

1. ROBERT TWEEDIE MACAHILL
2. PACIFIC CROWN VIDEO LIMITED

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v.

1. METRO-GOLDWYN-MAYER INCORPORATED
2. PARAMOUNT PICTURES CORPORATION
3. WALT DISNEY PRODUCTIONS
4. WARNER BROS. INCORPORATED
5. WARNER BROS. DISTRIBUTING CORPORATION

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[COURT OF APPEAL, Gould, V. P., Marsack J.A., Spring J. A.]

### Civil Jurisdiction

*Letters rogatory—orders for attendance of witnesses—whether witnesses includes parties—orders for production of documents—whether such orders may validly include documents seized by the police following execution of search warrant.*

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S. M. Koya for the Appellant.

F. M. K. Sherani for the Respondent.

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Date of Hearing: 15 November 1979

Delivery of Judgment: 28 November 1979

On the 22nd May 1979 the Supreme Court made an *ex parte* order on the affidavit of Mr Sherani Barrister and Solicitor of the Court appointing an Examiner to examine and record the evidence of a number of persons named or specified.

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The application was made pursuant to Letters Rogatory issued by a United States District Court in two civil actions commenced in that court. Despite the heading on the order the appropriate Act from which Fiji courts drew authority was the Foreign Tribunals Evidence Act. On 20 June 1979 a further order was made disposing of certain matters thereafter not in issue. The Court excluded from the earlier order witnesses who were on record as defendants. The Crown was heard on the application and submitted it could not, because of pending criminal proceedings in Fiji, make available original exhibits in the custody of the Crown but were prepared to make available copies.

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*Held:* A plaintiff in Fiji without the authority of a Court Order (not to be made without good reason) was not entitled to the copies of documents held by the police.

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To the extent that the Court had authorized the production of copies of material seized, it acted pursuant to a judicial discretion given by the Foreign Tribunals Act. In doing so it gave insufficient attention to factors to which the learned Judge of Appeal referred. Therefore the orders of 20 and 26 June 1979 were set aside. Leave to call S/IP. C. B. Singh to produce the property seized or to the Examiner to take in evidence copies should not have been given. Appeal allowed.

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## Cases Referred to:

- A *Ocean Timber Transportation Ltd. v. Attorney-General of Hong Kong*. H.K.H.C. Action No. 1967 of 1978.  
*Penn-Texas Corporation v. Anstalt* (1963) 1 All E.R. 258.  
*Penn-Texas Corporation v. Murat Anstalt* (No. 2) (1964) 2 All E.R. 594.  
*American Express Warehousing v. Doe* (1967) Lloyd's List Law Reports 222  
*Radio Corporation of America v. Rauland Corporation* (1956) 1 All E.R. 260.
- B *Re Westinghouse Electric Corporation* (1977) 3 All E.R. 703.  
*Rio Tinto Zinc Corporation v. Westinghouse* (1978) 1 All E.R. 434.  
*Eccles & Co. v. Louisville & Nashville Railroad Company* (1912) 1 K.B. 135.  
*The Queen v. Lushington Ex Parte Otto* (1894) 1 Q.B. 420.  
*EMI Ltd. v. Pandit* (1975) 1 All E.R. 418.  
*Anton Piller KG v. Manufacturing Processes Ltd.* (1976) 1 All E.R. 779.

## C GOULD V.P.:

## Judgment of the Court

- On the 22nd May 1979, Tuivaga J. in the Supreme Court of Fiji, made an ex parte order on the affidavit of Mr F. M. K. Sherani, a Barrister and Solicitor of the Court, appointing an Examiner to examine and record the evidence of a number of named or specified persons. The application was made by Mr Sherani pursuant to Letters Rogatory issued by the United States District Court, Eastern District of Washington, in two civil actions commenced in that Court. The order was headed In the Matter of the Evidence by Commission Act, 1859, but the appropriate Act from which the courts in Fiji draw their authority in such matters in the case of non-Commonwealth countries is the Foreign Tribunals Evidence Act, 1856; this was noticed and corrected in a subsequent order to which reference will be made. Under Order 70 r.2 of the Supreme Court Practice which (as it appears in the Annual Practice 1967, and with certain modifications) is in force in Fiji, the application was correctly made ex parte. The persons mentioned in the order were two Assistant Superintendents of Fiji Police, Ashok Singh and Chandar Bhan Singh, Robert Macahill, Matt Wilson both of Suva, and two Fiji companies, Pacific Crown Video Limited and Matt Wilson Limited each by its proper representatives.

- F It would appear that there were two actions in the United States with different plaintiffs but the same defendants. One is No. C78-360, brought by Metro-Goldwyn-Mayer Inc. and others and the other, No. C78-243, brought by Universal City Studios and others: the defendants in each case are Edward J. Chopot and Victoria Ann Schmit both of Washington, the said Robert Macahill and Pacific Crown Video Ltd. (of which Macahill is the Managing Director) and the said Matt Wilson and Matt Wilson Ltd.

