



Employment Court of New Zealand

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Eden Group Limited v Jackson [2017] NZEmpC 38 (5 April 2017)

Last Updated: 12 April 2017

IN THE EMPLOYMENT COURT AUCKLAND

[\[2017\] NZEmpC 38](#)

EMPC 135/2016

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

AND IN THE MATTER of an application for access to
Court documents

BETWEEN EDEN GROUP LIMITED Plaintiff

AND TIMOTHY NIGEL JACKSON First
Defendant

AND PHILLIP ANDREW KITE Second
Defendant

AND CHRISTOPHER JOHN BLACKMAN
Third Defendant

AND NEW SPACE LIMITED Fourth
Defendant

Hearing: On papers filed on 9, 14 and 17 February 2017

Appearances: D Ayers, applicant
J Billington QC and T Drake, counsel for
plaintiff
B O'Callahan and M Chen, counsel for
defendants

Judgment: 5 April 2017

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH IN RESPECT OF A REQUEST

TO ACCESS DOCUMENTS ON THE COURT FILE

Introduction

[1] On 9 February 2017 Daniel Francis Ayers sought permission to access certain court documents in this proceeding. Mr Ayers is not a party to the proceeding but he

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had provided an affidavit to support a 'without notice' application made urgently by the plaintiff for search and freezing orders in May 2016.

Background

[2] In this proceeding there are claims that the first, second and third defendants breached duties owed by them to the plaintiff by colluding to set up a business to compete with it in circumstances where they had conflicts of interest. The plaintiff alleges those defendants engaged in deceptive and misleading behaviour and misused confidential information. The fourth defendant is alleged to have incited, instigated, aided or abetted breaches of the employment agreements of the other defendants and a penalty is sought against it.

[3] On 20 May 2016 the plaintiff applied without notice for a search order and a freezing order. Urgency was sought and granted. The application for a search order was supported by affidavits from Christopher Collins, who is a director of the plaintiff, and Mr Ayers. In his affidavit, Mr Ayers deposed to having received instructions to assist the plaintiff because of his expertise as a computer forensic scientist. He explained his investigation of the plaintiff's computers and cell phones to which some of the defendants had access. At para 9 of his affidavit Mr Ayers deposed:

In order to allow Eden Group to apply for search and freezing orders in the Employment Court and apply for an interim injunction in the Employment Relations Authority I have provided a preliminary draft of my report to [counsel] together with many of the emails and documents I have recovered.

[4] Mr Ayers described what steps he had taken to examine a laptop, desktop computers, server and iPhones used by the first, second and third defendants in their employment by the plaintiff. He also referred to information he had recovered.

[5] Search and freezing orders were made on 23 May 2016.¹ Mr Ayers was one of the persons named in the search order as being entitled to have access to premises occupied or used by the defendants, and to be entitled to have access to, and copy, certain electronic data.

[6] The search order was executed on 25 May 2016 under the supervision of an independent lawyer. The independent lawyer provided a report to the Court in which she confirmed meeting with Mr Ayers, and others, on 25 May 2016 for the purposes of carrying out the search authorised by the order on premises in Avondale, Auckland. Mr Ayers was allowed access to those premises where he took photographs, obtained access to cell phones, and took steps to clone desktop computers, a laptop and server.

[7] The independent lawyer reported that Mr Ayers had taken with him to be copied and returned:

(a) three desktops - hard drives only; (b) one laptop and cable;

(c) a server;

(d) a back up drive; (e) a large hard drive; (f) four cell phones;

(g) three memory sticks; and

(h) a portable hard drive.

Order for transfer

[8] On 25 November 2016 this Court ordered, by consent, that certain items in Mr Ayers's possession be transferred to another computer forensic expert.² That order was made following a request in a joint memorandum of counsel dated 16

November 2016. The order required Mr Ayers to transfer to that other expert:

(i) The computer storage devices and data, and all original forensic copies of the same, referred to at clause 6(a) and (d) of the Search Order sealed 23 May 2016 and paragraph 14 of the Oral Judgment (No 2) of Chief Judge Colgan dated 10 June 2016;

(ii) The two Apple iPhones, formerly used by two of the defendants, provided by the plaintiff to Daniel Francis Ayers;

(iii) All other computer storage devices purchased by Daniel Francis Ayers or any associated person, and used to store copies of data relating to this proceeding.

[9] Mr Ayers was required to comply within 48 hours of service of the order on him.

This application

[10] On 9 February 2017 Mr Ayers applied to the Registrar of this Court for access to the following documents:

Joint Memorandum of Counsel (Consent Memorandum) dated 1 November

2016.

