Employment Court of New Zealand

Eden Group Limited v Jackson [2016] NZEmpC 72 (10 June 2016)

Last Updated: 1 July 2016

IN THE EMPLOYMENT COURT AUCKLAND

[2016] NZEmpC 72

EMPC 119/2016

IN THE MATTER OF	an application for a search order
BETWEEN	EDEN GROUP LIMITED Applicant
AND	TIMOTHY NIGEL JACKSON First Respondent
AND	PHILLIP ANDREW KITE Second Respondent
AND	CHRISTOPHER JOHN BLACKMAN Third Respondent
AND	NEW SPACE LIMITED Fourth Respondent

EMPC 120/2016

IN THE MATTER OF an application for a freezing order

AND BETWEEN EDEN GROUP LIMITED Applicant

AND TIMOTHY NIGEL JACKSON First Respondent

AND PHILLIP ANDREW KITE Second Respondent

AND CHRISTOPHER JOHN BLACKMAN Third Respondent

AND NEW SPACE LIMITED Fourth Respondent

EDEN GROUP LIMITED v TIMOTHY NIGEL JACKSON NZEmpC AUCKLAND [2016] NZEmpC 72 [10 June 2016]

EMPC 135/2016

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

AND 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:	10 June 2016 (Heard at Auckland)
Appearances:	T Drake and M Donovan, counsel for Eden Group Limited B O'Callahan and Margaret Chen, counsel for Timothy Jackson, Phillip Kite, Christopher Blackman and New Space Limited
Judgment:	10 June 2016

ORAL JUDGMENT (NO 2) OF CHIEF JUDGE G L COLGAN

[1] The search and freezing orders made by the Court without notice on 23 May

20161 expire today and this is also an opportunity for the Court to review the original proceedings and new ones removed from the Employment Relations Authority to the Court under s 178 of the Employment Relations Act 2000 (the Act).

[2] There are a number of housekeeping matters to be dealt with at the start.

First, the Court's judgment of 23 May 2016 and the Court's reasons for that

1 *Eden Group Ltd v Jackson* [2016] NZEmpC 58.

judgment issued on the following day2 may now be published, the proceedings to which they relate being on notice and the orders having been executed.

[3] Next, without opposition, the three proceedings now before the Court will be consolidated so that they will run in tandem to the extent that the first two proceedings survive and on each occasion, all of those matters will be before the Court if that is appropriate.

[4] Next, the Court has received two reports from the independent lawyer who supervised the execution of the search order. Ms Jody Foster, the independent lawyer, has not been required by the parties to attend today's hearing and, in view of her commitments in the High Court, her attendance was excused. I should record that the Court is grateful to Ms Foster for agreeing to act as the independent lawyer on the execution of the search order and thanks her for her role.

[5] Next, the Employment Relations Authority has removed to the Court, under s

178 of the Act, the substantive proceedings issued in that forum.3 The plaintiff has today filed, and will shortly serve, its statement of claim. By consent, there is a direction that the defendants in that proceeding will file and serve their statement or statements of defence within the next 14 days.

[6] I now turn to the very shortly-to-expire search and freezing orders.

The search order

[7] The directions that I am about to give will be largely by consent and mean that the search order is spent and no renewal of it is needed.

[8] The following directions deal with those items searched for and seized during the execution of the search order. They are conveniently summarised in para 6 of the memorandum to the Court of counsel for the applicant dated 9 June 2016 and in Ms

Foster's initial report/affidavit of 26 May 2016.

2 *Eden Group Ltd v Jackson* [2016] NZEmpC 60.

3 *Eden Group Ltd v Jackson* [2016] NZERA Auckland 175.

[9] First are the documents referred to from (a)-(i), (k) and (m) at para 46 of Ms Foster's affidavit/report filed on 26 May 2016. Those items are now available for return by the applicant's lawyers to the respondents' and arrangements will be made between counsel to do this.