- G According to an affidavit by R. T. Macahill the action No. C78-360 (to which we were informed that the parties wish to refer as embracing both actions) was commenced in February 1979, and the relevant documents served in March 1979. In November and December 1978, and February 1979, certain video cassettes, papers and documents were seized by the police under search warrants issued under section 104 of the Criminal Procedure Code. This, we were informed by counsel for the appellants, was done on the complaint of the plaintiffs in the United States actions, the present respondents. In the actions mentioned, the plaintiffs claim ownership of

various copyrights, damages and injunctions from the defendants under various heads; infringement of copyright, conspiracy, violation of the Lanham Act, and unfair competition. A

The materials seized under the search warrants were not at the premises of Pacific Crown Video Limited or of R. T. Macahill but at those of Matt Wilson Limited, Ali & Co., and Air Pacific Limited all of Suva. However, we have not been asked to make any point of this and in the written submissions of Mr Koya made for an earlier application, but which he also made part of his argument in this Court, he referred to the various items seized as belonging to Pacific Crown Video Limited. B

On the 3rd May 1979 the police instituted criminal proceedings against R. T. Macahill in the Magistrate's Court, Suva, charging him with 14 counts of infringement under the United Kingdom Copyright Act, 1956, as applied to Fiji by the Copyright (Fiji) Order, 1961. It is in connection with these proceedings that the articles seized have been held. Prior to this, on the 22nd March 1979 Pacific Video commenced an action in this Court, No. 125 of 1979, against the Attorney-General of Fiji and the Commissioner of Police seeking inter alia a declaration that the search warrants "whereby the police seized plaintiff's properties" at the premises mentioned, were invalid and the seizure and detention was unlawful. Alternatively it was prayed that the Commissioner be restrained from parting with possession of or releasing the property without leave of the Court. According to affidavit of R. T. Macahill, in an interlocutory matter on the 10th April 1979, the Crown Solicitor gave an undertaking, to the Court that the property would not be parted with until after the investigation of the criminal offences and thereafter they would be dealt with according to law. C D

Mr Sherani's affidavit in support of his application for the ex parte order, exhibited, among other documents, an Order Authorising Commissions signed by a United States District Judge, and the Letters Rogatory. It will be sufficient to quote one passage from each. First from the Order— E

"THIS COURT HEREBY REQUESTS the Sovereign Nation of Fiji, and all of its governmental officials and law enforcement officials, to honor said commissions and to make available for sworn testimony upon deposition, in Fiji, any and all witnesses whose deposition testimony is required by one or more of the parties hereto, and the produce depositions, identify through testimony, and permit the copying of business records, correspondence, papers, video tapes, and all other documents and tangible things seized as aforesaid or otherwise obtained by the Royal Fiji Police or any other agency of the Fijian Government and to produce any other documents or tangible things relating to the copying, shipping or commercial exhibition of motion pictures by any defendant herein, and/or to the transmittal or sharing of revenues derived or expenses incurred in such activities." F G

Secondly, from the Letters Rogatory, after reciting the action—

"...and it has been suggested to us that justice cannot be completely done between said parties without the testimony of: H

Ashok Singh, Assistant Superintendent of the Fijian Police;

- A Chandar Bhan Singh, Assistant Superintendant of the Fijian Police;  
Other officers of the Fijian Police, or employees of the Fijian Government, the identities of whom are presently unknown to plaintiffs, having knowledge of the seizure of video tapes, business records, other documents and tangible things from Robert Macahill, Pacific Crown Video, Pacific Crown Aviation, Matt Wilson, Matt Wilson Limited or from the offices or premises of any of them, or of the seizure from any third persons of any of the said items, which had been provided by, or directed to or from, any of the persons or companies above listed;
- B Robert Macahill;  
Matt Wilson; and
- C Other witnesses, whose testimony may be required by one or more of the parties to this action.
- witnesses who reside within your jurisdiction;
- D WE, THEREFORE, REQUEST that in the interest of justice you cause by your proper and usual process, said witnesses to appear before you or some competent officer authorized by you, commencing April 30, 1979, or as soon thereafter as feasible, at a place or places to be determined by you or said officer authorized by you, then and there to answer on oral examination, under oath, the questions propounded by the attorneys for the parties above—described, to produce upon said examination and identify video tapes, business records, other documents and tangible things seized as aforesaid by the Fijian Police or by any other agency of the Fijian Government and to produce any other documents and tangible things relating to the copying, shipping, or commercial exhibition of motion pictures by any defendant herein, and that you will cause said testimonies to be reduced to writing, and such video tapes, business records, other documents and tangible things or electronically reproduced copies thereof, that said witnesses may produce or identify to be marked as exhibits, and to cause said testimonies and exhibits to be returned to us under cover duly sealed and under your hand and seal, addressed to the Clerk of the United States District Court for the Eastern District of Washington, United States of America, and we shall be ready and willing to do the same for you in a similar case when required."
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- G For completeness, it should be noted that the ex parte order, as well as ordering the witnesses to attend before the Examiner, required them to produce the "documents marked Schedule B appearing hereunder and as may be required of them by the Order of the said Examiner made at the instance of either the Plaintiff/Petitioners or the Defendants/Respondents herein." Schedule B was limited to documents from the 1st January 1976, to the present, but otherwise was in the widest possible terms relating to the plaintiffs and defendants, their dealings with one another, with the various copyrights and the subject matter thereof and (by way of example only) the shipment, sale, renting, exhibiting and financing thereof. The final paragraph, No. 13, of Schedule B specifies all documents seized by the Fiji Police from any of the defendants in the United States actions or their represen-
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tatives or from their offices or premises, which appears to negative any idea that the widely cast other provisions of Schedule B are to be limited by implication to the subject matter of those seizures.

