



Employment Court of New Zealand

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TPT Forests Limited v Penfold [2021] NZEmpC 105 (8 July 2021)

Last Updated: 15 July 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 105](#)

EMPC 334/2020

IN THE MATTER OF	an application for search order
AND IN THE MATTER OF	an application for access to court documents by The China Navigation Company PTE Ltd
BETWEEN	TPT FORESTS LIMITED First Applicant
AND	TPT GROUP LTD Second Applicant
AND	CRAIG PENFOLD First Respondent
AND	SIMON STRONGE Second Respondent

Hearing: On the papers

Appearances: B Marten and M Redding, counsel for The China Navigation Company PTE Ltd
P Skelton QC, R Upton and S Rankin, counsel for first and second applicants
No appearance for first respondent
S Langton, counsel for second respondent

Judgment: 8 July 2021

JUDGMENT OF JUDGE J C HOLDEN

(Application for access to court documents)

[1] The China Navigation Company PTE Ltd (CNCo) seeks access to documents filed in these proceedings comprising:

(a) The affidavit of Mark Procter sworn on 2 November 2020; and

TPT FORESTS LIMITED v CRAIG PENFOLD [\[2021\] NZEmpC 105](#) [8 July 2021]

(b) Any subsequent affidavit of Mark Procter sworn in support of the applications that became the subject of the Court's judgment dated 31 March 2021.1

[2] The plaintiffs (TPT) are opposed to the making of the orders sought. Mr Penfold has not filed any documents in relation to the application, and Mr Stronge takes no position on the application and will abide the Court's decision.

CNCo has separate litigation in the High Court

[3] The background to CNCo's application is that it is involved in litigation against TPT Shipping Ltd in the High Court arising out of a voyage charterparty between CNCo and TPT Shipping Ltd. TPT Shipping Ltd is a related company to the applicants in these proceedings. The High Court litigation revolves around a letter of indemnity in the name of TPT Shipping Ltd, in which CNCo says TPT Shipping Ltd promises to indemnify CNCo for the consequences of the cargo's delivery without the production of the original bills of lading. The proceedings in the High Court are an attempt by CNCo to enforce the letter of indemnity.

[4] The High Court litigation is currently stayed because TPT Shipping Ltd is in administration under [Part 15A](#) of the [Companies Act 1993](#).

[5] CNCo now wishes to investigate the potential for litigation against TPT Forests Ltd and/or TPT Group Ltd directly and is making its application as part of its investigation "of all publicly available information on the TPT Entities that casts light on how this group operated".

[6] CNCo points to the statement in the judgment of 31 March 2021:

[29] The claim by TPT Forests and TPT Group that they are joint employers of the respondents does not appear strong; it may be an argument of convenience. Nevertheless, there is some support for the argument in the documentation, and it is not possible to dismiss it at this stage of the proceedings.

1 *TPT Forests Ltd v Penfold* [\[2021\] NZEmpC 39](#), [\[2021\] ERNZ 112](#).

[7] Relying on that paragraph, CNCo asserts that Mr Procter's affidavits are therefore relevant to it because they speak to precisely the issue it is grappling with, namely, how did this closely-held group of companies operate?

TPT opposes the application on various grounds

[8] TPT opposes the application primarily on the basis that CNCo has no recognised and legitimate interest in the documents sought. It says that the proceedings in the High Court against TPT Shipping Ltd are separate, unrelated proceedings.

[9] It says further that the affidavits sought contain commercially sensitive information and information regarding the conduct of identified individuals, including Mr Penfold and Mr Stronge, and TPT's China-based employees. It says the affidavits also contain serious, yet disputed and untested allegations, and that they would impact on the privacy of current and/or former employees of TPT and current and former clients (and their officers and representatives) of TPT.²

[10] TPT says that there is no overriding general public interest permitting release of the documents. It also says that providing access to the documents may impact on the parties' ability to achieve a confidential settlement of the issues currently before the Court.

[11] For these reasons TPT says it is not in the interests of justice for the affidavits to be made available to CNCo.

The Employment Court applies the Senior Courts (Access to Court Documents)

Rules 2017

[12] The Employment Court has previously considered applications for access to court documents. Because neither the [Employment Relations Act 2000](#), nor the [Employment Court Regulations 2000](#) deal with access to documents held on the court

2. Mr Proctor has filed three affidavits, the one of 2 November 2020, one dated 20 November 2020 in respect of the second respondents' application to rescind the search orders and one dated 7 December 2020 filed in support of TPT's application for a non-publication order over the 2 November 2020 affidavit.

file, the Court applies the [Senior Courts \(Access to Court Documents\) Rules 2017](#) (the Rules).³

[13] Rule 8(1) of the Rules provides that "[e]very person has the right to access the formal court record relating to a civil proceeding". The "formal court record" is defined in r 4 and would not include the evidence filed in these proceedings to which CNCo now seeks access.

[14] In these circumstances, r 11 of the Rules applies. Rule 11(7) gives the Court jurisdiction to grant CNCo's application in whole or in part, with or without conditions, or to refuse the request, or to refer the request to a Registrar for determination by that Registrar.

[15] Pursuant to r 12, in an application such as this, the Court considers:

- (a) the orderly and fair administration of justice:
- (b) ...
- (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 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) ...
- (h) any other matter that the Judge thinks appropriate.

[16] Rule 13 requires the Court to have regard to the following:

- (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

3. See, for example, *Prasad v LSG Sky Chefs NZ Ltd* [2017] NZEmpC 160 at [3]- [5]; *Prasad v LSG Sky Chefs NZ Ltd* [2018] NZEmpC 9 at [4] and *Johnston v The Fletcher Construction Company Ltd* [2020] NZEmpC 117 at [9]- [11].

(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.

[17] There is no presumption in favour of disclosure of any documents that do not form part of the formal court record; a balancing act of the relevant factors is required.⁴

On balance, affidavits should not be made available to CNCo

[18] Here CNCo says it wishes to evaluate its legal position in respect of any potential claim it may have against either or both applicants. What the nature of those proceedings might be is not identified.

[19] Neither CNCo nor TPT Shipping Ltd are mentioned in Mr Procter's affidavits.

[20] The affidavits concern the alleged conduct of Messrs Penfold and Stronge. CNCo's application refers to neither man.

[21] While CNCo does not know the content of the affidavits, and an element of fishing may be accepted in applications such as this, here there seems very little prospect that relevant material may be found.⁵

[22] That minimal prospect must be balanced against the confidentiality and privacy interests TPT has alluded to, and that the substantive claim by the applicants against the respondents is at an early stage. I am also conscious that the affidavits of Mr Procter include untested evidence both in respect of the conduct of the respondents and the allegations apparently made by the respondents against the applicants. With

⁴ *Crimson Consulting Ltd v Berry* [2018] NZCA 460, (2018) 25 PRNZ 447 at [16].

⁵ Contrast *Johnston*, above n 3, at [21]-[22] and *Martin v Solar Bright Ltd (in liq)* [2021] NZEmpC 36 at [17].

those factors in mind, I am not satisfied that the affidavits should be made available to CNCo.

[23] The application is declined.

[24] Costs are reserved. If they are sought by TPT, a memorandum seeking directions may be filed.

J C Holden Judge

Judgment signed at 2 pm on 8 July 2021

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