Search Order sealed 23 May 2016 (original and any amendments to date). Oral [Judgment] (No 2) of Chief Judge Colgan dated 10 June 2016.

Plaintiff's Application dated 14 October 2016 plus any affidavits filed in

support thereof.

Details of the solicitors on the record for each party to the proceeding.

Any other document of whatever type on the court file referring to Daniel

Francis Ayers.

Any affidavits at any stage of the proceeding sworn or affirmed by

Christopher Collins of the Plaintiff.

[11] Mr Ayers's reason for requesting access was his concern that the Court had made an order affecting him which he considered the Court had no jurisdiction to make and referred to documents he had not seen. The nub of this application is Mr Ayers's dissatisfaction with being required by the order of 25 November 2016 to personally transfer material to another computer forensic expert. He considers that a company in which he has an interest, Special Tactics Ltd, was engaged to assist the plaintiff and that the electronic data referred to in that order is being held by that company.

[12] Mr Ayers supplemented his application with a memorandum. One attachment to his memorandum was a notice pursuant to r 19.66(2) of the [District Court Rules 2014](#) notifying him that, unless he obeyed the order of 25 November

2016, he would be guilty of contempt of court.

[13] Mr Ayers is considering issuing proceedings. Access to the documents he has requested may assist him in assessing if he has any basis for doing so. He describes these potential proceedings as follows:

As foreshadowed in today's application for access to documents on the Employment Court file, I intend to commence proceedings against one or more parties to this matter (and possibly their solicitors and/or counsel personally) for the torts of abuse of process and malicious prosecution. A claim shall also be lodged against the Attorney General in respect of the breach of natural justice.

[14] He continued at para 26:

It is likely that the conduct of one or more counsel and/or solicitors in this matter will merit referral to the Lawyers Complaints Service on the grounds of abuse of process and, possibly, misleading this Court.

[15] Mr Ayers ended his memorandum at para 27 as follows:

Access to documents on the court file is sought so that I can be properly informed of the case against me and so that I can take steps to commence civil proceedings and referral to the Lawyers Complaints Service.

Response by the parties

[16] On 9 February 2017 a copy of Mr Ayers's request was sent to counsel for the parties and their responses were sought. The plaintiff's response was that Mr Ayers should only be given access to those documents forming part of the formal court record within the meaning of r 3.5 of the [High Court Rules 2016](#), on condition the documents are used for a specific purpose and not for wider distribution to parties who have no interest in this matter. The defendants take no position on Mr Ayers's application.

Regulation 6 and [High Court Rules 2016](#)

[17] Access to documents held on the Court's file is not provided for in the [Employment Court Regulations 2000](#). However, reg 6 of those Regulations provides for the [High Court Rules](#) to be used as follows:

6 Procedure

(1) Every matter that comes before the court must be disposed of as nearly as may be in accordance with these regulations.

(2) If any case arises for which no form of procedure has been provided

by the Act or these regulations or any rules made under section

212(1) of the Act, the court must, subject to section 212(2) of the

Act, dispose of the case—

(a) as nearly as may be practicable in accordance with—

(i) the provisions of the Act or the regulations or rules affecting any similar case; or

(ii) the provisions of the [High Court Rules 2016](#)

affecting any similar case; or

(iii) the provisions of the rules (other than those on registrable Australian judgments) in the Trans-

Tasman Proceedings Regulations and Rules 2013,

but only insofar as the case is or involves a proceeding in which an initiating document is to be

or has been served on a defendant in Australia under section 13 of the Trans-Tasman Proceedings Act

(b) if there are no such provisions, then in such manner as the court considers will best promote the object of the Act and the ends of justice.

[18] The relevant [High Court Rules](#) are in [Part 3](#), Subpart 2 - Access to court documents. Generally hearings are open to the public and can be freely reported. Documents produced in court are available for inspection. However, the [High Court Rules](#) recognise that outside of that hearing process (and a brief window of opportunity relating to the appeal period), persons other than the parties need permission to inspect documents held on the court file. The reason for this distinction was described by Toogood J in *X v Standards Committee (No 1) of the*

New Zealand Law Society in the following way:³

[61] No doubt one of the reasons for the distinction between the preliminary stages of Court proceedings and the substantive hearing stage is that it is not until the hearing that the parties have fully identified the issues with which the Court is required to deal. The preliminary stages of litigation involve the parties in a great deal of paperwork, such as the filing of statements of claim and defence, and discovery by way of the exchange of lists of relevant documents. Changes of pleading often follow discovery and inspection, and the parties may be requested to provide further particulars of their pleadings.

