

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 117
EMPC 131/2017
EMPC 270/2017
EMPC 381/2017**

IN THE MATTER OF	an application for access to court documents by Steve Vrtkovski on behalf of Mayweathers
BETWEEN	GRANT JOHNSTON Plaintiff
AND	THE FLETCHER CONSTRUCTION COMPANY LIMITED Defendant

Hearing: On the papers

Appearances: S Vrtkovski, counsel for Mayweathers
M Donovan, counsel for plaintiff
R Upton, counsel for defendant

Judgment: 5 August 2020

**JUDGMENT OF JUDGE K G SMITH
(Application for access to court documents)**

[1] An application has been made by Steve Vrtkovski of Mayweathers, a law firm in Sydney, Australia, for access to court documents in three proceedings between Grant Johnston and The Fletcher Construction Co Ltd.¹ The three proceedings have resulted in two substantive judgments and one costs judgment of this Court.²

¹ File numbers EMPC 131/2017, EMPC 270/2017 and EMPC 381/2017.

² *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894; *Johnston v The Fletcher Construction Co Ltd* [2018] NZEmpC 18; *Johnston v The Fletcher Construction Co Ltd* [2019] NZEmpC 178 (*Johnston* (2019)).

[2] The first substantive judgment dealt with an application seeking special leave to remove Mr Johnston's claim against Fletcher Construction from the Employment Relations Authority to the Court. The second one was the Court's decision about Mr Johnston's claim.

[3] In relation to each proceeding what has been sought is access to the following:

- (a) The pleadings.
- (b) Affidavits, including their annexures or exhibits, filed and/or read in open Court.
- (c) Documents admitted into evidence or read in open Court.
- (d) Written submissions filed and/or handed up in open Court.
- (e) Transcripts of evidence.

[4] The application was supported by a letter from Mr Vrtkovski explaining its purpose and was elaborated on in his submissions replying to Fletcher Construction's opposition to the application. It has been made because the firm is conducting an investigation into possible claims against Fletcher Group Ltd on behalf of some shareholders. Fletcher Construction is part of Fletcher Group.

[5] Mayweathers anticipates that documents on the Court's files may contain information important to its investigation because Mr Johnston was Fletcher Construction's Financial Controller. Mayweathers understands that an aspect of the claim was about allegations as to the handling of financial information by Fletcher Construction during the period to which the investigation relates.

[6] Mr Vrtkovski advised that the documents sought are for information purposes only and to assist the investigation. To that end any document to which access is given is not intended to be used in other potential proceedings. Underlying the application was a comment that the documents sought might only be available from the Court or, at least, might more easily and cost effectively be obtained from the Court.

[7] The application was opposed by Fletcher Construction but not by Mr Johnston. Fletcher Construction accepted that Mayweathers is entitled to access the formal court record, within the meaning of that phrase in the Senior Courts (Access to Court Documents) Rules 2017. It does not, however, accept that access should be granted to the balance of the court records as requested. The grounds of Fletcher Construction's opposition can be summarised as follows:

- (a) Mayweathers has no legitimate interest in seeking access beyond the formal court record, because it was not a party to the proceedings and does not purport to act for any client with a legitimate interest in the documents sought.
- (b) The application is speculative and a fishing expedition.
- (c) Allegations about alleged financial impropriety were considered in the substantive decision and were found to be unsupportable.
- (d) It is not in the public interest for material relating to unfounded allegations to be disclosed.
- (e) The judgment was issued over six months ago and, since then, the parties have entered into a full and final settlement confidential to them.
- (f) There is no public interest in disclosure beyond the formal court record.³
- (g) Granting the application is likely to impact on the privacy of current and former employees of Fletcher Construction who were involved in the proceedings and/or the disclosure of commercially sensitive information.
- (h) The application does not satisfy r 12 of the Senior Courts (Access to Court Documents) Rules.

³ Relying on *Crimson Consulting Ltd v Berry* [2018] NZCA 460, [2019] NZAR 30; and *Greymouth Petroleum Holdings Ltd v Empresa Nacional Del Petróleo* [2017] NZCA 490, [2017] NZAR 1617.

[8] Mr Upton, counsel for Fletcher Construction, supplemented the notice of opposition with a memorandum drawing attention to the fact that Mr Johnston’s claim was unsuccessful, except for a debt for a reasonably modest sum of unpaid holiday pay. He relied on a finding by the Court that Fletcher Construction’s actions did not fall below generally accepted accounting principles and were not contrary to the standards and requirements of the New Zealand Institute of Chartered Accountants.⁴

Analysis

[9] There are no provisions in either the Employment Relations Act 2000 (the Act) or the Employment Court Regulations 2000 (the regulations) dealing with access to documents held on the Court’s files. Usually, the absence of a provision in the Act or regulations can be dealt with by applying reg 6. Regulation 6 provides that, where there is no form of procedure in the Act or regulations, the Court is required to dispose of the case as nearly as may be practicable in accordance with the High Court Rules 2016 affecting any similar case.⁵ If there are no such provisions reg 6(2)(b) provides that the case is to be disposed of in such manner as the Court considers will best promote the object of the Act and “the ends of justice”.