On the 20th June 1979, Tuivaga J., made a further order, *inter partes*, on the application of the present appellants, R. T. Macahill and Pacific Crown Video Limited and in so doing exercised his powers under Order 32 rule 6 of the Rules of the Supreme Court. The order dealt with a number of matters. Having dealt with the confusion between the Evidence by Commission Act, 1859, and the Foreign Tribunals Evidence Act, 1856, the learned judge disposed of certain objections which had been made to the selection of the particular Examiner. Neither of these matters is now in issue. The order then proceeded to say that the scope of the *ex parte* order was wider than it ought to have been for the following reasons:—

“As I read the empowering provisions under which I have acted I noted that reference is only made to the examination of and taking of evidence from witnesses. In the context of those provisions I do not think one can properly equate witnesses with defendants in a same litigation. It was only late in these proceedings that I had become aware that certain people and firms who are residents of Fiji have been joined as defendants in the pending action before the United States District Court for the Eastern District of Washington. In the absence of any authority to the contrary I do not feel I have powers under the Foreign Tribunals Evidence Act 1856 and under Order 70 of the Rules of the Supreme Court to require Fiji residents who are on record as defendants in the American suits to appear and give evidence before the Examiner. This in my view accords perfectly with the accepted principle of sovereignty which is sacrosanct in each independent democratic country and nothing should be done to whittle it down. It seems clear that my original order will have to be revised and amended in the light of what I have said as to the contradistinction in legal parlance between a witness and defendant in the same suit.”

Counsel for the Crown had been heard on this application and took the position that while they could not, because of pending criminal proceedings in Fiji make available original exhibits in the custody of the Crown, they were prepared to make copies available if relevant and if so allowed, by the Court. The then applicants took objection to even copies being made available. On this question the order continues:—

“Having given this aspect of the case further consideration I feel that the matters required under Schedule ‘B’ may be too loosely drawn and may need to be firmly circumscribed. However, I see no legal objection in the light of observations made by the Crown representatives in these proceedings in allowing copies being made available by evidence on Commission provided the witnesses who were concerned in the seizure or procurement of the originals are able by oral testimony to identify copies of them as to be made part of their recorded evidence. This also applies equally well to any witnesses who might possibly be able to speak from their own personal knowledge of matters specified in Schedule ‘B’ from which copies could then be made available to the requesting Court. I based this ruling as before on the fact that the Examiner is for the purpose at hand to be regarded as merely a conduit, so to speak, through whom evidence of witnesses other than defendants would be channelled to the requesting court which may or may not accept the copies provided when the general issues under litigation between the parties are adjudicated upon.”



A The next part of the order deals with a submission that the ex parte order was a nullity because Mr Sherani, in his affidavit in support of it had failed to disclose certain matters. This has survived as a ground of appeal to this court and it is alleged that there was non-disclosure of the orders by the United States Court giving Mr Sherani authority to make the application, and also failure to disclose the pendency of Civil Action No. 125 of 1979, and Criminal Proceedings No. 1328 of 1979. The learned Judge dealt with the question of Mr Sherani's authority, considered that the application had been in order, and that at most it was a mere irregularity. We agree, B but in relation to both the matters complained of (there is no suggestion of any mala fides) it is quite clear that they were remedied before the hearing of the application for the inter partes order now under discussion. This order of the 20th June 1979, became the substantive and continuing order, and the earlier omissions, if they were such, have no effect on its validity. We therefore regard this matter as concluded.

C In the result, on the 20th June 1979, Tuivaga J. made an order which he summarised as follows:—

“For the reasons I have given I am constrained to revise and modify my ex parte Order of 22nd May 1979 and do so to the following extent:

- D (1) That Robert Tweedie Macahill and Pacific Crown Video Limited are not compellable to appear in the current proceedings before the Examiner appointed to take evidence on Commission.
- (2) That Matt Wilson and Matt Wilson Limited are likewise not compellable to appear before the Examiner.
- (3) Copies of matters specified in Schedule ‘B’ may be received in evidence by the Examiner through competent and compellable witnesses.
- E (4) That each side will bear its own costs of these proceedings.”

F The matter came before Tuivaga J. again on the 26th June 1979. Whether there was a misunderstanding or not, is not clear, but the Examiner issued a certificate that at a hearing on the 21st June 1979 Chandar Bhan Singh, one of the police witnesses, on advice, refused to produce items seized or copies thereof. The present respondents applied for a further order, which, after objection from the present appellants, was made in the following terms, though the learned Judge considered it hardly necessary in view of his order of the 20th June 1979:—

“IT IS FURTHER ORDERED THAT

- G (1) The Crown through S/IP C. B. Singh produce to the Examiner all cassettes and documents seized on the 16th, 20th and 21st November 1978 AND 20 December 1978, AND 27th February 1979.
- H (2) That the Examiner after submissions by Counsel take in evidence copies of such documents as requested by Counsel for the parties herein; and, that the Examiner after submissions by Counsel, take in evidence copies of such video tape cassettes, or portions thereof, as requested by Counsel for the parties herein. And that such copies shall be made by and on facilities provided by the Plaintiffs/Petitioners under the supervision of S/IP C. B. Singh.

- (3) That the original cassettes and documents be at all times in the custody of S/ IP. C. B. Singh and retained by him for production to the Magistrate's Court as directed by the Search Warrants." A

In coming to his conclusions on this order the learned Judge distinguished the case of *Ocean Timber Transportation Limited v. Attorney-General of Hong Kong*, to which we will have occasion to refer later in this judgment.

