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TPT Forests Limited v Penfold [2022] NZEmpC 42 (11 March 2022)

Last Updated: 16 March 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2022\] NZEmpC 42](#)

EMPC 334/2020

IN THE MATTER OF	an application for search orders
AND IN THE MATTER OF	an application for consequential orders
BETWEEN	TPT FORESTS LIMITED First Applicant
AND	TPT GROUP LIMITED Second Applicant
AND	CRAIG PENFOLD First Respondent
AND	SIMON STRONGE Second Respondent

Hearing: 17 November 2021
(Heard at Auckland, via VMR)

Appearances: P Skelton QC and S Rankin, counsel for applicants
S Foote QC and T Refoy-Butler, counsel for first respondent
S Langton and R L White, counsel for second respondent

Judgment: 11 March 2022

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE J C HOLDEN

(Application for consequential orders)

[1] In November 2020, the Court granted a search order to allow TPT Forests Ltd, the first applicant, to search for specified electronic devices held by Messrs Penfold and Stronge, the first and second respondents.¹ The specified electronic devices were

¹ *TPT Forests Ltd v Penfold* [\[2020\] NZEmpC 179](#).

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cloned and returned to the respondents and the cloned devices are currently in the possession of independent solicitors.

[2] Subsequently, TPT Group Ltd was joined as a second applicant.²

[3] TPT Forests Ltd and TPT Group Ltd (TPT) now seek consequential orders to vary the search order to allow for the identification of their documents on the cloned devices. That is the main issue to be resolved. There also are issues over the involvement of Mr Whale, the computer expert engaged by TPT as an independent computer expert, and over whether TPT is required to disclose further documents, as specified in a letter from Mr Stronge's solicitor, Mr Langton, dated 10

Consequential orders sought

[4] In the search order the Court reserved leave to address:

- (a) what is to happen to any goods removed from the premises or to any copies that have been made;
- (b) how the confidentiality to which the respondents are entitled will be maintained; and
- (c) any privilege claim.

[5] TPT now seeks to vary the existing search orders to allow Mr Whale to inspect the cloned devices and produce a report for the Court listing the files identified as TPT's information.

[6] If the orders sought are made, TPT intends to provide Mr Whale with the native files of all TPT's documents identified as having been taken by Mr Penfold and/or Mr Stronge so Mr Whale can undertake the searches using those native files. It is proposed that Mr Whale then applies key word searches to identify any potentially

2 *TPT Forests Ltd v Penfold* [2021] NZEmpC 39, [2021] ERNZ 112.

privileged documents, so the independent solicitors can review those documents. Lastly, it is proposed Mr Whale prepare a report on his findings, including listing TPT's document in a schedule and then to file that report with the Court and serve a copy on the parties' solicitors.

[7] TPT submits that the interests of justice favour the making of the proposed consequential orders:

- (a) It is plainly just that TPT should now be able to identify which of its documents have been taken and used by Messrs Penfold and Stronge.
- (b) TPT only seeks to identify its documents at this stage and does not seek to inspect the documents on the cloned devices for general discovery purposes.
- (c) The cloned devices have now been in the possession of the independent solicitors since November 2020 and the proposed orders are consistent with TPT's desire to secure the just, speedy and inexpensive determination of the proceeding.
- (d) It is in accordance with standard practice for the independent computer expert to undertake these types of searches; it is inappropriate for TPT's documents to be returned to Messrs Penfold and Stronge for them to undertake searches, given they are the very people alleged to have removed TPT's documents and to have done so unlawfully. TPT also says Mr Penfold and Mr Stronge (or their solicitors) do not possess the technical knowledge or ability to identify TPT's confidential information. The provision of the native files of TPT's documents to Mr Whale to undertake the searches is the appropriate response in the circumstances.
- (e) Finally, TPT says that the proposed consequential orders do not prejudice Mr Penfold or Mr Stronge in any way.