[10] Unfortunately, the High Court Rules no longer provide for access to files. Access to files in the High Court was previously dealt with under sub-pt 2 of pt 3 of the High Court Rules. That subpart was revoked and replaced by the Senior Courts (Access to Court Documents) Rules 2017.⁶ The Employment Court is not a senior court listed in those rules and there was no corresponding amendment to the Act or regulations to address the gap created by the repeal and replacement of the subpart.

[11] Recent applications for access filled that gap by applying the Senior Courts (Access to Court Documents) Rules, by using reg 6. Even if the rules cannot be directly applied this Court has considered it is appropriate to use them by analogy.⁷ That is the approach I intend to take.

⁴ *Johnston* (2019), above n 2, at [87].

⁵ Employment Court Regulations 2000, reg 6(2)(a)(ii).

⁶ Rule 19(2).

⁷ See *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 160 at [4]; *Sawyer v The Vice-Chancellor of Victoria University of Wellington* [2019] NZEmpC 7 at [8]; Senior Courts (Access to Court Documents) Rules 2017 (2017/193).

[12] The Senior Courts (Access to Court Documents) Rules distinguish between access by a party to the litigation and by a non-party on request.⁸ Where an application is granted it can be subject to conditions.⁹ Under the rules every person has the right to access the formal court record of a civil proceeding.¹⁰ What comprises the formal court record is defined and means:¹¹

- (a) a register or an index:
- (b) a 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, an order, or a minute of the court, including any record of the reasons given by a Judge:
- (e) [not relevant]
- (f) the rolls of barristers and solicitors kept under section 56 of the Lawyers and Conveyancers Act 2006 or any former corresponding enactment.

[13] Mayweathers' request for documents goes beyond the formal court record and, therefore, needs to be considered by reference to rr 11, 12 and 13.

[14] Rule 11(2) requires that the request for access must:

- (a) identify the person and give the person's address;
- (b) set out sufficient particulars of the document to enable the Registrar to identify it;
- (c) give reasons for asking to access the document, which include the purpose for which access is sought; and

⁸ Rule 6(b) and 7. The Rules do not limit the Court's power to control proceedings; see r 5.

⁹ Rule 6.

¹⁰ Rule 8(1).

¹¹ Rule 4.

- (d) set out any conditions the person is prepared to meet if they were imposed.

[15] Mayweathers' application complies with r 11(2); what was sought, and why, is clearly described.

[16] Rule 12 lists the matters to be considered. It reads:

12 Matters to be considered

In determining a request for access under rule 11, the Judge must consider the nature of, and the reasons given for, the request and take into account each of the following matters that is relevant to the request or any objection to the request:

- (a) the orderly and fair administration of justice:
- (b) the right of a defendant in a criminal proceeding to a fair trial:
- (c) the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice:
- (d) the protection of other confidentiality and privacy interests (including those of children and other vulnerable members of the community) and any privilege held by, or available to, any person:
- (e) the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions):
- (f) the freedom to seek, receive, and impart information:
- (g) whether a document to which the request relates is subject to any restriction under rule 7:
- (h) any other matter that the Judge thinks appropriate.

[17] When assessing the considerations in r 12 a balancing exercise is required by r 13.¹² That rule reads:

13 Approach to balancing matters considered

In applying rule 12, the Judge must have regard to the following:

¹² *Crimson Consulting Ltd*, above n 3.

- (a) before the substantive hearing, the protection of confidentiality and privacy interests and the orderly and fair administration of justice may require that access to documents be limited:
- (b) during the substantive hearing, open justice has—
 - (i) greater weight than at other stages of the proceeding; and
 - (ii) greater weight in relation to documents relied on in the hearing than other documents:
- (c) after the substantive hearing,—
 - (i) open justice has greater weight in relation to documents that have been relied on in a determination than other documents; but
 - (ii) the protection of confidentiality and privacy interests has greater weight than would be the case during the substantive hearing.

[18] The rules do not contain any presumption in favour of access being granted and the order in which the considerations in r 12 are listed does not confer any hierarchy on them.¹³

[19] Mayweathers' application is broadly drafted and, if granted, would provide access to the whole of each Court file. The application did not propose any conditions for access, beyond an acknowledgment that any documents inspected would not be disclosed in other proceedings that may be contemplated once that firm's investigation ends.

[20] Mayweathers' application relies on granting access being consistent with the orderly and fair administration of justice in r 12(a), the principle of open justice in r 12(e) and the freedom to seek, receive and impart information in r 12(f). Ranged against those considerations, and despite the lengthy grounds of its opposition, Fletcher Construction concentrated on reducing possible intrusion into the private lives of individuals, protecting confidentiality, commercial sensitivity and the effluxion of time. It emphasised rr 12(c), 12(d) and 13(c).

