

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

**I TE KŌTI TAKE MAHI O AOTEAROA  
TE WHANGANUI-A-TARA**

**[2022] NZEmpC 57  
EMPC 327/2021**

IN THE MATTER OF an application for discovery before  
proceedings commence

AND IN THE MATTER OF an application for non-party discovery

BETWEEN ROCKIT PACKING COMPANY  
LIMITED  
First Applicant

AND ROCKIT TRADING COMPANY  
LIMITED  
Second Applicant

AND ROCKIT GLOBAL LIMITED  
Third Applicant

AND AUSTIN PAUL MORTIMER  
Respondent

Hearing: 7 March 2022  
(heard via Audio Visual Link)

Appearances: P Crombie, counsel for applicants  
S Cook and O Brown, counsel for Cylinder Pac International Ltd

Judgment: 30 March 2022

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**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH  
(Application for non-party discovery)**

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[1] The applicants (Rockit Group) seek discovery from Cylinder Pac International Ltd (CPI) of documents they consider may be in that company's possession or under its control.

[2] The documents sought, which will be described shortly, are said to be relevant in a proceeding which Rockit Group has lodged in the Employment Relations Authority against its former Chief Executive, Austin Mortimer.<sup>1</sup>

[3] Initially this application sought discovery against Mr Mortimer in anticipation of lodging a proceeding in the Authority. That application was withdrawn after the proceeding was lodged and Mr Mortimer has not participated in this application as it relates to CPI.

[4] CPI is not a party to the proceeding in the Authority between Rockit Group and Mr Mortimer. The application is, therefore, for discovery against a non-party.

### **The power to order non-party discovery**

[5] The power to order discovery against a non-party is provided for in cl 13 of sch 3 to the Employment Relations Act 2000 (the Act). The clause reads:

#### **13 Discovery**

- (1) The court may, in relation to discovery that relates to proceedings brought or intended to be brought in the court, or intended to be brought in the Authority, make any order that the District Court may make under section 105 or 106 of the District Court Act 2016; and those sections apply accordingly with all necessary modifications.
- (2) Every application for an order under section 105 or 106 of the District Court Act 2016 (as applied by subclause (1)) is to be dealt with in accordance with regulations made under this Act.
- (3) Nothing in subclauses (1) and (2) limits the making of rules under section 212 or regulations under section 237.

[6] Section 106 of the District Court Act 2016 deals with applications involving non-parties in that jurisdiction and reads:<sup>2</sup>

#### **106 Discovery against non-party after proceeding commenced**

- (1) This section applies if it appears to the court, at any stage of a proceeding and in such circumstances as may be prescribed, that a document or class

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<sup>1</sup> There may be a dispute about the companies in the Group he worked for but that is immaterial for present purposes.

<sup>2</sup> Section 105 is not relevant; it enables pre-proceedings discovery between intended plaintiffs and intended defendants.

of documents may be or may have been in the possession, custody, or power of a person (C) who is not a party to the proceeding.

- (2) The court may order C—
  - (a) to disclose to the court and to any other prescribed person whether the document or documents are in C's possession, custody, or power; and
  - (b) if a document has been but is no longer in C's possession, custody, or power, to disclose to the court and to any other prescribed person when C parted with it and what has become of it; and
  - (c) to produce such of those documents as are in C's possession, custody, or power to the court or to any other prescribed person.

### **The proceeding in the Authority**

[7] A brief review of what is claimed to have happened is required to provide context to this application. Bearing in mind that the allegations made against Mr Mortimer are disputed, and yet to be tested, only a brief overview will be given.

[8] The catalyst for the litigation between Rokit Group and Mr Mortimer is his involvement with CPI as a shareholder and a payment he made to the company of \$50,000 described as a loan. Mr Mortimer's involvement with CPI occurred at a time when Rokit Group was entering into a business relationship with that company.

[9] Rokit Group grows and exports apples that are sold in transparent cylinder tubes. In 2017 Rokit Group began negotiations with an Australian company, Auzfresh Holdings Pty Ltd, about being supplied with a machine to manufacture those tubes. In those negotiations Mr Mortimer liaised with Auzfresh and its sole director, Darren Williames.