[8] Mr Stronge (supported by Mr Penfold) submits that the Court should order a discovery process analogous to the one used in the High Court and under which process Messrs Penfold and Stronge should themselves provide verified discovery of the relevant documents in the yield (which will include the discovery of the documents on the list sought by TPT), and where privileged and confidential documents would be listed but withheld from open inspection.

[9] Mr Stronge submits that this would be the just approach:

- (a) There is (if a High Court-styled discovery process is ordered by the Court) a well-established, certain and effective process for discovery of the relevant documents in the yield, which is "just" and works.
- (b) There is no compelling reason why Mr Penfold and Mr Stronge should not provide discovery of the relevant documents contained in the yield themselves, especially where there is no risk of destruction of the evidence now, and both respondents are legally represented. Mr Stronge notes that TPT's suggestion that this would involve documents being returned to the respondents is not applicable here as, once the devices were cloned, the original devices were handed back to them with the (allegedly) confidential and proprietary information on them. The respondents proposed that the IT consultant search the yield against key words and provide those documents directly to them to discover, which would have resolved the concern that they do not have sufficient technical expertise to identify what is confidential.
- (c) The respondents are the best people to assert a claim for privilege as they are the privilege holders, which is in line with conventional discovery processes.

[10] An affidavit was filed for a former client of TPT expressing concern that documents protected by legal privilege might be disclosed to TPT under the process it suggests. Another affidavit was filed for a company associated with Mr Stronge's

current employer. It expresses concern that its commercial and sensitive material likewise may be disclosed to TPT to its detriment.

Search orders provided for in the [Employment Relations Act 2000](#) and in [Part 33 of the High Court Rules 2016](#)

[11] Search orders are provided for in [s 190\(3\)](#) of the [Employment Relations Act 2000](#) and [pt 33](#) of the [High Court Rules 2016](#). They are available where an applicant has a strong prima facie case on an accrued cause of action and the potential or actual loss or damage to the applicant will be serious if the search order is not made. There must be sufficient evidence that the respondent possesses relevant evidentiary material and that there is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding, or an anticipated proceeding before the Court.³ Without evidence of the real possibility that the respondent may make the material unavailable, there is no basis for a search order.⁴ The purpose of a search order is, primarily, to secure or preserve such material.⁵

[12] When a search order comes to be reviewed by the Court, it may make any order it considers just and, in doing so, must consider:⁶

- (a) what is to happen to any goods removed from the premises or to any copies that have been made;
- (b) how the confidentiality to which the respondent is entitled is to be maintained;
- (c) any privilege claims;
- (d) any application by a party; and
- (e) any issue raised by the independent solicitor.

³ [High Court Rules 2016](#), r 33.3.

⁴ *Columbia Picture Industries Inc v Robinson* [1986] 3 WLR 542 at 551 and 572; *Fieldforce (NZ) Ltd v Auchterlonie* [1994] NZHC 1407; (1994) 7 PRNZ 563 (HC) at 564.

⁵ *TBD (Owen Holland) Ltd v Simons* [2020] EWCA Civ 1182, [2021] 4 All ER 889 at [175].

⁶ Rule 33.8.

[13] After a search order has been executed the parties often will agree on consequential orders, which can expedite the proceedings. Where computer devices are involved, that agreement can include agreed key word searches.

[14] While TPT has suggested a process, including key word searches, that has not been agreed to by Mr Penfold or Mr Stronge. An alternative arrangement was proposed by the respondents but that also has not been agreed. Accordingly, what consequential orders, if any, should be made is left for the Court.

Consequential orders are not required to protect potential evidence

[15] I agree with Mr Langton, counsel for Mr Stronge, that the relevant question is whether the proposed consequential orders are necessary to secure or preserve evidence in circumstances where it might otherwise be destroyed or made unavailable for the purpose of the proceeding. Orders may be required, for example if hard copy material had been obtained through the search order and the material ought to be copied before its return. Another example suggested by Mr Langton is where a computer device has been taken but not cloned, in which case consequential orders may be needed allowing for the device to be cloned before its return or, alternatively, that the device be searched for the applicant's business records so that they can be removed and preserved prior to the return of the device. Here, however, all the devices have been cloned and the clones are now kept safe by the independent solicitors. In this case then, no consequential orders are needed to preserve the evidence and/or keep it safe.