The present appeal names R. T. Macahill and Pacific Crown Video Limited as appellants. As we understand the matter from counsel by some agreement between the parties the litigation affects also the other two Fiji defendants, Matt Wilson and Matt Wilson Limited. We shall continue to use the general phrase "the appellants". The Notice of Appeal asks, in effect, that all three of the orders we have described, namely those of the 22nd May 20th June and 26th June by set aside. There is a cross appeal by the respondents (who are the plaintiffs in both the United States actions) asking that the order of the 20th June 1979, to the effect that R. T. Macahill and Pacific Crown Video Limited are not compellable to appear in the proceedings before the Examiner, be set aside. B C

It will be convenient to deal first with cross appeal as it will be relevant, in considering some aspects of the appeal itself, to know to what extent the orders appealed against remain effective.

Mr F.M.K. Sherani, who appeared for the respondents did not appear to urge his case very strongly. In logic, he submitted, a plaintiff should be able to call a defendant as a witness, but he had no direct authority. He relied upon *Penn-Texas Corporation v. Anstalt* [1963] 1 All E.R. 258 and *Penn-Texas Corporation v. Murat Anstalt* (No. 2) [1964] 1 All E.R. 594, but these cases do not assist; they are concerned with the jurisdiction to order an English company, which was not a party to the suit, to give evidence or to produce documents by its proper officers. The latter was permissible provided the documents were specified, it is suggested to the extent that would be required in a subpoena duces tecum. D E

Counsel relied upon the wording of the latter part of section 1 of the Foreign Tribunals Evidence Act, 1856; for future reference we shall set out here sections 1 and 5 of that Act. They read:—

"1. Where, upon an application for this purpose, it is made to appear to any court or judge having authority under this Act that any court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned court or of the court to which such judge belongs, or of such judge; it shall be lawful for such court or judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness persons named in such order, of such witness or witnesses accordingly; and it shall be lawful for the said Court or Judge, by the same order, or for such court or judge, or any other judge having authority under this Act, by any subsequent order to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other mat- F G H

A       ters connected therewith, as may appear reasonable and just; and any such order may be enforced in like manner as an order made by such court or judge in a cause depending in such court or before such judge."

B       "5. Provided also, that every person examined under any order made under this Act shall have the like right to refuse to answer questions tending to criminate himself, and other questions, which a witness in any cause pending in the court by which or by a judge whereof or before the judge by whom the order for examination was made would be entitled to; and that no person shall be compelled to produce under any such order as aforesaid any writing or other document that he would not be compellable to produce at a trial of such a cause."

C       Counsel relied upon the provision of the power in the latter part of section 1 to command the attendance of "any person, to be named in such order." The important words in the section are, however, "witness or witnesses", twice used, and we think Tuivaga J. was right in confining his attention to those words. Counsel further pointed out that a party could be interrogated and ordered to make discovery. He conceded, in the course of his argument, that he must rely on English practice in the matter and whether or not he is correct in this no evidence of a different practice in the territory of the issuing court has been put before us. There are references in the cases, which indicate that in some jurisdictions there are much wider rules. For example, Salmon L. J. in *American Express Warehousing v. Doe* (1967) Lloyd's List Law Reports 222 at 226, said:

E       "The rule of the District Court under which these letters rogatory were issued was Rule 26 relating to depositions and discovery. It is only necessary to read one short sentence.

E       Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes."

F       We would add that under English law the calling of a defendant by a plaintiff is not regarded as a legal impossibility—this conclusion is stated in *Gross on Evidence* (4th Edn.) p. 146, where it is said: "this means that, should he be minded to do so a plaintiff can compel a defendant to testify."

G       However, this may be, the real issue is whether the words "witness or witnesses" in section 1 of the Act were intended to include parties or to exclude them. A party may have the dual capacity, but when he is a witness it must almost invariably be on his own behalf. The fact that a party can be subjected to discovery by way of interrogatories or otherwise argues in favour of the narrower construction of the word as used in section 1. What can be obtained by way of discovery ought to be so obtained and there is no point in providing assistance to a foreign tribunal which it does not stand in need of. Beyond what could be obtained by discovery, little would be likely to be elicited, when it is recalled that the party calling would be tendering the witness as his own, raising questions of hostility and cross-examination, and much would be excluded under the head of privilege. In our opinion therefore in the context of the Foreign Tribunals Evidence Act, 1856, the word witness should not be



construed so as to include a party called by the opposite party. We have not been referred to any case where such a thing has been done.

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If we are wrong in this, we would support the learned Judge's order of the 20th June 1979, on the ground that to order R. T. Macahill in particular (and we have not been asked to differentiate) to give evidence in the circumstances shown, would be oppressive and unfair. The respondents commenced their civil proceedings and also instigated the search warrants resulting in criminal proceedings. While he is in the position of defendant in those numerous charges R. T. Macahill should not, in the interests of civil plaintiffs, be put in the position of having to disclose his evidence and his defences. There is no guarantee that his evidence would not be made available to the prosecution—in fact the contrary can be assumed. It may be said that he can claim privilege—that may be so but if he is able to do so to any real degree what good is done by compelling him to give evidence.

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The argument that the order in question was oppressive can be augmented by reference to the extreme breadth, to which we have referred, of Schedule B. By way of further example taken at random it calls for long distance telephone bills, desk calendars, appointment books, diaries, financial records and expense accounts, the provision of which might well occasion very long periods of research. The authorities on this subject, so far as we have seen, are confined, and we think the reason is obvious, to cases in which it has been sought to interrogate witnesses who are not parties. *Penn-Texas Corporation v. Murat Anstalt* (supra) already referred to, is one such authority, as also is *Radio Corporation of America v. Rauland Corporation* (1956) 1 All E.R. 260. In *American Express Warehousing v. Doe* (supra) a comparatively wide list of documents was requested and received the approval of the court, but at p.225 Lord Denning said—

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“The rule forbidding discovery is, at any rate, limited to discovery in the nature of a “fishing expedition” where the person does not know what the documents are, or the nature of them, and he is “fishing” to find something out. Where the documents are sufficiently specified, there is no objection to an order being made on a person to give his testimony and to produce supporting documents as ancillary to that testimony.”

