Employment Court of New Zealand

TPT Forests Limited v Penfold [2021] NZEmpC 39 (31 March 2021)

Last Updated: 7 April 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2021] NZEmpC 39
EMPC 334/2020

IN THE MATTER OF	an application for a search order
AND IN THE MATTER OF	an application for leave to set aside or vary an order
AND IN THE MATTER OF	an application to join party
AND IN THE MATTER OF	an application for interim non-publication order
BETWEEN	TPT FORESTS LIMITED Applicant
AND	TPT GROUP LIMITED Intended Second Applicant
AND	CRAIG PENFOLD First Respondent
AND	SIMON STRONGE Second Respondent

Hearing:	18 December 2020 (Heard at Auckland)
Appearances:	P Skelton QC and S Rankin, counsel for applicant and for intended second applicant S Foote QC and T Refoy-Butler, counsel for first respondent S Langton and R White, counsel for second respondent
Judgment:	31 March 2021

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN

(Application for leave to set aside or vary order; an application to join party; an application for interim non-publication order)

TPT FORESTS LIMITED v CRAIG PENFOLD [2021] NZEmpC 39 [31 March 2021]

[1] In my judgment dated 5 November 2020, I made search orders against the respondents, Mr Penfold and Mr Stronge, in the terms proposed by the applicant, TPT Forests Ltd (TPT Forests). The search orders covered various electronic devices (the search orders).1

[2] The search orders were subsequently amended to change the address for Mr Penfold and to change the independent solicitors.2

[3] The search orders were executed. The electronic devices have been cloned and returned to Mr Penfold and Mr Stronge. The clones are held by independent solicitors.

[4] Mr Penfold and Mr Stronge now apply to rescind the search orders, essentially on the basis that TPT Forests was not their employer.

[5] TPT Forests applies for an order that a related company, TPT Group Ltd (TPT Group) be joined as a second applicant. Both TPT Forests and TPT Group claim that they were joint employers of Mr Penfold and Mr Stronge. TPT Group and TPT Forests are related companies; TPT Forests is a wholly owned subsidiary of TPT Group.

[6] TPT Forests and TPT Group (TPT) also apply for non-publication orders over information in an affidavit from Mr Procter filed in support of the application for the search orders. Mr Procter is a director and shareholder of both TPT Forests and TPT Group. TPT says non-publication orders are necessary to protect its commercial relationships and business reputation.

[7] This judgment resolves all three applications.

TPT Group is the named employer in the employment agreements

[8] When TPT Forests applied for the search orders, it did so on the basis that it previously employed both respondents and that it alleged that the respondents had

1 *TPT Forests Ltd v Penfold* [2020] NZEmpC 179.

2 *TPT Forests Ltd v Penfold* [2020] NZEmpC 190 (supplementary).

acted unlawfully in their accessing and use of TPT Forests' confidential information and/or intellectual property. TPT Forests also alleged that Mr Stronge had breached employment obligations.

[9] Mr Procter's affidavit recorded the applicant as TPT Group. The other filed documents had the applicant recorded as TPT Forests. The search orders were in the name of TPT Forests.

[10] The employment agreements for Mr Penfold and Mr Stronge, attached to Mr Procter's affidavit, identified the employer as TPT Group.

The respondents' application for rescission is based on wrong applicant

[11] The respondents say that TPT Forests lacked standing to apply to the Court for the search orders because it was not their employer and that the Court lacked jurisdiction (and therefore the power) to grant the orders in favour of TPT Forests as there was no employment relationship between TPT Forests and the respondents.

[12] Further, the respondents say TPT Forests failed to take all reasonable steps to ensure that its application for search orders included that the respondents had a defence to the claims, being that there was no employment relationship between TPT Forests and them. They say this was a material non-disclosure. The respondents rely on High Court Rules 2016 (HCR) rr 33.5(4) and 7.23 and say the material non-disclosure means the search orders should be rescinded.

[13] They also say TPT Forests failed to file a memorandum of counsel and the separate certificate required by r 7.23(3) and referred to in HCR form G 32.

[14] TPT says the Court had jurisdiction to grant the search orders because TPT Forests had claimed an employment relationship with the respondents, which had been breached.

[15] TPT says the failure to name TPT Group as an applicant was not a case of material non-disclosure but of misnomer and was an error of TPT Forest's previous counsel.

[16] TPT acknowledges that counsel ought to have provided the Court with a memorandum and certificate but points out that Mr Procter's affidavit contained information as to potential defences.