[10] As negotiations developed Auzfresh decided to establish a New Zealand company to provide the cylinder tube machine. In fact, two companies were created. The first one was called Cylinder Pak (NZ) Ltd and was incorporated in November 2018. Mr Mortimer and Mr Williames were appointed as directors of this company. Its shareholding was divided between Auzfresh and DK Lecanvey Trustees Ltd; a company belonging to Mr Mortimer's solicitors that held a parcel of shares in the company on trust for him. This company was removed from the Companies Register without having any dealings with Rokit Group. CPI was incorporated in February

2019. Its initial shareholders were Auzfresh and DK Lecanvey Trustees on behalf of Mr Mortimer.

[11] Mr Williames explained in his affidavit that Mr Mortimer did not provide any capital to either of the two companies. His explanation was that Mr Mortimer's shareholding in CPI was provided as security for a loan of \$50,000 he made to that company to assist with funding for the initial prototype of the cylinder tube machine. According to Mr Williames, Mr Mortimer advanced the loan in June 2020, at the same time as a shareholders' agreement was entered into between the shareholders in CPI.

[12] The first agreement to supply a machine and provide for an associated licence fee for its use was signed by Rockit Group and CPI in February 2019. A second supply agreement was entered into in September 2019 but for a longer term with an increased licence fee. There is a dispute over why changes were made between the two agreements.

[13] Mr Williames' evidence was that, on 23 October 2020, CPI repaid Mr Mortimer's loan without interest. The payment meant that as at November 2020 Mr Mortimer's beneficial interest in CPI ended. The shares held by DK Lecanvey Trustees on Mr Mortimer's behalf were transferred to Auzfresh. Mr Williames' evidence was that no dividends, commissions or other payments were made to Mr Mortimer in exchange for the loan and there were no plans for that to occur.

[14] Rockit Group's statement of problem in the Authority makes serious allegations against Mr Mortimer arising from these transactions. Amongst them it alleges that he did not disclose his business connection with CPI. Other claims are to the effect that alterations to the supply agreements seriously disadvantaged Rockit Group and, at least implicitly, may have benefited Mr Mortimer.

[15] The remedies Rockit Group seeks in the Authority are a finding that Mr Mortimer's behaviour lacked good faith, the return of a portion of a sum paid to him as part of a severance package payable as a "good leaver" under the employment agreement, and an inquiry as to damages it may have sustained.

[16] For completeness, Mr Mortimer denies any wrongdoing. I understand his defence is that he disclosed his interest in CPI to Rockit Group, that the loan was to facilitate development of the prototype cylinder-making machine that would not have happened without those funds, and that he is not in breach of his employment agreement or any duties owed to his former employer.

### **The application**

[17] Against that background very extensive discovery was sought against CPI. If successful the application required CPI to disclose whether that company has or has had in its possession, custody, power or control documents listed in eight categories in a schedule to the application.

[18] Generally speaking, the documents sought relate to all actual or potential transactions between Auzfresh, Cylinder Pak, CPI, Mr Williames and Mr Mortimer from 8 February 2019 onwards. Rather than attempt to summarise the extensive application a copy of it is attached to, and forms part of, this decision.

[19] Other disclosures are required if CPI no longer has possession or control of the listed categories of documents.

[20] A modification made by Mr Crombie during his submissions reduced the scope of the documents sought but the application still covers an extensive range.<sup>3</sup> A wide search was mounted to discover the ambit, nature and extent of the business relationship (if any) between Mr Mortimer and CPI to assist Rockit Group in the Authority investigation.

[21] CPI has opposed the application. Its grounds of opposition can be summarised as:

- (a) The Court lacks jurisdiction to make the orders sought.
- (b) If the Court has jurisdiction:

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<sup>3</sup> Items 4 and 6 in the attached schedule were not pursued.

- (i) applying by analogy reg 37 of the Employment Court Regulations 2000 disclosure of the documents sought would be unnecessary and undesirable; and
- (ii) the documents sought lack the necessary relevance to the issues in the Authority and it would be unduly burdensome for CPI to be ordered to provide them.

### **The issues**

[22] The issues in this case are:

- (a) Does the Court have jurisdiction to grant the application?
- (b) If it does have jurisdiction, should the application or some of it be granted?

### **Analysis**

[23] Mr Crombie and Mr Cook agreed that the Court has jurisdiction to make orders for non-party discovery before any proceeding is lodged in the Authority. That arises from the words in cl 13(1) conferring jurisdiction where a proceeding is “intended to be brought in the Authority”. The issue in this case is whether the Court has jurisdiction to make an order once the claim is lodged in the Authority.