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This case, Lord Denning said in *Re Westinghouse Electric Corporation* (1977) 3 All E.R. 703, 708 was the last case before the new act, the Evidence (Proceedings in Other Jurisdictions) Act, 1975, came into force. He also said, at p.710, that the use of the words “relating thereto” apparently accepted in the *American Express Warehousing Co.* case, and used freely in Schedule B in the present case, cast the net too widely and “may have to be narrowed a bit”.

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These cases proceeded on the basis of disapproval of pre-trial discovery, and apply to non-parties. They have no direct application to the calling of parties but, at least to the extent that such an application fails to specify the particular documents requested and amounts to a “fishing” expedition, we think it may be considered as an element in oppressiveness.

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We should add that the Evidence (Proceedings in Other Jurisdictions) Act, 1975, is not in force in Fiji, but, as Lord Wilberforce pointed out in *Rio Tinto Zinc Corporation v. Westinghouse* (1978) 1 All E.R. 434 at 442, the United Kingdom had made a declaration under the Hague Convention of 1970 that it would not execute Letters of

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- A Request issued for the purpose of obtaining pre-trial discovery of documents. He considered that under the new law English courts would continue not to countenance fishing expeditions.

- B For the reasons we have given we are of the opinion that the order of the 20th June, 1979 excluding the parties from the list of witnesses to be called, was rightly made, on the ground that such a procedure did not fall within the scope and intention of section 1 of the Foreign Tribunals Evidence Act, 1856 or that, if this is a misconstruction of the Act, on the ground that to include the parties was oppressive in the circumstances. The cross appeal is therefore dismissed with costs.

- C We proceed to the appeal itself. A number of the grounds which relate particularly to the calling of the parties to the action as witnesses, need not be considered, having regard to the fact that the respondents have failed in their cross appeal to have them restored. Other grounds relate to the proceedings as a whole. Grounds 1(c) and (d) read:

- D (c) that the said Orders are oppressive and unconstitutional. The civil proceedings pending before the requesting Court are in substance penal in nature. The requests by the United States District Court of the State of Washington to obtain evidence in Fiji for the purpose of investigating activities outside the United States of a Fiji company (Pacific Crown Video Limited) and a Fiji Citizen (Robert Tweedie Macahill) who are not subject to the United States jurisdiction in respect of alleged infringement of United States Copyright Act, constituted and abuse of sovereignty of Fiji and an abuse of process of law;

- E (d) that the Letters of Request from the United States District Court of the State of Washington constituted an abuse of process of this Court having regard to all the circumstances of the case leading to the institution and the pendency of Criminal Case No. 1328 of 1979 against the defendants/Appellant Robert Tweedie Macahill and the institution and the pendency of Supreme Court Civil Action No. 125 of 1979."

- F These grounds are expressed in rather flowing terms and counsel's argument in support of them was not particularly concise. The position concerning damages including something in the nature of a penalty is not very satisfactorily dealt with in the record of appeal. Paragraph 2(i)(b) of Mr Sherani's affidavit of the 19th June 1979, states that he was informed by the United States solicitor for the plaintiffs that the plaintiffs were not praying for treble damages against any defendant. On the other hand our attention was drawn to a request in paragraph 20 of the claim in Action C-78-243 for damages for unfair competition, and that the damages be trebled pursuant to 15 U.S.C. §1117. On this meagre information and because the heads of the claim included "conspiracy" we were invited to say that the United States proceedings were criminal in nature and therefore the Foreign Tribunals Evidence Act, 1856, does not apply. This proposition has only to be stated to be rejected. The proceedings in the United States are clearly civil proceedings for damages. Mr Koya, for the appellants, sought to call in aid the decision of the House of Lords in *Rio Tinto Zinc v. Westinghouse* (supra) that the possibility of penalties being imposed on certain companies by the E.E.C. was sufficient to sustain a claim to privilege by them. We see nothing in this to help counsel's argument that a claim for treble damages (if indeed one has been made) authorised by statute, transforms civil proceedings into criminal proceedings.

As to the ground of appeal concerning Fiji sovereignty, counsel again relied on the fact that in the *Rio Tinto* case the Attorney-General intervened to say that requests by the United States Government for evidence to be given by companies or individuals outside the jurisdiction of the United States for the purposes of investigation of alleged breaches of United States anti-trust law, would, under the policy of Her Majesty's Government, be regarded as infringement of the United Kingdom's sovereignty. There has been no such intervention by the Attorney-General in the present case and a civil action for damages between private litigants seems unlikely to attract one. Proceedings by Governments under anti-trust laws must surely fall into a special category.

As to the suggestion that the Letters Rogatory constitute an abuse of the process of the Supreme Court in view of the current civil and criminal proceedings, we do not consider that such a term is applicable. Certainly difficulties have arisen, owing in the main to the criminal proceedings and the position of the material seized by the police. This does not render the request an "abuse" but presents the Fiji Court with the task of fulfilling as far as possible the general policy of giving effect to such request so far as proper and practicable and so far as Fiji law permits. That policy has already been applied in the orders made.

