for injunction as detailed above, alleging that the Appellant was passing off the Respondents' newspaper as its own.

12. The Appellant contends that by virtue of the Respondent Kuys holding the office of Secretary of the Appellant at all material times he was in a position of trust and owed a fiduciary duty to the Appellant. The Appellant has contended that this fiduciary relationship precluded him from owning the newspaper known as "The Windmill Post."

10 13. The Respondents contend that if a fiduciary relationship existed of the kind that would prevent the Respondents from creating or owning a newspaper in their own name, then there was in this case a specific dispensation from such fiduciary relationship permitting the ownership by the Respondents of the newspaper.

20 14. At the hearing before the Honourable Mr. Justice Speight a detailed investigation into the factual position between the parties, and in particular between the months of December 1966 and July 1967 was undertaken. The short point in issue was whether having regard to the relationship of the parties with one another and any contract between them, it could be said that the newspaper belonged to the Respondents or to the Appellant. The Respondents could not protect their property by injunction against passing off in the event that the property was not theirs beneficially. The Honourable Mr. Justice Speight after reviewing the evidence, said:

30 "The true situation I find to be that Kuys p.134 understood the arrangements made in January Line 1 to to be that he was authorised to start a 7 paper as his own enterprise. He bought out one other paper in the field. He had been already running the Society's earlier publication. which had collapsed. The others were luke-warm and unwilling to take any steps, but were happy to let him try. Nothing which was said or done in 40 December 1966 or January 1967 would have led him or an independent third party to believe otherwise."

15. On appeal the Honourable Mr. Justice Turner in his Judgment summarised the respective submissions by the Appellant and the Respondents as follows:

"Mr. Clark submitted as the essence of the matter that contract or no contract, Kuys p.141 at all material times owed a fiduciary duty Line 2 to to the Society by virtue of his position as Line 37 Secretary, and that the newspaper which was born from the conference of January 5th, 1967 was from the beginning and remained by reason of this fiduciary relationship, always the property of the Society.

To the appeal ultimately put forward before us on this succinct submission, Mr. Heron made one reply. This was that if - as he did not admit - Kuys stood before the conversations

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of January 5th in such a fiduciary relationship to the Society, that without those conversations he must have held any newspaper started by him as trustee for the Society, the effect of the conversations was to give him a dispensation from the fiduciary relationship, with the result that the newspaper born out of those conversations was from the beginning his property, and not, as would otherwise have been the case, that of the Society.

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I have no doubt that the two ultimate submissions made by Mr. Clark and Mr. Heron, summarised as above, posed the crucial question on which this appeal must turn."

Mr. Justice Turner summarised the effect of the Supreme Court Judgment as follows:

p. 142
Line 13 to
Line 18

"In a word I read the judgment, even though the words "fiduciary" or "dispensation" do not appear therein, as finding as a basic essential fact that the effect of the conversations of 5th January was to give Kuys a dispensation from the fiduciary duty which without that dispensation he might have owed. Once this conclusion is reached, the appeal must necessarily fail."

16. Again in the Judgment of Mr. Justice Haslam after considering a number of the factual matters which were advanced by both parties to indicate support for their contentions, said:

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p. 146
Line 21 to
Line 23

"I therefore agree that there was ample evidence to support the findings of the learned Judge that the Plaintiffs had discharged the onus of proof, and that this appeal must fail."

17. In the Judgment of the President of the Court of Appeal, Mr. Justice North said:

p. 148
Line 54 to
Line 62

"I agree that it might have been better if the learned Judge had said in express terms that Mr. Kuys had discharged the burden of showing that the fact that he was the Secretary of the Auckland Society and later of the National Society did not in the circumstances require him to hold that he was trustee of the newspaper and its title for the Society. Nevertheless, in result that is what I understand the learned Judge really decided. I should add that on my own examination of the facts I would undoubtedly have come to the same conclusion, for it is beyond my powers of credence to contemplate that Mr. Kuys would have been willing to incur all the risks which everybody knows are attendant on commencing the publication of a newspaper

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p. 149 Line 1
to Line 4

and then be obliged to hand over the newspaper to the Society at the end of six months if, as proved to be the case, he ceased to be the Secretary of the Society."

AND the Respondents humbly submit that the appeal should be dismissed with costs for the following among other

R E A S O N S

1. THAT the Respondents were under no fiduciary relationship of a kind which precluded the ownership of "The Windmill Post."
2. THAT if the Respondents were under a fiduciary relationship of the kind which would preclude the ownership by them of "The Windmill Post" then the Appellant had given a dispensation from such fiduciary relationship.
3. THAT the appeal is essentially against findings of fact and not of law.

ROBERT ALEXANDER HERON.

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Respondents

CASE FOR THE RESPONDENTS

SLAUGHTER & MAY,
35, Basinghall Street,
London EC2V 5DB
Agents for the Respondents.