[16] On a practical level, this matter now has been removed to the Court from the Employment Relations Authority.⁷ The pleadings are still incomplete, but disclosure of documents would be expected as part of the Court process.

[17] As the devices were returned to Mr Penfold and Mr Stronge intact, they hold the documents in question. They are prepared to use an IT consultant to assist. Both Mr Penfold and Mr Stronge are represented by counsel, who have professional

⁷ *TPT Forests Ltd v Penfold* [2021] NZERA 571.

obligations, including with respect to discovery.⁸ As TPT holds native documents, it is well placed to challenge the disclosure should it consider discoverable documents have been withheld or mischaracterised. There then are the concerns raised by the respondents and third parties. Even though inspection is not presently sought, the execution of the proposed consequential orders may identify documents the existence of which these parties are entitled to keep confidential.

[18] It also is relevant that search orders are a serious intrusion on respondents. Search orders ought to go no further than the minimum necessary to preserve documents or other articles that otherwise might be destroyed or concealed.⁹ That caution also is relevant when considering consequential orders.

[19] In these circumstances, I do not consider orders consequential on the search order are required or just.

[20] While Mr Stronge suggested a process be followed akin to the High Court discovery process, that suggestion was made prior to the removal of the proceedings to the Court. Now that the proceedings are in the Court, the disclosure provisions contained in the [Employment Court Regulations 2000](#) apply.¹⁰ These provisions are designed to ensure relevant documents are disclosed while protecting the parties' privileged documents. They should be used in these proceedings, including to resolve any disputed claims of privilege.

[21] As noted, Mr Stronge also has sought documents from TPT. Again, the Employment Court disclosure process should be followed.

[22] It follows that no consequential orders are made in respect of the devices that were the subject of the search order. Nor are any orders made in respect of the documents sought by Mr Stronge from TPT.

⁸ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, at r 13.9.

⁹ *Columbia Pictures Industries Inc v Robinson* [1987] Ch 38 at 76-77.

¹⁰ [Employment Court Regulations 2000](#), regs 37-52.

[23] For the avoidance of doubt, the clones of the uplifted devices are to remain with the independent solicitors for them to continue to hold pending further order of the Court.

The respondents say Mr Whale is an associated person

[24] The respondents have protested about Mr Whale being appointed the IT expert to execute the search orders on the respondents. Rule 33.4(1) places restrictions on who may be a permitted person for the purposes of carrying out a search. It sets out that the permitted person identified must not include the applicant, or in the case of non-natural persons, any director, officer, employee, partner, or *other person associated with the applicant*, other than the applicant's solicitor.¹¹

[25] The respondents say that Mr Whale was someone "associated" with TPT, and that rr 33.4 and 33.6 prohibited him from attending the search. They note that r 33.6(1)(c) allows other named or described persons, "*including computer specialists not associated with either the applicant or the respondent*, to take and retain in their custody, or copy, any described thing" (emphasis added).

[26] While the respondents have, on a without prejudice basis, consented to Mr Whale cloning the devices, that consent is on particular terms that have not been accepted by TPT.

[27] In arguing that Mr Whale is an associated person, the respondents point out that he has been an advisor to TPT on the same subject matter of which the search orders are the subject; they say that is he was engaged by TPT, broadly, to advise it on whether the respondents had removed their information from their computer systems.

[28] The respondents submit that a business or professional association such as the one between Mr Whale and TPT is enough to make him an associated person for the purposes of rr 33.4 and 33.6. They say that a broad interpretation of "associated" is supported in circumstances where search orders are an invasion of a person's privacy and right not to be the subject of a search, as well as consistent with checks being built

¹¹ [High Court Rules 2016](#), r 33.4(1) (emphasis added).

into the process by the [High Court Rules](#) to avoid abuse of the search order process and to protect respondents.

[29] While the respondents have no issue with Mr Whale's professionalism or integrity, they say that his connection or association with TPT should have ruled him out of attending the search and should rule him out of any involvement in any consequential orders arising out of that search.