Ground 1(e) reads:

"(e) that the said Orders directing Messrs. C.B. Singh and Ashok Kumar Singh who are servants of the Crown to produce documents and articles seized by the Police are beyond the powers of the Court or that they are unfair and harsh;"

On this counsel relied upon *Eccles & Co. v. Louisville & Nashville Railroad Company* (1912) 1 K.B. 135. That case turned on whether the court was satisfied that production of documents would be in violation of a duty a servant owed to his master, for whose authority the servant had declined to ask. The police officers here have not refused to produce documents: to the extent that they are required to comply with the order of the 26th June, 1979, they are willing to do so, and Crown counsel has appeared in the proceedings without making this particular point. There is no merit in this ground of itself, but it tends to merge in what is put forward under Ground 2, discussed below.

The next surviving ground is 1(1) which reads:

"(i) that the Orders are overly broad in that Schedule "B" requires the production of documents in the nature of discovery."

We have indicated our view earlier that in relation to the parties, Schedule B is too broad, but as the parties have been eliminated and only the police witnesses remain, the matter assumes a different aspect. All they are concerned with is the subject matter of the seizures under the search warrants. This of itself limits the scope of the evidence which can be given and indicates a specific ascertained collection of documents. The greater part of Schedule B will be irrelevant. In these circumstances there appears to be no need to make any further order.

Finally we come to Ground 2 which we set out in full:

"2. That the learned Trial Judge erred in law in making the Order on 26th June, 1979:

*Particulars*

- A (a) that the learned Trial Judge had no jurisdiction or power to make the Order in question;
- (b) that the said Order contravened Section 104 of the Criminal Procedure Code;
- B (c) that the said Order involves and calls for certain actions on the part of the Police and Senior Inspector *C. B. Singh* which actions but for the said Order would constitute trespass to goods or abuse of authority in dealing with private properties belonging to a citizen and which were seized under Search Warrants issued under Section 104 of the Criminal Procedure Code;

*Particulars*

- C (i) The articles in question were seized by the police between 16th November, 1978 and 27th February, 1979 under Search Warrants;
- (ii) Section 104 of Criminal Procedure did not confer either on the Magistrate's Court or the Police any right of ownership or possession in respect of the said articles. It merely conferred legal custody for a prescribed purpose;
- D (iii) The production of the said articles or the copying and delivery thereof to a third person without the direct consent of the owner amounts to an interference with his right of ownership and possession vested in him by law."

E Mr Koya frankly states that he bases the whole of his argument under this head on the case of *Ocean Timber Transportation Ltd. v. Attorney-General of Hong Kong* decided in the High Court of Hong Kong as Civil Action No. 1967 of 1978 and on appeal to the Hong Kong Court of Appeal as Civil Appeal No. 86 of 1978. The three Judges in the Court of Appeal unanimously upheld the judgment of Cons J. in the Supreme Court.

It will be necessary to look at the facts of the case in some detail and it will be convenient to take a passage from the judgment of Leonard J. where they are concisely summarised:

- F "The plaintiff/respondent is a limited company incorporated in Hong Kong. On the 12th June 1978 officers of the Royal Fiji Police Force gave certain information to the Commercial Crimes Bureau of the Royal Hong Kong Police Force causing the Bureau to suspect that criminal offences may have been committed by directors of the respondent. The offences suspected were (a) a conspiracy by the directors to defraud the respondent of payments made to the
- G account of the respondent at a bank in Hong Kong by Flour Mills of Fiji Ltd. under the terms of a contract made between the respondent and Flour Mills of Fiji Ltd. dated 9th March 1974 and (b) dishonest appropriation by the directors of such payments with intent permanently to deprive the respondent of them. Our Commercial Crimes Bureau applied for a warrant to enter and search the premises of the respondent. Consequent on the issue of that warrant and in
- H accordance with its authority papers belonging to the respondent came into the hands of the Bureau. The alleged offences are still under investigation and the papers are still legally detained by the Bureau with a view to possible prosecution in Hong Kong. They have been shown to representatives of the Royal Fiji

Police Force who have requested copies to assist them into their investigation of possible offences in Fiji. The respondent objects and seeks declarations that the documents or copies of them should not be permitted to be sent away from Hong Kong without its consent or permitted to be examined by or delivered to any person other than those directly concerned with the investigation of the alleged offences set out in the information leading to the search warrant pursuant to which the documents were seized. A

At first sight this seems not unreasonable; the documents belong to the respondent. No suggestion has been made that the respondent is suspected of participation in any crime. Indeed the respondent is the victim of the offences alleged in the information leading to the issue of the warrant. B

In its defence in the court below however the Crown claims that it is entitled to retain the documents pending completion of the investigation into the offences allegedly committed in Hong Kong. This is not disputed. It also claims to be lawfully entitled to make copies of them and to supply them to the Royal Fiji Police Force for the following reasons: C

- (a) That it is not prevented by the Police Force Ordinance Cap. 232, pursuant to section 50 whereof the documents were seized, from doing so and that Ordinance imposes no duty of confidentiality upon the Crown;
- (b) That any duty of confidentiality owed to the respondent does not extend to refusing to supply copies to a government law enforcement agency of a Member of the Commonwealth of Nations namely the Royal Fiji Police to enable the latter to investigate suspected criminal offences within the jurisdiction of Fiji; D
- (c) That "it is in the public interest that the contents of the documents be disclosed in the manner set out above and no duty of confidentiality extends so as to prevent a disclosure in the public interest." E