[17] Alternatively, if the Court accepts there has been material non-disclosure, TPT says the application for rescission ought be dismissed, in the Court's discretion. The reasons given are:

(a) there was no intention to mislead the Court;
(b) the failure to provide a memorandum and certificate was procedural only;
(c) this resulted from counsel error and it is unfair to make TPT Forests and TPT Group suffer for it;
(d) rescission of the orders would be wholly disproportionate to the nature of the mistake;
(e) the search orders have been executed; and
(f) the undertaking as to damages is still able to be enforced in the substantive proceeding.

The Court had jurisdiction

[18] Section 190(3) of the Employment Relations Act 2000 (the Act) gives the Court the same powers of the High Court to make a search order. Where an application is made, the Court looks to Part 33 of the HCR. Rule 33.3 provides the matters the Court must be persuaded of in order to make such an order:

...

(a) the applicant seeking the order has a strong prima facie case on an accrued cause of action; and
(b) the potential or actual loss or damage to the applicant will be serious if the search order is not made; and
(c) there is sufficient evidence in relation to a respondent that–

(i) the respondent possesses relevant evidentiary material; and
(ii) there is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the court.

[19] It is axiomatic that all elements of an applicant's cause/s of action would need to be proved at the substantive hearing, and the applicant ultimately may not succeed in its proceeding.

[20] In the present case, at the time the Court considered the application for search orders, it was satisfied of the three elements provided for in r 33.3. It had jurisdiction to make those orders.

There were procedural irregularities

[21] As noted, TPT acknowledges that there were errors in the documentation. In particular, it accepts no certificate was filed, which ought to have occurred given that the application was without notice.3

[22] However, the procedural errors were of form rather than substance. The affidavit filed by Mr Procter included information regarding possible defences.

[23] In short, I do not consider that the procedural errors are determinative of the outcome of this application.

Executed search orders not usually rescinded

[24] High Court Rule, r 7.23(4)(b) allows the Court to rescind orders made without notice where there has been a failure to disclose all relevant matters to the Court or to file the required memorandum. High Court Rule, r 7.51(1) gives the Court a discretion to rescind an order that has been fraudulently or improperly obtained.

[25] Where an order has been executed, however, it will not usually be rescinded, as there is no practical purpose in doing so.4 The exceptions, where rescission of an executed order may be contemplated, are where the order has been obtained mala fide,

3 High Court Rules 2016, r 7.23(3), form G 32, at 5.

4. *Tira v McClay* [2020] NZHC 2991 at [74]; *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721 (CA) at 727-728.

there has been material non-disclosure, there is an abuse of process, and/or where there are special circumstances demonstrating a need for immediate relief.5

[26] Here, the respondents claim material non-disclosure.

[27] The Court may rescind an order for material non-disclosure even where the failure to put the material before the Court was unintentionally misleading.6 The principles applicable to an application to rescind a search order in such circumstances include:7

(i) There is a duty on the applicant to make proper enquiries and to fully and fairly disclose the material facts.
(ii) If material non-disclosure is established, the Court will be concerned to ensure that an applicant who obtains an ex parte order without full disclosure is deprived of any advantage the applicant may have derived by that breach of duty.
(iii) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the Judge on the application.

(iv) It is not every omission that will lead to an order being discharged. The Court has a discretion, notwithstanding proof of material non- disclosure that justifies or requires the immediate discharge of the ex parte order, nevertheless, to continue the order or to make a new order.

5. *D B Baverstock Ltd v Haycock* [1986] 1 NZLR 342 (HC) at 345; *Anvil Jewellery Ltd v Riva Ridge Holdings Ltd* [1986] NZHC 274; [1987] 1 NZLR 35 (HC) at 43.

6 *Jeffreys v Morgenstern* [2014] NZHC 2847 at [40].

7 *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 (CA) at 1356-1357.

Omission of TPT Group significant

[28] The respondents allege that the omission of reference to TPT Group as the employer was a material non-disclosure and meant the Court was not alerted to the potential defence that there was no employment relationship between the respondents and TPT Forests. Certainly, on its face, not naming an employer is very significant. However, context is important. It is acknowledged by the respondents that there was no deliberate concealment. The employment agreements were attached to Mr Procter's affidavit and, as noted, his affidavit recorded TPT Group as the applicant for the search orders.

[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.