[24] Mr Crombie invited a conclusion that the Court continues to have jurisdiction from reading together cl 13 and s 106. That was because cl 13 applies s 106 to the application “with all necessary modifications”. It was said that the necessary modification was to read “court” in s 106(1) as meaning the Employment Court or the Authority, in which case CPI’s argument “falls away”.

[25] A supporting submission was that s 106(1) refers to orders being made “at any stage of a proceeding” so that jurisdiction was established when the application was filed and continued to exist after the proceeding was lodged in the Authority. Being able to apply s 106(1) meant the Court continued to be seized of the subject matter. It

was said that this conclusion would enable the parties, and the Court, to concentrate on the real issue which is whether the documents were relevant and should be disclosed.<sup>4</sup>

[26] I do not accept Mr Crombie’s submissions about the jurisdiction of the Court. The text of cl 13 is clear and unequivocal. It confines the Court’s jurisdiction to proceedings “intended to be brought in the Authority” and does not extend to situations like the present one.

[27] Had the intention been for the Court to continue to have jurisdiction the clause would have been different. It would have expressed the jurisdiction as being to make orders for non-party discovery in relation to a proceeding brought or intended to be brought in either the Court or Authority.

[28] From Rokit Group’s perspective the situation is not saved by s 106 applying with all necessary modifications. Reading them together in the way argued for would result in unacceptably straining the language of both the clause and section. It would be an unusual way of expressing the Court’s jurisdiction if the clause, which on its face limits what can be done, is expanded through the importation of a section from the District Court Act which expresses how the jurisdiction is to be exercised. There would also be an unexplainable contradiction if they were read together as argued for by Rokit Group. The clause refers to proceedings “intended to be brought in the Authority”. Section 106(1) applies “at any stage” of the proceeding. One indicates a limitation on the jurisdiction confining it to situations where a proceeding is yet to be lodged and the other confers jurisdiction at any time during a proceeding.

[29] Being able to make modifications does not provide the solution sought by Rokit Group. The only modification that might assist its argument would be to alter cl 13 by removing the limitation on the Court’s jurisdiction and substituting the reference in s 106 to an order being able to be made “at any stage”. That is not, however, what the clause provides for. It contemplates modifications to s 106 to make it effective in disposing of an application to the Court.

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<sup>4</sup> By reference to Employment Court Regulations 2000, regs 37–43. See the discussion in *Wells v Farmlands Co-Operative Society Ltd* [2020] NZEmpC 135; *Nisha v LSG Sky Chefs New Zealand Ltd (No 20)* [2016] NZEmpC 77, [2016] ERNZ 568 at [86]–[90], [103] and [105]; *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165, [2013] ERNZ 605.

[30] Mr Crombie’s submissions also do not sit comfortably with the delineation of roles between the Court and Authority created by the Act. If successful the result argued for by Rokit Group would, in effect, create overlapping jurisdictions by allowing the Court to make orders for non-party discovery while a proceeding is before the Authority. That would be inconsistent with the scheme of the Act requiring matters to be investigated and resolved by the Authority in the first instance.<sup>5</sup>

[31] There is, in fact, no need to treat cl 13 in the way argued for because of the extensive powers available to the Authority. While the Authority cannot order non-party discovery, it can effectively require evidence to be provided in other ways. Under s 160 of the Act it may call for evidence and information from the parties “or from any other person”.<sup>6</sup> It can require the parties or “any other person” to attend an investigation meeting to give evidence, interview the parties or “any person”, fully examine any witness and summons any person to produce evidence including any document.<sup>7</sup>

[32] Those sections enable the Authority to compel the provision of relevant information from CPI. They support CPI’s argument that cl 13 does not work as Rokit Group argued it does.

[33] For completeness, the legislative history of cl 13 does not assist Rokit Group’s case. Clause 13 in its present form was the product of amendments made by s 39(2) of the Employment Relations Amendment Act 2010.<sup>8</sup> The explanatory materials supporting the Bill that resulted in the amendment included an observation that the change was intended to clarify the law by providing the Court with the ability to address applications for pre-proceeding discovery where it is not the “originating body”.<sup>9</sup>

[34] The amendment was promoted following the Court’s decision in *A v The Internet Company of New Zealand*, where what had to be considered was “pre-

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<sup>5</sup> See, for example, Employment Relations Act 2000, ss 157(1) and 161(3).

<sup>6</sup> Employment Relations Act 2000, s 160(1)(a).