The legislation under which the search warrant was issued was not identical with section 104 of the Fiji Criminal Procedure Code and Mr Sherani seeks to make some point of this. The Hong Kong officers acted pursuant to section 50(7) of the Police Force Ordinance, which reads:

"Whenever it appears to a magistrate upon the oath of any person that there is reasonable cause to suspect that there is in any building, vessel (not being a ship of war or a ship having the status of a ship of war) or place any newspaper, book or other document, or any portion or extract therefrom, or any other article or chattel which may throw light on the character or activities of any person liable to apprehension under this section or on the character or activities of the associates of any such person, such magistrate may by warrant directed to any police officer empower him with such assistants as may be necessary by day or by night— F

(b) to enter and if necessary to break into or forcibly enter such building, vessel or place and to search for and take possession to any such newspaper, book or other document or portion of or extract therefrom or any such other article or chattel which may be found therein, and G

(b) . . . contains certain powers of arrest.' " H



Though this section refers to documents etc., articles and chattels which may throw light on the character or activities of certain persons, the result is still a search warrant, to be authorised by a magistrate on sworn evidence. No sections are quoted in the judgments, comparable to Fiji Section 107 and the last lines of section 104, which state how the things seized are to be dealt with though the learned Judges seem to have directed themselves on similar lines. These sections are:

“104 (final passage) . . . . . to seize it and carry it before the court issuing the warrant or some other court to be dealt with according to law.”

“107(1) When any such thing is seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.

(2) If any appeal is made, or if any person is committed for trial, the court may order it to be further detained for the purpose of the appeals or the trial.

(3) If no appeal is made, or if no person is committed for trial, the court shall direct such thing to be restored to the person from whom it was taken, unless the court sees fit or is authorised or required by law to dispose of it otherwise.”

The articles seized are thus under the control of the court before which they are taken.

In the Hong Kong case the Attorney-General contended that the police might disclose the documents either directly or by way of photographs to anyone they thought fit. Cons J. said:

“In my view, the first contention is too wide. The power to enter, search and take possession is given to the police to assist them in their duty to investigate crime or suspected crime. In the course of that duty it may well be proper to show documents seized to others who are not in the police force, for example, potential witnesses or persons who may be particularly expert in some scientific or specialist field. It may well be that the police would be justified in making one or several copies of the documents for purposes of that kind or even merely to make investigation within themselves more efficient or more swift. There could be no complaint against dealings of that nature for they are all proper to the object for which the legislature has granted the power. It is that object which marks out the boundaries of the power, for no person to whom exceptional power is given by the legislature may abuse that power or use it for improper ends. If he does so, the court will intervene to stop him. It makes no difference, in my view, that the search and seizure have been authorized by a magistrate. A magistrate's warrant authorises the police to enter and to take—it does not authorise them to misuse what they may have taken.”

Cons J. discussed the question whether the photocopying of the documents would amount to a conversion but expressed no concluded opinion on it. He said:

“But I express no carefully considered opinion on these two points, for it seems to me that the question of conversion is irrelevant in the present instance. No wrong, as yet, has been committed. The plaintiff seeks the aid of this court to prevent a wrong that may be committed in the future. It invokes this court's equitable jurisdiction. The precise juridical nature of the wrong contemplated is immaterial. The court will, if satisfied that it is a wrong of some kind, prevent the commission of that wrong so far as it is able.”

Cons J. then went on to deal with the submission that the police, on the grounds of public interest, were entitled to show or give copies of documents to the police force of a friendly state. That precise question does not arise here as we are not dealing with any question of crime in the United States. We are, however, dealing with the policy of the courts under the Foreign Tribunals Evidence Act. Cons J. made one possibly relevant remark when he said:

"Here a balance must be struck between competing aspects of public interest. For it seems to me as much in the public interest that these courts should uphold the rights of the individual resident of this colony as it is that our police should, wherever they are able, give assistance to other law enforcement authorities."

A foreign civil litigant may be thought to have no stronger a claim than foreign law enforcement authorities unless he can rely upon legislation. As the matter stands however, in the present case, the question of removing the material seized from the jurisdiction no longer arises as it has been eliminated by the orders made by Tuivaga J.

One further quotation from the judgments in the Hong Kong case may be made. Huggins J.A. said:

"Here I would interpose that nothing I am about to say should be construed as discouraging the police from extending to their counterparts in other states, directly or through Interpol, every assistance they can, provided only that they do not thereby put themselves outside the law of Hong Kong. In particular it must be noted that the documents in this case are the property of the Respondent. The Royal Hong Kong Police, if they think fit, may share any documents which belong to them with other police forces, provided always that there is no statutory limitation on the use which may be made of any particular class of documents. As criminals seek to take more and more advantage of international boundaries so the need for international co-operation in fighting crime increases. Nevertheless, the provision that the police should not put themselves outside the law of Hong Kong is important. For law of Hong Kong is important. For law enforcement authorities must never regard themselves as above the law which they seek to enforce. There lies chaos."

So far as the property in the articles seized in the present case is concerned, that may be included in the subject matter of the civil litigation, but that remains undecided and in our opinion the parties from whom it was seized had at least a possessory title. In the special circumstances of *The Queen v. Lushington Ex Parte Otto* (1894) 1 Q.B. 420, it was said that a witness who produced an article under a subpoena duces tecum had lost his possessory title as he admitted receiving it from a thief. We do not consider that is the situation here. There is a general statement in the judgment of Wright J. in that case at pp. 423, which is of some interest:

"In this country I take it that it is undoubted law that it is within the power of, and is the duty of, constables to retain for use in Court things which may be evidences of crime, and which have come into the possession of the constables without wrong on their part. I think it is also undoubted law that when articles have once been produced in Court by witnesses it is right and necessary for the Court, or the constable in whose charge they placed (as is generally the case), to preserve and retain them, so that they may be always available for the purposes of justice until the trial is concluded."

