Privy Council Appeal No. 21 of 1972

New Zealand Netherlands Society " Oranje " Incorporated *Appellant*

v.

Laurentius Cornelis Kuys and another – – – – *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH MARCH 1973

Present at the Hearing:

LORD WILBERFORCE

LORD HODSON

LORD PEARSON

LORD DIPLOCK

LORD SIMON OF GLAISDALE

[*Delivered by* LORD WILBERFORCE]

This is an appeal from a judgment of the Court of Appeal of New Zealand affirming a judgment in the Supreme Court at Auckland of Speight J. in favour of the present respondents. At the trial the learned judge granted the respondents, plaintiffs in the proceedings, a perpetual injunction restraining the appellant from publishing, distributing or selling a newspaper under the name or style of The Windmill Post or any use of the words " Windmill " or " Post " or from the use of the large windmill device on the front page. This was, in effect, relief against passing off, since the appellant was publishing a newspaper with the same title and device.

The litigation arises out of the existence and activities of the Dutch community of residents in New Zealand. To further their interests there was formed in 1949 the Netherlands Society " Oranje " Incorporated (predecessor of and not to be confused with the appellant Society). This was centred in Auckland, and may be referred to as the " Auckland Society ". The respondent Laurentius Cornelis Kuys joined this Society in 1962: he became a member of its committee and in 1963 its Secretary. In 1963 he started a group travel scheme whose purpose was to enable members to travel to the Netherlands at reduced rates. Also from 1963 the Society published a newsletter for the benefit of its members called " The Holland Bulletin ", of which Kuys was the original editor. By the end of 1966 the Bulletin was in serious financial difficulties such that it could not continue in its then form and the last number in fact appeared in December 1966.

Kuys, previously to this, had desired to establish a National Society of the Dutch in New Zealand and a proper newspaper on the lines of one published in Australia: this desire was shared by other members inciuding Mr. Dubois, the President of the Society; but Kuys was told more than once that to do so was financially impossible. In 1966 Kuys acquired the only other Dutch newspaper, the " New Zealand Hollander ", for £100 which, as the judge held, came out of his own resources. He took on a partner, Mr. I. L. Griffiths, not a member of the Auckland Society, and some time in 1966 Kuys and Griffiths fixed upon the name " Windmill Post " as a trade name for the export and import of goods. Griffiths was aware of Kuys' desire to start a newspaper. Towards the end of 1966 contacts had been made by Kuys or Griffiths with printers and other newspapers with a view to calculating the cost of publication.

On 5th January 1967 there was a meeting of members of the Dutch Community at the house of Mrs. Hoeberigs, at which Kuys and Dubois were present. At the trial there was a radical disagreement between Dubois and others representing the appellant Society on the one hand and Kuys and his witnesses on the other as to what was decided at this meeting. It is not disputed that it was agreed to form a new National Society of the Dutch community in New Zealand—this became the appellant Society which was incorporated on 27th January 1967. It is also not disputed that it was agreed to produce a newspaper to be called the Windmill Post. This was in fact produced first in February 1967 and later became the property of the second respondent, a company formed by Kuys and Griffiths. But there was a critical difference as to the terms on which the paper was to be administered.

The appellant's contentions, supported by the evidence of Dubois and one Renneberg, a committee member of the Auckland Society and later Treasurer of the appellant, were that it was agreed that the paper should be the property of the Society, that Kuys should be the editor and publisher, that in the first place the Society should not be under any financial responsibility for the paper but that the whole risk (of loss or profit) should be borne by Kuys who would look to sales and advertisements to make it pay; that for six months the Society should guarantee purchases by its members of 2,000 copies at 1/- per copy and finally that after six months the whole project should be reconsidered.