[62] It is only once the case is fully shaped, at the commencement of the substantive hearing, that the presumption in the Rules against public disclosure of documents related to the proceedings ceases to apply, and the presumption changes to one of open justice.

[19] It follows that in deciding whether to grant permission at this interlocutory stage, a balancing exercise is required weighing up the privacy interests of the parties concerned in the litigation and the public interest in open justice.⁴

3 X v Standards Committee (No 1) of the New Zealand Law Society HC Auckland CIV 2011-404-

7750, 13 December 2011.

4 X v Standards Committee (No 1) of the New Zealand Law Society [2011] NZCA 676 at [9].

[20] The starting point is r 3.7 and a right to access formal court records kept in a registry or a court, unless there has been an order otherwise. In r 3.5 access is defined to mean “to search, inspect, or copy under the supervision of an officer of the court”.

[21] What constitutes the formal court record is also defined in r 3.5 as follows:

(a) a register or index:

(b) any published list that gives notice of a hearing: (c) a document that—

(i) may be accessed under an enactment other than these rules;

or

(ii) constitutes notice of its contents to the public:

(d) a judgment, order, or minute of the court, including any record of the reasons given by the Judge:

(e) the rolls of barristers and solicitors kept under [section 56](#) of the [Lawyers and Conveyancers Act 2006](#) or any former corresponding enactment.

[22] Mr Ayers’s application covers documents forming part of the formal court record but he has applied for access to more than that, relying on r 3.13 (the same rule requires notice to be given of the application to any person who might be adversely affected). To be granted access to those other documents, his application needs to be considered against r 3.16 which reads:

3.16 Matters to be taken into account

In determining an application under [rule 3.13](#), or a request for

permission under [rule 3.9](#), or the determination of an objection under that rule, the Judge or Registrar must consider the nature of, and the reasons for, the application or request and take into account each of the following matters that is relevant to the application, request, or objection:

(a) the orderly and fair administration of justice:

(b) the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person:

(c) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions:

(d) the freedom to seek, receive, and impart information:

(e) whether a document to which the application or request relates is subject to any restriction under [rule 3.12](#);

(f) any other matter that the Judge or Registrar thinks just.

Discussion

[23] There is no order or direction in this proceeding prohibiting access to the formal court record or other documents held on the court file. Taking into account the matters in r 3.16, it is appropriate that Mr Ayers be given access to some, but not all, of the other documents referred to in his application. Granting that access is consistent with the nature and reasons for his request and, in particular, r 3.16(a) and (d); that is the orderly and fair administration of justice and the freedom to seek, receive and impart information. Providing that access will help Mr Ayers understand what transpired in making the order of 25 November 2016. Granting access will also enable him to obtain advice which may well include reflecting on the fact that he was personally named in the search order as one of the persons entitled to have access under that order not Special Tactics Ltd.

[24] The need to consider the protection of confidentiality, and privacy interests, for the parties must also be taken into account under r 3.16(b). At this stage of the proceeding the parties are entitled to some privacy in relation to the matters they have placed in issue and anything they may have said or done.

[25] I consider the balance between the privacy interests of the parties and the public interest in open justice can be achieved by placing conditions on the use of documents to which access is to be granted.

[26] Mr Ayers is entitled to have access to the formal court record requested in his application as follows:

- (a) The sealed search order of 23 May 2016; and
- (b) the oral judgment (No 2) of Chief Judge Colgan dated 10 June 2016.5

[27] In addition, and subject to the conditions below, Mr Ayers is granted access to the following documents held on the court file:

- (a) The joint memorandum of counsel dated 1 November 2016; and
- (b) the plaintiff's application dated 14 October 2016 and the supporting affidavit of Mr Collins of the same date.

[28] However, no adequate basis has been provided for the necessity for the court file to be searched for any other documents sought by Mr Ayers, or to look for "[any] other document of whatever type on the court file referring to Daniel Francis Ayers". Those aspects of Mr Ayers's request are too wide-sweeping and vague.

[29] Access to those documents referred to in [27] is subject to the following conditions:

- (a) The documents are to be inspected and/or copied under the supervision of the Registrar of this Court.
- (b) The documents may only be used for the purpose of Mr Ayers taking legal advice about possible civil action or any professional complaint he may make.

5 Eden Group Ltd v Jackson (No 2) [\[2016\] NZEmpC 72](#).

(c) Subject to (b) above, any copy of a document made by Mr Ayers (or provided to him by the Registrar) is not to be used, disseminated or published except by leave of this Court.

KG Smith

Judge

Judgment signed at 2.10 pm on 5 April 2017