- Counsel for the respondents, as we have said, sought to distinguish the Hong Kong section 50 from the Fiji section 104. In our opinion, though there are differences they are not material. Counsel also sought to establish that the respondents were in a special position which regard to the material seized as they themselves were in a position to have seized them under the law as to copyright. He conceded that he could point to no section in the Copyright Act, 1956, and relied upon the courts inherent jurisdiction. Our own researches indicate that in *EMI Limited v. Pandit* (1975) 1 All E.R. 418 the court, on a very strong case and in exceptional circumstances, made an order that the defendant permit the plaintiffs to enter and inspect infringing materials. The learned Judge described it as being in essence discovery, and the order did not justify unlawful entry, disobedience being punishable only to contempt proceedings. A similar case was *Anton Piller K.G. v. Manufacturing Processes Limited* (1976) 1 All E.R. 779, where it was said that the order was only to be made in an extreme case where there was grave danger of property being smuggled away or of vital evidence being destroyed. All we need say on this aspect of the matter is that we are not in a position to know whether the respondents could have presented the necessary strong case and shown exceptional circumstances, because they did not attempt to do so.

- Instead, even before commencing their civil proceedings they were instrumental in setting the criminal law in motion and the seizures were made under criminal procedures. It is in this light, we think, that the position must be examined.

Counsel for the respondents sought also to draw upon *Rio Tinto Zinc v. Westinghouse* (supra) for the phrase "the public domain". We quote from the judgment of Lord Wilberforce at p.444 of the All England Report:

- "Unless a case of bad faith is made against Westinghouse (which is expressly disclaimed) it is impossible to deny that the letters rogatory were issued for the purposes of obtaining evidence in the Richmond proceedings. The fact, if it be so, that evidence so obtained may be used in other proceedings and indeed may be central in those proceedings is no reason for refusing to allow it to be requested: all evidence, once brought out in court, is in the public domain, and to

- Insofar as it is sought to apply these words to the material seized we are unable to agree that they have any relevance. No evidence has been given concerning these articles and the fact that they may become the subject matter of evidence in the criminal proceedings and may at that stage become "in the public domain" does not provide a reason for making them the subject the evidence now, if that is otherwise unacceptable.

- Tuivaga J. in his order of the 26th June 1979, considered that the Hong Kong case was distinguishable, and placed importance on the fact that the Fiji Court had been judicially requested to act on the Letters Rogatory in actions to which the property seized was very relevant, and in which the ownership of the property was claimed. He was of the opinion that sections 104 and 107 of the Criminal Procedure Code prevented him from making the original exhibits available but that there was no contravention of the Code or of an alleged right of ownership by furnishing copies.

- It is not a question so much of distinguishing the Hong Kong case as of deciding whether the reasoning of the learned judges in the passages we have quoted does or does not apply with equal force to the provision of copies in the present case. Pre-

sumably the provision of copies in the former case could have been done without risk of the authorities being deprived of the use of the originals—it is the same here. But if it is a breach of the duty of the police, imposed or implied by the Criminal Procedure Code, to allow any interference with the property not consistent with the purpose for which they were authorised to hold it, i.e. their own investigations and at the disposal of the court, is that an action which the court should authorise?

We do not think that the fact that the respondents have commenced their action in the United States puts them in a stronger position than if they had been plaintiffs in Fiji. Would a plaintiff in Fiji have had the right to obtain copies from the police? According to what was said by Cons. J. the police would have been entitled to provide copies to potential witnesses in the interests of their own criminal investigation, but does that prevent it from being a breach of duty to provide them for the purposes of civil actions. Prima facie we think, for the reasons given by Cons J. that, without the authority of a court order, it would not, and the court would not make such an order without good reason.

To the extent that the order of Tuivaga J. authorises the production and verification of copies of the material seized, it was made in the exercise of a judicial discretion, pursuant to his function under the Foreign Tribunals Evidence Act, 1856. We think that in doing so he gave insufficient attention to a number of factors. One is, as we have indicated, that the order authorised the police to do something in excess of their power; another and important factor is that the police officers were not parties to the civil actions, and to make the order would be to give pre-trial discovery; a third is that Civil Action 125/1979 asks for a declaration that the search warrants were invalid and the seizures unlawful; this action has not been heard and if the appellants succeeded in it the property seized should not have been in the hands of the police at all; lastly that the proceedings would be likely to be complicated by questions of privilege, which would concern the parties but not the police witnesses.

For these reasons we think with respect that the orders of the 20th and 26th June 1979, should have refused leave to call S/IP C.B. Singh to produce the property seized, or to the Examiner to take in evidence copies as specified in paragraphs (1) and (2) of the Order of the 26th June 1979, as drawn up.

The appeal is allowed to that extent with costs. The cross appeal, as appears above, has already been dismissed.

It would appear that the orders made upon the Letters Rogatory are now exhausted, but we have been informed that a fixture has been made for the hearing of the criminal proceedings. As the result of these may have a bearing on future proceedings the Letters Rogatory should remain on the file and the parties have liberty of apply generally to the Supreme Court.

*Appeal partly allowed; cross appeal dismissed.*