[30] Search orders are draconian and can cause distress to the subjects of those orders. Here, the reports of the independent solicitors illustrate the environment in which the search orders were executed. It was early in the morning and family members were present. The experience would have been upsetting. That is in the nature of search orders. There is, however, no suggestion that either respondent was disadvantaged by the omission of TPT Group in the search orders. Neither respondent says he was unaware of the substantive issues.

[31] The claim of failure to identify the defence regarding the correct employer follows as a result of the error made. The possible defence does not arise from a contest of views but from the applicant's inadvertent omission or misnomer.

[32] In the circumstances of this case, the incorrect name of the employer was not a material non-disclosure.

[33] The search orders are not rescinded.

Even if there was material non-disclosure, orders would not be rescinded

[34] The respondents both agree that the ancillary order that the cloned material be held by the independent solicitors pending further order of the Court should remain in place. That is sensible but means there is no real purpose served by rescinding the search orders.

[35] The argument based around the failure to disclose a defence is lacking substantive merit. If TPT Forests' counsel had appreciated that the named employer in the employment agreement was TPT Group, TPT Group would have been named as an applicant. There is an artificiality in the point that the Court would not have granted the orders if it had known that the applicant was not the employer. If counsel (or indeed the Court) had noticed the error, the application would have been refiled including TPT Group as an applicant. No other substantive error in the application has been suggested.

[36] As noted by Sir John Donaldson MR in *WEA Records*, the Courts are concerned with the administration of justice, not with playing a game of snakes and ladders. If the respondents have suffered any injustice by the making of the order, taking account of all relevant evidence, including the filed affidavits and the fruits of the search, they have their remedy in pursuing the undertaking as to damages.8 TPT Forests acknowledges this possibility.

[37] In these circumstances, even if the failure to name TPT Group amounted to a material non-disclosure, the Court would not have rescinded the search orders.

Appropriate to add TPT Group as second applicant

[38] TPT Forests (supported by TPT Group) applies to join TPT Group as a party to the proceeding. First, TPT Forests says there was a misnomer when the proceedings were initially filed and that TPT Group and TPT Forests ought to have been jointly listed as applicants. Second, and in any event, TPT Forests relies on the broad power contained in s 221(a) of the Act and says that joining TPT Group will enable all

8 *WEA Records*, above n 4, at 727.

disputes relating to the same subject matter to be determined without the delay and expense of separate proceedings. Third, TPT Forests says it is in the interests of justice to grant the order in the circumstances.

[39] Mr Penfold agreed that TPT Group ought to be joined to the proceeding. However, his consent was to the joinder of TPT Group once the search order was rescinded.

[40] Mr Stronge opposes the application for joinder. He says that the relevant proceedings are those in the Authority; there is no issue in the Court as to whether TPT Group was the employer.

[41] Mr Stronge says where, as here, the search order is not rescinded the issues to be determined by the Court will be:

(a) what should happen to the cloned devices; and
(b) the outcome of any application from the respondents to enforce TPT Forests' undertaking as to damages.

[42] Section 221 of the Act allows the Employment Court to direct parties to be joined to a proceeding. It will do so if it considers this will enable the Court to more effectually dispose of the matter before it, according to the substantial merits and equities of the case. Section 221 serves the same purpose, and is to the same effect, as High Court Rule, r 4.56.9 That Rule allows a Judge, at any stage of the proceedings, to order that the name of a party be added as a party because either the person ought to have been joined, or the person's presence before the Court may be necessary to adjudicate on and settle all questions involved in the proceeding. The threshold is a fairly low one.10

[43] Here the parties agree that TPT Group was an employer, if not the only employer, of the respondents. There can be no doubt that that TPT Group ought to have been named as an applicant at the outset. It clearly has an interest in the

9 *Zara's Turkish Ltd v Kocatürk* [2019] NZEmpC 139 at [14].

10 *Newhaven Waldorf Management Ltd v Allen* [2015] NZCA 204 at [46].

proceedings going forward, including in what happens to the documentation recovered from the respondents' devices. I consider it appropriate that it is now joined as a second applicant for the matters that remain to be dealt with by the Court.

[44] I accordingly order that TPT Group Ltd be joined as a second applicant to these proceedings.

Parties agree on principles applicable to applications for non-publication

[45] TPT has applied for an interim non-publication order over the evidence of Mr Procter, as recorded in his affidavit sworn on 2 November 2020 in support of the application for search orders. In the alternative, TPT seeks an interim non-publication order over certain passages from Mr Procter's affidavit and various exhibits to that affidavit.

