Employment Court of New Zealand

Eden Group Limited v Jackson [2016] NZEmpC 81 (24 June 2016)

Last Updated: 6 July 2016

IN THE EMPLOYMENT COURT AUCKLAND

[2016] NZEmpC 81

EMPC 119/2016

IN THE MATTER OF	an application for a search order
AND IN THE MATTER	of an application by respondents for further directions regarding search
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 81 [24 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:	21 and 23 June 2016 (in Chambers by telephone conference call) (Heard at Auckland)
Appearances:	T Drake and M Donovan, counsel for Eden Group Ltd B O'Callahan and Margaret Chen, counsel for respondents/defendants
Judgment:	24 June 2016

JUDGMENT (NO 3) OF CHIEF JUDGE G L COLGAN

[1] At the conclusion of the last hearing of these matters on 10 June 2016 and as recorded in the oral judgment issued that day,1 a number of issues were left to counsel to attempt to resolve, but failing which would be dealt with at a directions conference on 21 June 2016. These included any issues of privilege, the possibility of progress towards an early substantive hearing on questions of liability rather than,

as Eden Group Ltd (Eden Group) had then signalled, an application for interlocutory

1 *Eden Group Ltd v Jackson* [2016] NZEmpC 72.

injunction, and issues about undertakings to be given by the respondents which might obviate the need for the making of a further freezing order.

[2] As the Court's office was about to close on the day before the scheduled directions conference, 20 June 2016, the respondents applied for a number of orders and directions, but by 9 am on the following morning, counsel for Eden Group had not had an opportunity to obtain instructions on these matters relating to the fruits of the search order. In these circumstances, that aspect of the directions conference was adjourned until yesterday, 23 June 2016, although progress was able to be made in respect of the freezing order, which I will record later in this judgment.

[3] No issues of privilege of discovered documents have been raised. At the conclusion of this judgment I will deal with matters discussed relating to an early substantive hearing and/or an application by the plaintiff for an interlocutory injunction.

[4] Immediately following the first part of the telephone directions conference (on 21 June 2016), and by agreement as to their contents, the individual respondents filed signed undertakings. The contents of these, and their enforceability as injunctive orders of the Court, mean that Eden Group has withdrawn its application for a further freezing order. The interim freezing order then in place expired at midday on 21 June 2016. The undertakings by the three individual respondents, although annexing personalised asset lists, are each in the following form:

I, ... hereby undertake not to deal with all property of every kind, whether tangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise, I hold, as bare legal owner or as beneficial owner, including but not limited to the assets set out in the **attached** Schedule, otherwise than in accordance with the ordinary course of business or in accordance with usual and typical day-to-day living expenses or ordinary family decisions, provided that any spending on capital items beyond $10,000 per annum will require the consent of Eden Group Limited, which consent shall not be unreasonably withheld, or the consent of the Court, and in any event not to diminish any property or assets for the purposes of defeating my ability or the ability of the fourth respondent/fourth defendant to meet a judgment in this proceeding.

[5] Turning to the outstanding issues relating to the search order raised by the respondents, they sought the return of three items or categories of items to themselves or another from the custody of Eden Group's lawyers.

[6] The first item is that listed as "(j)" in the first line of [10] of the Court's second judgment of 10 June 2016 and also in para 46 of the affidavit/report of Jody Foster, the independent lawyer, sworn on 26 May 2016.

[7] What I will call item 46(j) is a building consent folder for work undertaken for a customer, initially of Sector One and subsequently of New Space Ltd (New Space), called Wrightway Studio (Wrightway). This is a folder of documents relating to Auckland Council building consents for the work to be performed at Wrightway's premises. The folder must remain at the relevant site for the duration of the construction and includes such documents as permit plans, inspection records, engineering and fire compliance specifications and Council inspection records. At the completion of the construction project, the folder is returned to the person who applied for the consent and will then be used in support of a subsequent application for a Code Compliance Certificate which, when granted, completes the project.

[8] The parties now agree that the file containing the Wrightway construction documents can, by consent, be sent directly to Wrightway and it should be despatched as a matter of priority.

[9] The next items covered by the respondents' application are known as items

46(p) and 46(q). These refer to Ms Foster's affidavit of 26 May 2016. These items are, respectively, the diaries of Messrs Blackman and Jackson. In the case of Mr Jackson's, its contents commence with references to January 2016, the month after Mr Jackson ceased his employment with Eden Group on 18 December 2015. Recordings in the diary cease as from 24 May 2016, although some drawings and references to events and meetings supersede this. Mr Jackson says that he needs to have access to the diary to prepare his evidence in the substantive proceedings and, if necessary, to oppose Eden Group's signalled application for an interim injunction. Mr Jackson says that, although Eden Group claims "ownership of the diary because it paid for the purchase of the diary", the contents were created by him. He therefore

asks that a copy of the contents of the diary be made and provided to him within five working days, in which circumstances Eden Group may retain the original diary. I will apply the same reasoning to the case of Mr Blackman's diary.