[10] Next are the items or documents listed as (h), (j), (n) and (o) and two diaries listed at (p) and (q) of para 46 of Ms Foster's first report to the Court. The applicant asserts that these are its exclusive property and should be retained by it. I understand Mr O'Callahan, for the respondents, to accept that this may be correct, at least in respect of some of those items. The following direction, therefore, applies to those in which the applicant asserts exclusive proprietorship, and to the balance of the items set out in para 46 of Ms Foster's first report which have not otherwise been dealt with. These documents will be made available for inspection by the respondents' counsel only, at the offices of the applicant's lawyers. That means, to be clear, that the inspection is only to be conducted by counsel and the documents and their contents are not to be made known to the respondents, at least at this stage. It may be that, after

discussion, further agreement can be reached between counsel as to which documents will be retained exclusively by the applicant; which may be copied, with such copies being given to the respondents; and, if any fall into this category, which may be returned to the respondents without any copies being retained by the applicant.

[11] The leave reserved at the conclusion of this judgment, and the next scheduled directions conference of the case, will ensure that if there is any dispute about the future destinations of any of these documents, the Court can be asked to determine this.

[12] Next are the electronic items taken by the applicant's forensic analyst, Daniel Ayers. These are listed at para 47 of Ms Foster's first report to the Court. It is agreed between the parties that these items have all been copied, returned to, and reconnected for, the respondents and that this was completed by 31 May 2016 at the latest.

[13] Penultimately, there are the documents referred to in para 48 of Ms Foster's first report to the Court. These are also electronic media and include cell phones, memory sticks and a portable Seagate hard drive. It is agreed that forensic examination of these items by Mr Ayers will be completed today, following which they will be sent by courier from Christchurch to the applicant's counsel and will then be returned by arrangement to the respondents.

[14] It is common ground that the Seagate hard drive referred to contains only information that is personal to one or more of the respondents. They have, however and responsibly, acknowledged that there was another Seagate hard drive that the search did not detect and that this may well contain relevant items. It has been agreed that this Seagate hard drive will be delivered to Mr Ayers (via Mr Drake's office) for forensic analysis and its contents will be otherwise treated as if it was subject to the search order.

[15] Next, there is an item described in para 31 of Ms Foster's first report of 26

May 2016. This consists of two boxes of printed, unused job cards relating to Sector One. These will be returned to the applicant without objection to that course by the respondents.

[16] This paragraph was not contained in the judgment delivered orally but

counsel are agreed that the issue was addressed. In Ms Foster's first report of

26 May 2016 (para 37), the supervising lawyer reported that Mr Kite would facilitate the return of Apple iPhones the subject of order 8 in the search order. Those two iPhones were returned to the applicant's counsel on 27 May 2016 and, without objection, I direct that these may now be returned to the applicant.

[17] Next, aside from issues of privilege in documents seized, with which I deal subsequently in this judgment, there is the question of how the respondents' confidential information, that may have come into the hands of the applicant's lawyers and/or the applicant, should be dealt with. Without opposition, I direct that any such documents as may fall into this category of confidential or otherwise commercially sensitive information of the respondents, are to be treated as if they were documents disclosed in the course of litigation pursuant to regs 37-52

(inclusive) (Mutual disclosure and inspection of documents) of the Employment Court Regulations 2000. In particular, such documents are subject to the constraints on their use as are contained in reg 51.

[18] I regard the search order as being spent and that there is no need for its extension or renewal.

The freezing order

[19] The respondents seek its discharge and that is opposed by the applicant.

[20] I propose to extend the freezing order until 12 noon on Tuesday 21 June 2016 for two reasons. The first is to enable the applicant to file any appeal against the non-renewal of that order, which will follow at the end of that period. The second reason is to enable the respondents to file and serve undertakings, a draft form of which was handed up in court this morning but which undertakings have not yet been filed. In addition to the three by the individual respondents, I am told that there will be a similar undertaking filed on behalf of the fourth respondent.

[21] I make a further freezing order, in the same terms as that which is about to expire, to 12 noon on Tuesday 21 June 2016, for a number of reasons. These include, principally, the undertakings that I accept will now be given by the respondents. It is important that I reiterate that these are regarded as having the effect of injunctions granted by the Court and are so enforceable. The individual respondents, who have been in court this morning, will be well aware of the consequences of any breach of those undertakings. Despite my initial view, from which I am not moved, that there has been some dishonesty on the part of the respondents in their dealings with the applicant, and which I think has been tacitly acknowledged by them through counsel, to their credit the first three respondents have acknowledged their wrongdoing and have acted responsibly since the orders were executed. In their circumstances outlined in evidence, and given the significant events of the last fortnight or so affecting them, I am satisfied that there is now no longer a case for ongoing freezing orders. There is insufficient risk, in my view, of

the dissipation or other alienation of assets by and of the respondents which would cause the Court to continue the freezing order and its draconian consequences.