[46] The parties agree on the principles that apply to such an application. As Mr Langton, counsel for Mr Stronge, succinctly put it, when the Court considers an application to prohibit publication under cl 12, sch 3 of the Act:

(a) The starting point is the principle of open justice, which is a "*fundamental*" legal principle.11
(b) The applicant bears the onus of proving a departure from the principle.12
(c) To do so, it is not necessary for the applicant to show "exceptional circumstances" exist, but the standard is a high one. The applicant must show it will suffer specific adverse consequences, and that they are sufficient to justify an exception to the fundamental rule.13 That is, it must be necessary to so depart from the open justice principle in order to achieve the proper administration of justice.14

11 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2].

12 *Erceg*, above n 11, at [13].

13 *Erceg*, above n 11, at [13].

14 *Erceg*, above n 11, at [17] citing *John Fairfax & Sons Ltd v Police Tribunal of New South Wales*

(1986) 5 NSWLR 465 (NSWCA) at 476-477.

(d) The factors that weigh for and against a departure from the open justice principle may be different at an early and/or interim stage. Open justice may have less weight at the interim stage than at a later stage in the proceedings.15

[47] The parts of Mr Procter's affidavit that TPT is particularly concerned about comprise allegations made by the respondents to third parties in the industry in which TPT operates. No non-publication orders were sought at the time the affidavit was filed.

[48] TPT now says orders are necessary in the interests of justice. It says the disputed allegations included in Mr Procter's affidavit have the potential to seriously damage the business reputation of TPT in the industry. It says that its business relationships have been seriously tested already and that there is a significant risk that further reputational damage will occur if the disputed allegations are able to be published. TPT also says that the disputed allegations not only risk seriously damaging the business reputation of TPT, they also risk further loss of business for TPT, noting that it has already lost one major client. TPT is particularly concerned that Mr Stronge wants to show the affidavit to his new employer, a competitor of TPT.

[49] It says that Mr Procter's outline of the disputed allegations was intended to give the Court a wider understanding of the context of, and issues involved in, the case but that the proceeding is ultimately about TPT's specific claims of breach of employment obligations by Mr Penfold and Mr Stronge rather than about whether the disputed allegations are true.

[50] Both respondents say that the information in Mr Procter's affidavit is not of a nature that warrants protection. It is not commercially sensitive information that may be misused by a competitor, disclosure of trade secrets or publication of material that would involve a breach of confidence.

15. *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511 at [96]; *FVB v XEY* [2020] NZEmpC 182 at [11].

[51] They strongly argue that they would suffer prejudice in the preparation of their cases if they were not able to share the content of the affidavit with potential witnesses, including independent experts. They say they would be precluded from preparing a proper defence to the accusations now made.

[52] The respondents note that the evidence that TPT seeks to keep confidential was evidence that its own witness chose to provide to the Court.

[53] They also note that Mr Procter has provided evidence that TPT has engaged with clients in relation to the allegations the respondents made. They both say this counts against TPT's argument that the Court should make orders now, as the 'cat is already out of the bag'.

[54] They make the point there presently is a one-sided and adverse picture created by the Court's judgment on the application for a search order.16

No non-publication orders made

[55] I accept the allegations identified in Mr Procter's affidavit might impact on TPT's reputation. It is less clear, however, that there are specific adverse consequences that may result from Mr Penfold's and Mr Stronge's publication of the affidavit that would warrant a non-publication order. Mr Procter deposed that TPT's business model is based on openness and transparency so that early advice to clients of any potential issues is normal practice and was done here.

[56] The allegations therefore are already known in the business community in which TPT operates, in part at least because TPT front-footed the issues when it became aware of the allegations.

[57] I also note that, although TPT claims that the disputed allegations are not central to the case, in Mr Procter's affidavit, he identifies defences that would go to the substance of the allegations.

16 *TPT Forests Ltd v Penfold*, above n 1.

[58] In short then, I am not satisfied that there are specific adverse consequences identified by TPT that are sufficient to justify an exception to the fundamental principle of open justice or that outweigh the interests of the respondents in being able to disclose the contents of the affidavit to properly prepare their defences to the allegations being made.

[59] No non-publication orders are made.

[60] Costs on all applications are reserved. A telephone directions conference will now be convened to progress proceedings.

J C Holden Judge

Judgment signed at 2 pm on 31 March 2021