IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2012-409-002405
[2013] NZHC 801

	BETWEEN	NGAI TAHU JUSTICE HOLDINGS LIMITED Plaintiff
	AND	THE ATTORNEY-GENERAL Defendant

Hearing: 18 April 2013
(Heard at Christchurch)

Judgment: 18 April 2013
(Determined on the papers)

RULING OF ASSOCIATE JUDGE OSBORNE
on application for permission to access Court documents

Introduction

[1] On 19 March 2013, Mr Hamish Clark, a reporter employed by TV3 at Christchurch, applied to the Registrar to search documents filed in this proceeding between Ngai Tahu Justice Holdings Ltd ("Ngai Tahu") and the Attorney-General. In particular, he was seeking a copy of the statement of claim, the statement of defence and any other memorandum relating to the current status of the proceeding before the Court.

[2] The Registrar referred the application to me. I enquired of counsel for the parties as to the parties' positions in relation to the request. By counsel, both parties have in response opposed the request.

The High Court Rules as to permission to access documents

[3] The High Court Rules differentiate access to Court documents at hearing stage from access to such documents other than during the substantive hearing stage.

Rule 3.9 High Court Rules provides a procedure for access during the substantive hearing stage. I am not concerned with that provision in this ruling.

[4] The request in this case must invoke r 3.13.

[5] Rule 3.13 provides:

> **3.13 Applications for permission to access documents, court file, or formal court record other than at hearing stage**
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> (1) This rule applies whenever the permission of the court is necessary under these rules and is sought to access a document, court file, or any part of the formal court record, except where access may be sought under rule 3.9.
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> (2) An application under this rule is made informally to the Registrar by a letter that—
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> (a) identifies the document, court file, or part of the formal court record that the applicant seeks to access; and
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> (b) gives the reasons for the application.
>
> (3) The application is heard and determined by a Judge or, if a Judge directs the Registrar to do so, by the Registrar.
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> (4) On receipt of an application made in accordance with subclause (2), the Judge or Registrar may direct that the person file an interlocutory application or originating application.
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> (5) The applicant must give notice of the application to any person who is, in the opinion of the Judge or Registrar, adversely affected by the application.
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> (6) The Judge or Registrar may dispense with the giving of notice under subclause (5) if it would be impracticable to require notice to be given.
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> (7) The Judge or Registrar may deal with an application on the papers, at an oral hearing, or in any other manner the Judge or Registrar considers just.

[6] Also relevant is r 3.16 which provides:

> **3.16 Matters to be taken into account**
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> In determining an application under rule 3.13, or a request for permission under rule 3.9, or the determination of an objection under that rule, the Judge or Registrar must consider the nature of, and the reasons for, the application or request and take into account each of the following matters that is relevant to the application, request, or objection:

(a) the orderly and fair administration of justice:

(b) the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person:

(c) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions:

(d) the freedom to seek, receive, and impart information:

(e) whether a document to which the application or request relates is subject to any restriction under rule 3.12:

(f) any other matter that the Judge or Registrar thinks just.

The general approach to a request for access

[7] The previous regime required an applicant to show a particular interest in order for access to be granted. That is no longer required, as confirmed in *BNZ Investments Ltd v Commissioner of Inland Revenue.*[1] That said, the Court is likely to be less sympathetic to a request made by a person who cannot show a "recognisable and legitimate public or private interest" for seeking access: *Commerce Commission v Air New Zealand.*[2] In his judgment in that case, Asher J referred to the initial requirement upon the Judge or Registrar under r 3.16 (before taking into account the six listed matters) to:

> … consider the nature of, and reasons for, the application or request …

[8] His Honour said of the nature of and reasons for the request that:[3]

> They form a background for the assessment of the relevant matters that are then listed. They will tend to drive the analysis of the six factors. For instance if the purpose is publication to the public by the media, that may lead to a different focus than if the application was by a private person for personal or commercial purposes. Inevitably a Court will be less sympathetic to an application which does not have a recognisable and legitimate public or private purpose.

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1 *BNZ Investments Ltd v Commissioner of Inland Revenue* (2009) 20 PRNZ 311 (HC).