¹³ *Crimson Consulting Ltd*, above n 3, at [32]; *Schenker AG v The Commerce Commission* [2013] NZCA 114; *Greymouth Petroleum*, above n 3, at [21].

[21] Beyond the formal court record, access to the Court's file by a non-party is only likely to be permitted where what is being pursued is for a recognised and legitimate purpose.¹⁴ The Court of Appeal in *Greymouth Petroleum Holdings Ltd v Empresa Nacional Del Petróleo* commented that the purpose of obtaining documents to assist, or to potentially assist, other litigation is legitimate but only if there is a point to the exercise. In that respect, the Court observed:

[57] When access is sought to the court file by a non-party, that party will often be unable to point to an exact document of relevance that is on a court file; there will often be an element of "fishing". However, there must at least be a reasonable prospect that relevant material may be found. ...

[22] I accept that the application was made for a recognised and legitimate purpose. It must be consistent with the orderly and fair administration of justice to consider allowing access to court files to enable an investigation into a possible further action to be undertaken. Granting access would also be consistent with the freedom to seek, receive and impart information referred to in r 12(f). The application cannot be dismissed, as Fletcher Construction contended, as speculative and/or a fishing expedition merely because Mayweathers' purpose is to seek information. These considerations weigh in favour of granting access.

[23] However, the considerations in rr 12(c) and (d), dealing with private lives and privacy interests, tell against granting access. Rule 13(c)(ii) provides that, after the substantive hearing, the protection of confidentiality and privacy interests has greater weight than would be the case during it. In this part of the analysis the Court of Appeal's approach in *Greymouth Petroleum* is persuasive. The Court said:¹⁵

... After the substantive hearing the need for public scrutiny diminishes in importance as time moves on. Parties are entitled to expect that the need for open justice has been met by full access during the substantive hearing stage, and that personal information not part of the formal court record or the decision will be given greater protection as the years go by. This is particularly so in a civil case as distinct from a criminal case where these considerations, while relevant, may have less weight because of the particular public interest in criminal prosecutions.

[24] Later in the same decision the Court said:¹⁶

¹⁴ *Greymouth Petroleum*, above n 3, at [36].

¹⁵ At [25] (footnotes omitted).

¹⁶ At [26].

... While open justice had to be given full weight during the hearing, and there were no restrictions on media access and access by any interested member of the public, the parties could reasonably have expected that the arguments and what was said and done during the hearing would become in due course forgotten. The parties will have moved on, and as time goes by the courts will be more reluctant to allow old and completed disputes to be stirred up and brought out of the darkness. The court file is not a permanent library available to any party who wishes to read a document.

[25] If granted, the access requested would inevitably identify the individuals who were referred to by Mr Johnston, in explaining his case, as either directly or indirectly involved in decisions about handling financial information he criticised. Those individuals did not give evidence and may not even know what was said about them. The allegations were unsuccessful but, even so, granting access will disclose personal information about them that would be a significant intrusion into their privacy. That intrusion would be compounded by the time that has elapsed since the hearing was conducted and the judgment was issued. Mayweathers emphasised that the information had already been disclosed during the hearing, but that is not a sufficient answer to address the concern I have mentioned.

[26] I do not accept the Mayweathers' analogy, of a journalist seeking to inform the community, because it is not apposite. The judgment fulfils that role and Mayweathers' investigation is directed at investigating possible future litigation not to performing the sort of public service provided by responsible journalism. As the Court observed in *Greymouth Petroleum*, the court file is not a library. This consideration points away from granting access.

[27] For completeness I should add that the commercial sensitivity of the information to Fletcher Construction is not very persuasive in considering granting or declining access; the company is part of a group of publicly listed companies with associated financial disclosure obligations to the share market.

[28] Mayweathers did present an alternative, to limit the scope of the application by confining it to the pleadings, affidavits, matters dealt with in evidence, submissions and to seeking a copy of the transcript. Even in its alternative form, the application, if granted, would involve providing access that would intrude on the privacy of individuals.

[29] Standing back and evaluating the application as a whole, those factors pointing away from granting access to documents beyond the formal court record outweigh those pointing in favour of it. I have considered whether the application might be granted in some limited, or conditional way, but in the end that would not be practicable because of the intertwined nature of information about individuals and the actions that the allegations sought to criticise.

Outcome

[30] In each proceeding Mayweathers is entitled to documents comprising the formal court record and to that extent the application is granted. In this case the formal Court record comprises a list of the documents on the file, the hearing notice, all judgments, minutes and orders.

[31] In all other respects the application is dismissed.

KG Smith
Judge

Judgment signed at 3.30 pm on 5 August 2020