On his side Kuys' case was that, the former Bulletin being moribund, he, Kuys, should publish a new newspaper to be called " The Windmill Post " which should be his property; that the Society should have the right to publish in it the Society's news; that the Society would guarantee for six months the purchase of the new paper at 1/- per copy by 2,000 members; finally that at the end of six months these terms, including the question whether the Society would continue its support, would be renegotiated. (It will be noted that both versions refer to " the Society ", in disregard of the fact that the appellant was not at the time in existence. It must be taken to mean the Auckland Society and subsequently the appellant as its assignee. The expression " the Society " will be used hereafter in this sense.) The question which of these versions was correct was vital, and the entire case depends on it. Speight J. heard evidence from persons present at the meeting. He also heard evidence from persons present at a later meeting held in March 1967 at which the arrangements made in January were reported and again discussed. There was evidence, which the judge accepted, that at this March meeting complaints were made as to the Society's prospective liability for newspaper losses, so that attention was focused upon the exact

terms of the January arrangement. One of the witnesses, whose evidence the judge found to be acceptable, made a tape recording at the time of the March discussions which he transcribed in typescript.

On this evidence, the learned trial judge accepted the evidence of Kuys and his witnesses and rejected that of the appellant Society. He held that the newspaper was the property initially of Kuys and later of his assignee the second respondent. It being proved that the appellant, who had parted from Kuys in June 1967, was seeking to publish a rival newspaper under the same name and emblem, he granted an injunction in the terms already mentioned. On appeal, the Court of Appeal, after reviewing all the facts, endorsed the judge's findings and affirmed his judgment.

Before their Lordships, Counsel for the appellant conceded, necessarily, that no attack was possible upon the concurrent findings of primary fact in the Courts below. But it was submitted that the judgment of Speight J. was defective in law. The appellant, as defendant to the proceedings, had pleaded, it was correctly said, that Kuys, by virtue of his position as Secretary and member of Committee of the Society, was in a fiduciary position. He had acquired the ownership of the newspaper while he held this position and by virtue of it. Admittedly it would be possible for the Society to release him from accountability and to allow him to keep the ownership for himself: but this could only be done by an arrangement freely arrived at after full disclosure of all relevant matters. There had not, it was said, been that full disclosure. Moreover, it was contended that Kuys' conduct in a number of respects was such as, in any event, should disentitle him to the equitable remedy of injunction.

Their Lordships are in agreement with these contentions in so far as they stress the necessity to give consideration to the nature of the relationship between Kuys and the Society and to the question whether that relationship imposed upon him, in relation to the particular transaction under investigation, duties of a fiduciary character. The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords (*Boardman v. Phipps* [1967] 2 A.C. 46). It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship. As Lord Upjohn said in *Boardman v. Phipps* (*supra*)

> "Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case" (l.c. p. 123).

The present case is concerned with an officer of an incorporated, non-profit making society. Kuys was not paid for his services but he was a trusted employee; and he was ready to agree that he had duties of trust and confidence placed in him. On the other hand the scope of his responsibility and the dividing line between that and his own personal interests were loosely defined. It appears from the evidence that he was able to run a small insurance business of his own: also it appears that he was permitted a personal interest in the Group Travel Service which he managed for the Society. A person in his position may be

in a fiduciary position *quoad* a part of his activities and not *quoad* other parts: each transaction, or group of transactions, must be looked at. Their Lordships find support for this approach in the English Court of Appeal's judgments in *Tufton v. Sperni* [1952] 2 T.L.R. 516, particularly in that of Jenkins L.J., and in the High Court of Australia's judgment in *Birtchnell v. Equity Trustees, Executors and Agency Company Limited* (1929) 42 C.L.R. 384. Dixon J. said:

> "The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, . . . but also from the course of dealing actually pursued by the firm." (l.c. p. 408).

This was said in the context of a partnership but the principle must be of general application.