[10] Again, the parties have agreed sensibly that copies having been taken of the pages in the diaries upon which entries have been made, these copies should now be, if they have not already been, sent to the respondents and the originals of the diaries will be preserved as potentially disclosable documents by counsel for Eden Group. These should be supplied to Messrs Jackson and Blackman within five working days. I so direct.

[11] Finally, the applicant seeks to have returned directly to it the items known as

46(h), (n) and (o), again referencing para 46 of Ms Foster's affidavit. It submits that these items belong to it and are, respectively, a loose bundle of ASB Bank statements; documents on a Sector One letterhead file which appear to relate to a West Plaza 2015 project; and a file concerning "Royal Oak Mall 2015" which appears to be a Sector One project file. I take the view that they are documents relevant to the substantive proceedings between the parties and so are disclosable unless there is any assertion of privilege in them which, in any event, ought to have been made by now. Those documents are to be returned to Eden Group on the basis that they may subsequently be required to be disclosed to the respondents.

[12] Next, Mr Jackson says that, in addition to the originals of some items which have now been returned to him, so too have copies of some of these. He says that he is concerned about whether some seized items may have been disclosed by Eden Group's lawyers to representatives of the company before the hearing on 10 June

2016, including that copies may have been taken. He is concerned whether ongoing access to such documents is being provided to Eden Group. This was a matter that was raised at the hearing on 10 June 2016 and caused the Court to direct that items seized in the search were to be treated as documents disclosed under the provisions of the Employment Court Regulations 2000 (the Regulations) and that counsel were to discuss, and to attempt to resolve between themselves, whether some documents seized should be dealt with on an access-by-counsel-only basis.

[13] This raises an issue of concern and arguable deficiency in the terms of the search order as originally sought and issued. Counsel addressed me on this issue generally and asked that the Court make a statement about it including some general directions for the future in this case.

[14] The form of search order did not specify, I think now, sufficiently precisely, what was to happen to documents that were found and seized during the search. Mr Drake assures the Court that, in conjunction with the independent solicitor (whose report on this matter seems to confirm this), these documents were held by Eden Group's counsel. That could, however, and should, have been made more explicit in the Court's order and other parties seeking search orders in future, and Judges issuing them, may wish to consider specific provisions. Mr O'Callahan for the respondents argued that even if this had been the intention, it was necessarily implicit that such documents would not be handed over or copies given to Eden Group, at least without the consent of counsel for the respondents or by direction of the Court.

[15] Mr Drake has assured the Court that those implicit expectations were adhered to by him and Eden Group's lawyers, although Mr O'Callahan has expressed some concern as to how Eden Group's Director, Mr Collins, may have been able to depose to information in those documents without having seen, or at least been told of, their contents.

[16] Other than to note the issue and to make recommendations for the future, I do not propose to determine the rights and wrongs of the whereabouts of the documents seized in this case and the uses to which they may have been put. What I can and will, however, direct is that such documents that were seized are to be treated as disclosable documents and, therefore, subject to the restrictions upon the use of these contained in the Regulations in respect of the disclosure of relevant documents under those Regulations. Exceptions to this direction may include irrelevant documents and documents in which a recognised category of privilege may be asserted. Even then, however, I direct that such documents as were seized and are held by Eden Group's lawyers not be released or disclosed to any other person except by express consent of counsel for the respondents, or by order of the Court, whether or not they

are relevant to the current proceedings. In making this direction I am confident that commonsense arrangements between counsel can, for the most part if not universally, determine such issues as relevance and privilege but the direction I have given will reserve leave to apply to the Court ultimately.

[17] I move now to general directions for the hearing of the substantive proceedings under EMPC 135/2016, the other two files relating to the search and freezing orders now being effectively closed.

[18] The defendants will file and serve their statements of defence today, Friday

24 June 2016.

[19] In view of the ability of the Court to offer an early substantive fixture on both questions of liability and damages, Mr Drake informed the Court that Eden Group had decided not to seek interlocutory injunctive relief against the defendants.

[20] Eden Group, in particular, is satisfied that, by the end of September 2016, its expert forensic accounting advisers will have had sufficient time to assess both claimed past and prospective future losses incurred by Eden Group as a result, it says, of the defendants' breaches. Although not by any means in all respects, it is likely that there will be no contest by the individual defendants of some of the allegations of breach and, rather, the trial will focus on questions of probability of causation of losses, and the amounts of such losses.

[21] The Court has set aside up to two weeks for the trial of these proceedings commencing on Monday 14 November 2016.

[22] Further, by consent, I direct that, within six weeks of today's date, the parties will make contemporaneous disclosure of documents between themselves pursuant to the procedure under the Regulations but obviating the need for the giving of notices to this effect. Otherwise, the Regulations' procedures as to disputes about document disclosure will continue to apply. Disclosure of documents is, of course, not only of documents known or in existence before the causes of action arose, but is an ongoing obligation as in all litigation.

[23] Leave is reserved for either party to apply for any further orders or directions on reasonable notice. These are likely to be dealt with by the trial Judge allocated the hearing.

GL Colgan
Chief Judge

Judgment signed at 9.45 am on Friday 24 June 2016