[30] TPT submits that Mr Whale is properly independent and is not a person associated with TPT. TPT points out that he does not have any shareholding or other financial interest in TPT or any subsidiary company. TPT says that the categories of persons specified in r 33.4(1) are all people with some form of financial interest in an applicant company, and, applying the maxim of interpretation known as the *ejusdem generis* rule, the phrase "other person associated with the applicant" is to be read as an extension of the types of persons listed.¹² TPT says the proper reading is that it is a general catch-all

phrase, intended to capture these types of persons and is not intended to include a separate class of persons, namely independent experts who are professionally engaged to the applicant company. There is, it says, no attempt to use language capturing independent experts, because independent experts are not associated with the applicant in the required manner. The applicant's solicitor is, TPT says, in an entirely different position.

[31] TPT notes that Mr Whale, if appointed, will give his evidence as an independent expert witness, agreeing to abide by the code of conduct for expert witnesses set out in sch 4 to the [High Court Rules](#). This, TPT says, should give comfort to the respondents.

[32] Mr Whale has provided an affidavit in which he has explained his role to date. Mr Stronge filed an affidavit from Mr McKenzie, a forensic technology and cyber security consultant, outlining his experience as an independent expert assisting with the conduct of a civil search order.

12 Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 254; *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407, [2008] 2 NZLR 182 (CA) at [17]- [26].

[33] Mr Whale confirms he was first engaged by TPT in May 2020. His work was focussed on the laptops previously used by the respondents. He then was engaged to assist TPT with seeking and executing the search order. The proposal from TPT for consequential orders had Mr Whale inspecting the cloned devices and producing a report for the Court listing the files identified as TPT's information. It was not proposed that he inspect the documents themselves.

[34] Mr McKenzie says that when he is engaged to assist with a search order, he may be involved in initially examining the client's own information systems to determine whether there is evidence of intellectual property theft, misconduct or similar. He then may assist with the drafting of the forensic procedures to be adhered to during a search and to carry out the search orders. He says he may be engaged to review the "yield" of a search order, but it would be unusual, in his experience, for the same expert to carry out the initial examination and also review the "yield" of a search order. This may happen, however, where there is no other expert available with access to the necessary technology or software to carry out the required review or where the parties agree.

Mr Whale is not an associated person

[35] Whether an IT consultant engaged by an applicant is an associated person will depend on the circumstances. Of necessity, where an applicant requires expert assistance from an external IT consultant, that IT consultant will be engaged by the applicant on a professional basis. The inclusion in r 33.6 of computer specialists being not associated with either the applicant or the respondent, recognises that some computer specialists will be so associated. That would, of course, include any computer specialist who also comes within the categories of people specifically listed in r 33.4 (being a director, officer, employee or partner). It also, in my view, might extend to a contracted computer consultant who has an ongoing relationship with an applicant for a search order; if an employee of an applicant is an associated person, then the term "other person associated with the applicant" could be expected to include a long term contractor. That also would be consistent with the specific exclusion of the applicant's solicitor who otherwise might be included as an associated person because of their ongoing relationship with the applicant.

[36] In this case, Mr Whale did not have an ongoing relationship with TPT. He was engaged shortly prior to the search order being undertaken, to provide IT advice on this matter, initially on whether the respondents had removed TPT's information from its computer systems. His involvement only was ever to do with the forensic IT issues around Mr Penfold and Mr Stronge's actions with respect to the material on the devices. That did not make Mr Whale a person associated with TPT.

[37] The proposed consequential orders would have been an extension of this work. It was not proposed that he would inspect the documents on the devices, but just list them.

[38] Accordingly, I find that Mr Whale is not an associated person; he was entitled to assist with the execution of the search order and, had the consequential orders been made, would have been entitled to assist in the execution of those orders.

Costs are reserved

[39] The costs of this application are reserved pending resolution of the substantive proceedings now before the Court.

J C Holden Judge

Judgment signed at 3 pm on 11 March 2022