It is, then, necessary to consider the relationship of Kuys and the Society in regard to the publication of a newspaper. In their Lordships' opinion, there was at least the potentiality of a fiduciary relationship. The Auckland Society had for several years published the Newsheet called the Holland Bulletin—this was at the centre of its activity. Kuys was for some time the editor of the Bulletin and there is no doubt that he was so in his capacity as Secretary. It was contemplated that in one form or another the new Society, which became the appellant Society, should be associated with a newspaper: its stated objects included taking over the publication of the Holland Bulletin. It was obvious and essential that any newspaper would largely depend for its viability upon subscriptions by the Society's members and that they would subscribe partly at least because it contained the Society's news.

Another source of finance would be advertising, and there was evidence that the main likely clients, the airlines, were interested in supporting the Society. Thus, in these circumstances, if Kuys had proceeded to launch a newspaper, without any special arrangement, there would be at the least a case for saying that to claim or retain the benefit of it for himself would be a breach of fiduciary duty.

On the other hand, what has already been said as to Kuys' position and responsibilities, left open the way for a special arrangement, and, equally, such an arrangement was, on the judge's findings, made. It was straightforward and, in the circumstances, reasonable. The Bulletin could not be carried on: to produce a newspaper obviously involved the risk of loss. The contract limited the Society's commitment to the purchase of 2,000 copies at 1/- each for six months. Kuys was to secure what advertising and other income he could to cover all outgoings and his own remuneration. He was not to come down upon the Society for any losses. As one witness said, he was not to cry on its shoulder. The newspaper was to be his for ill and for good.

There was much discussion at the trial as to what was to happen at the end of the period of six months. But the judge's finding (supported by the evidence) was that the reconsideration then to be given to the situation was limited to the amount, if any, of the Society's support. That the ownership of the newspaper should revert to the Society was certainly not agreed, and if it was not agreed, either, in terms, that the ownership should remain with Kuys, no other conclusion was possible from the terms which were agreed. There was therefore, in their Lordships' opinion, established a set of facts which would fully displace any potential fiduciary obligation on Kuys to hold the newspaper in trust for the Society.

The learned judge did not in terms deal with the case in this way. He simply found the facts regarding the contract made in January 1967 and treated them as disposing of the case. Their Lordships would not disagree with the Court of Appeal, or indeed with the appellant's argument before the Board, that this somewhat telescoped approach may be open to criticism. But they also agree with the conclusions of the Court of Appeal, which were reached after a careful re-examination of the evidence, that the essential findings had been made.

As was said by Turner J.—

> ". . . . 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."

And North P. said this—

> "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 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 secretary of the Society."

On the main portion of this case their Lordships are in agreement with the Court of Appeal.

The remaining points may be briefly dealt with. First, as to disclosure. Their Lordships entirely accept, as a matter of law, that if an arrangement is to stand, whereby a particular transaction, which would otherwise come within a person's fiduciary duty, is to be exempted from it, there must be full and frank disclosure of all material facts. But the appellant was quite unable to point to any matter relevant to the establishment of the newspaper or which, had it been disclosed, could have affected the Society's decision that, on the facts found, had not been disclosed by Kuys. It is apparent from the judgments that even if the argument as to non-disclosure was advanced in the Courts below it was not accepted. There are no grounds on which it can be accepted in this appeal.

Secondly, as to the granting of an equitable remedy to the respondents. Their Lordships again endorse the validity of the maxim that seekers of equity must come with clean hands. A number of authorities, in various fields, were properly cited. But the appellant's argument, in this part of the case, fails on the facts. A large number of facts were ventilated at the trial, in an attempt to show that Kuys had been guilty of irregularities of various kinds in his management of the Society's affairs. Some of these are, their Lordships understand, the subject of further litigation. Their Lordships do not find it appropriate to do more than endorse the opinions of the Courts below that nothing, relevant to the transaction in question, of sufficient gravity, was established to entitle their Lordships to take a different view, on what is a matter of discretion,

from the Courts below. The one matter which was proved was the unjustified use in the respondents' newspaper of an emblem belonging to the Society (a small Windmill), but this was expressly excluded from the relief granted. In their Lordships' opinion the injunction granted should be upheld.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

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In the Privy Council

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DELIVERED BY
LORD WILBERFORCE

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