<sup>7</sup> See ss 160(1)(b), 160(1)(c) and 160(1)(f); sch 2 cl 5.

<sup>8</sup> With effect from 1 April 2011. It was further amended to refer to the District Court Act 2016 with effect from 1 March 2017: District Court Act 2016, s 261.

<sup>9</sup> Employment Relations Amendment Bill (No 2) 2010 (196-1) (explanatory note) at 9.



proceedings disclosure” to assist in identifying the correct intended defendant in a proposed claim.<sup>10</sup> Clause 13(1) at that time gave the Court jurisdiction to make, in relation to discovery, any of the orders that a District Court could make under ss 56A or 56B of the District Courts Act 1947.<sup>11</sup> In *A v The Internet Company* the Court considered the clause presented a dilemma because s 56A anticipated a claim in the Court, whereas the litigation contemplated would be before the Authority. The problem was overcome by applying the “necessary modifications” catch all.<sup>12</sup>

[35] The point made by Mr Cook was that the purpose of the amendment was to clarify the Court’s jurisdiction but not to extend it. It is notable that in the language of the amendment, and in the explanatory material, no reference was made to the creation of an overlapping jurisdiction enabling the Court to make orders during an Authority investigation.

## **Conclusion**

[36] The Court does not have jurisdiction to consider the application for non-party discovery against CPI in relation to a proceeding already lodged in the Authority. The application is therefore unsuccessful and is dismissed. That outcome means it is not necessary to consider the other arguments about whether the application for discovery was unnecessary, undesirable or unduly burdensome.

[37] Costs are reserved. If a costs application is to be made submissions must be filed within 15 working days. Any response may be filed within a further 15 working days. Submissions are to be fewer than 10 pages.

K G Smith  
Judge

Judgment signed at 12 pm on 30 March 2022

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<sup>10</sup> *A v The Internet Company of New Zealand* [2009] ERNZ 1 (EmpC).

<sup>11</sup> Now repealed and replaced with the District Courts Act 2016.

<sup>12</sup> At [8]-[9].

**Attachment 1**

**Schedule 2 – Documents sought from Cylinder Pac International Limited via its sole director, Darren Williames**

<b>Document</b>	<b>Description</b>	<b>Date</b>
1	Any Supply Agreement or Distribution Agreement or Sale Agreement of any kind made since 8 February 2019 (including all drafts of any such Agreements) between Cylinder Pac International Limited and either Auzfresh Holdings Pty Limited or Cylinder Pac Pty Limited which relate in any way to the sale, supply, distribution or grant of any licence to Cylinder Pac International Limited of machinery for the manufacture of cylinders designed to hold small apples and closure inserting machinery designed to make lids for the cylinders together with associated materials such as printed roll stock	
2	All written communications, whether by email, letter, facsimile or otherwise from the respondent, Austin Mortimer, to Cylinder Pac International Limited's sole director, Darren Williames, since 8 February 2019, but excluding communications sent by the respondent to Darren Williames through the email server at Rockit Global Limited	
3	All written communications, whether by email, letter, facsimile or otherwise and all attachments or enclosures or other documents referred to in those written communications, from Cylinder Pac International Limited's sole director, Darren Williames, to the Respondent, Austin Mortimer, since 8 February 2019 but excluding communications that were sent by email to the respondent via the Rockit Global Limited server – Austin@rockitapple.com	
4	Any loan agreement entered into between the respondent and Cylinder Pac International Limited or between the respondent and Auzfresh Holdings Pty Limited	

5	All written communications whether by email, letter, facsimile or otherwise between the respondent and Darren Williames as sole director of Cylinder Pac International Limited which directly or indirectly relate in any way to a loan advance from the respondent to Cylinder Pac International Limited	
6	All security documents, or other documents that were created, that relate to any security provided by Cylinder Pac International Limited for any loan advance to be made to it by the respondent, Austin Mortimer	
7	All written communications since 8 February 2019 from the respondent to Darren Williames of Cylinder Pac International Limited, and any written communications from by Darren Williames of Cylinder Pac International Limited to the respondent, that relate in any way to the issue of shares in Cylinder Pac International Limited to the respondent or to DK Lecanvey Trustees Limited	
8	All written communications between the respondent and Darren Williames of Cylinder Pac International Limited and between the respondent's solicitors DK Legal Limited of Hastings and any solicitor/s acting for Cylinder Pac International Limited which directly or indirectly relate in any way to a shareholders agreement for Cylinder Pac International Limited	