2 *Commerce Commission v Air New Zealand* [2012] NZHC 271.

3 At [30].

[9] In the same judgment, Asher J noted that the six matters to be taken into account under r 3.16 are "unambiguously non-hierarchical".[4] This has led Asher J in the *Commerce Commission* case and other judges in subsequent cases to reject any suggestion that open justice is a paramount consideration in the new access regime.[5] In this regard, I prefer the analysis of Asher J in the *Commerce Commission* case to that taken in favour of the paramountcy of open justice, in *BNZ Investments Ltd v Commissioner of Inland Revenue.*[6]

The factual background

[10] This proceeding arises out of the commercial, contractual relationship between the parties. It was filed on 2 November 2012 following the Christchurch earthquakes. Mr Clark identifies himself as a reporter with TV3 but beyond that does not identify a particular reason for interest in the documents in this proceeding. It may be inferred that the interest arises because of either the relationship of the Crown to Ngai Tahu in a commercial context or as a result of the impact of the Christchurch earthquakes, or both.

[11] What is clear from the Court file, but may not be known to Mr Clark, is that disputes in relation to this commercial dispute between the parties were subject to a reference to arbitration within their contract. That contractual position has led to the parties consenting to the making of a stay until further order of the Court and referring the parties to arbitration pursuant to Article 8(1) of Schedule 1 of the Arbitration Act 1996. Relevantly, s 14A Arbitration Act 1996 provides:

> **14A Arbitral proceedings must be private**
>
> An arbitral tribunal must conduct the arbitral proceedings in private.

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4 At [28].

5 *Commerce Commission v Air New Zealand*, above n 2, at [29]; *Chapman v P* (2009) 20 PRNZ 330 (HC) per Mallon J at [31]; *Sanofi-Aventist Deutschland GMBH v AFT Pharmaceuticals Ltd* (2012) 21 PRNZ 130 per Associate Judge Bell at [15]. *Orlov v New Zealand Law Society (No 7)* [2012] NZHC 452 per Heath J at [8].

6 *BNZ Investments Ltd v Commissioner of Inland Revenue*, above n 1, per Wild J at [29].

[12] Against this background I turn to examine the matters to be taken into account under r 3.16.

The nature and the reasons for the request

[13] In the absence of reasons stated by Mr Clark for his request, I infer that it is for the purposes of researching and considering a possible current affairs item or items in relation to either Ngai Tahu, the Crown, the Christchurch earthquakes or a combination thereof. I will return to this consideration in my discussion of the third principle (as to open justice) below.

The orderly and fair administration of justice

[14] The proceeding in this case has been commenced only very recently. None of the documents has been read in open court. In consenting to a stay of the proceeding, the parties have accepted that their contractual relationship requires them to arbitrate their dispute. That carries with it the requirement of a private process. While it might be asserted in relation to the plaintiff that that party chose to put its dispute into a more public forum, the same cannot be said of the defendant. By promptly having the plaintiff agree to a reference to arbitration, the defendant has simply maintained its contractual right to have matters resolved privately, a feature of arbitration which is viewed as one of its primary purposes.

[15] If the plaintiff's claim had been commenced by a submission to arbitration in the first place, without the intermediate step of a High Court order, the present request would not have been open to Mr Clark. On the particular facts of the case this is an overwhelming objection to an acceptance of the request. For that reason, I will only briefly examine the other considerations that come to bear in this case. Some simply reinforce the conclusion which is driven by the agreement to arbitrate. None of the others is sufficient in this case to displace the justice of recognising the privacy of an agreed arbitration.

[16] There is a further aspect arising from the fair administration of justice which is accentuated by the early, and possibly now permanently truncated, stage reached

in this proceeding. Because of the agreed stay, the defendant has not been required to file a statement of defence. Such pleadings as have been filed do not disclose even both sides of any competing arguments. In *Hotchin v APN New Zealand Ltd*[7] Fogarty J dismissed an application for access to the statement of claim in a defamation proceeding, finding that the application was premature.[8] In doing so, his Honour recognised the significance of the close of pleadings in this way:[9]

> … it would be an extremely unusual step for this Court to allow a newspaper access to a statement of claim prior to a praecipe having been filed. Praecipe is the former term for an agreement between the parties that the case is ready for hearing. That agreement only takes place after the pleadings in reply have been filed and then only at a much later date. Fair and accurate report of the pleadings would have to cover both the claim and the reply were it to be protected by qualified privilege.