[22] The onus is now on counsel for the respondents to formulate forms of undertaking on behalf of each of their clients that reflect more closely than the current form of undertaking, the terms of the freezing order that was made by the Court on 23 May 2016. That does not necessarily contemplate a replication of the terms of that order but, to be acceptable to the applicant, and ultimately to the Court which has to decide whether an undertaking is acceptable, it may result in the finality of the freezing order at the end of about

11 days.

Future of the proceedings

[23] I turn now to the future of the proceedings, and the substantive proceedings now before the Court in particular. I have already timetabled the filing of a statement of defence. There will be a further directions conference by telephone with counsel at 9 am on Tuesday 21 June 2016 to deal with any issues of privilege; to deal with the possibility of an early substantive hearing on questions of liability that the Court is able to offer the parties; and to deal with the applicant's signalled application for an interlocutory or interim injunction which it intends to file.

[24] This paragraph was omitted inadvertently from the judgment delivered orally and has been inserted in this written form. Any affidavit evidence intended by the applicant to be filed in support of an application of interim injunction is to be served in draft as soon as possible on counsel for the respondents. This is for the purpose of determining whether these draft affidavits may contain any privileged documents or other privileged information obtained as a result of the search. Counsel for the respondents may have the period of five working days within which to take objection to any of the contents of these draft affidavits on that ground. If, failing agreement between counsel as to these issues, the Court is required to determine whether a document or documents are privileged, these should be referred to the Court by counsel for the parties before affidavits are accepted for filing. If nothing is heard by the Registry from counsel for the parties by the end of five working days, it will be

assumed that no objection is taken by the respondents to the inclusion of such evidence in support of an application for interim injunction.

[25] A draft copy of this judgment was provided to counsel for the parties later the same day it was delivered, inviting them to check that the multitude of issues addressed at the hearing had been dealt with in the judgment or of any other such errors.

[26] Counsel have advised the Registrar of a number of matters, some at least of which appear not to have been the subject of argument at the hearing but which they nevertheless wish to have dealt with as directions following the search and freezing orders. In these circumstances, I propose to issue a supplementary judgment covering those issues.

[27] It may assist the parties if I indicate that at this stage, dates for the hearing of an interlocutory injunction, if that is to be brought, are currently available in the week commencing Monday 27 June, the week commencing Tuesday 5 July and the week commencing Tuesday 12 July 2016.

[28] Penultimately, it is appropriate that I should reiterate briefly the issue of alternate dispute resolution that I raised with the parties. They agree that this is a case which would not be appropriate for mediation with the assistance of the Mediation Service of the Ministry of Business, Innovation and Employment. I have indicated that the Court would make available, if the parties wish, a Judge to chair a judicial settlement conference. Perhaps most appropriately, however, given the nature of the dispute and its long-term implications, I do urge the parties to discuss seriously a private commercial mediation in an attempt not only to resolve this litigation, but to allow them to co-exist in business on a fair basis in future.

[29] I should note that the applicant has indicated that it wishes to await the outcome of any interlocutory injunction application before agreeing to go to mediation. I would, nevertheless, urge the parties to consider mediation earlier rather than later.

[30] Finally is the question of an estimate of costs following the Court's trial scale guideline contained in the Practice Direction.4 After hearing from the parties, I accept that this case is likely to be a Category 3 case. Although invited by the applicant to determine the band applicable to events which have occurred to date, I think the better and more just course is to defer consideration of the band indication until at least after the next hearing, although either Band B or C seems to be the

likely range of alternatives.

[31] Costs on these applications are therefore reserved.

[32] Leave is also reserved for either party to apply for any further orders or directions on short notice to the other and to the Court.

GL Colgan
Chief Judge

Judgment delivered orally at 3.25 pm on Friday 10 June 2016

4 <www.employmentcourt.justice.govt.nz/assets/Uploads/costs-guideline-scale.pdf>.