[17] The *Hotchin* case was a defamation proceeding, which has some peculiarities including a frequent resolution by jury trial. That feature of the *Hotchin* case does not alter the relevance of the observations made by Fogarty J as to fair and accurate reporting of all civil proceedings.

[18] Toogood J adopted a similar approach in a case involving ordinary commercial litigation and *Yarrow v Finnigan.*[10] His Honour observed that:[11]

> … the newspaper [which requested access] should take into account the fact that the default position under the Rules is that there is no access to the Court file, at least until the case begins …

[19] The present case serves to emphasise the importance to the fair administration of justice, identified in cases such as *Hotchin* and *Yarrow*, of not allowing access to the Court file when pleadings are incomplete. In this case the

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7 *Hotchin v APN New Zealand Ltd* (2011) 20 PRNZ 484 (HC).

8 At [19].

9 At [15].

10 *Yarrow v Finnigan* Telephone Conference Minute HC New Plymouth CIV-2011-443-000330, 15 July 2011.

11 At [22].

pleadings remain incomplete because the parties had contractually committed to a different (private) forum for the resolution of any disputes.

The principle of open justice

[20] The cases which I have earlier referred to and adopted indicate that the principle of open justice (that is to say encouraging fair and accurate reporting of and comment upon court hearings and decisions) is not paramount. Significantly, in relation to a request for disclosure made at this early stage of the proceeding, the matter listed under "open justice" at r 3.16(c) specifically refers to reporting of and comment upon *court hearings and decisions* (my emphasis). For the reasons I have already identified, the concept of open justice does not assume such significance in the early, pleading stages of civil litigation.

The freedom to seek, receive and impart information

[21] As a representative of the fourth estate, Mr Clark has a valid interest in the freedom to seek, receive and impart information. Such, again, is not a paramount freedom. In this particular case, it falls away insignificantly in view of the parties' and, particularly, the Attorney-General's right to privacy in the contractually-agreed arbitration forum. Even had the arbitration element not been present in this proceeding, the element of freedom to seek, receive and impart information was not such as to override the competing interests of the fair administration of justice.

Existence of other restrictions under r 3.12 High Court Rules

[22] Rule 3.12 precludes permission to access a document or Court file which relates to a proceeding brought under a specified enactment unless the requesting party is a person to that proceeding or the court permits the person to do so. Under r 3.12(3), the Arbitration Act 1996 is a specified enactment (along with 12 others).

[23] The provision within r 3.12 for the Court to grant permission means that, notwithstanding restrictions imposed by specified statutes, inspection in a proper case may be ordered. *Grayburn v Lang*[12] is such a case, the Court having allowed access to the court file to an interested party notwithstanding restrictions as to the publication of information arising under ss 262 and 262A Companies Act 1955. But the practical effect of r 3.12 is to act as something of a flag to the Court that some particular regard needs to be had to the protective provisions of the specified enactments before any request is granted.

[24] While this present proceeding cannot be properly described as a proceeding brought under an enactment specified in r 3.12(3), the very naming of the Arbitration Act within r 3.12, serves to highlight the important restrictions arising under that Act which the Rule intends should be specifically addressed. This, in a sense by a back-door route, reinforces the previous conclusions I have reached arising from the parties' contractual agreement as to arbitration.

Any other matters justly to be taken into account

[25] There are no further matters arise which require consideration.

Balancing

[26] The overall balancing of matters to be taken into account under r 3.16, even without the element of an agreement to refer matters to arbitration, would come down in favour of refusing the request made by Mr Clark. With the additional element of agreement to arbitrate, the case for declining Mr Clark's request is overwhelming.

[27] In reaching this conclusion, no criticism is to be made of Mr Clark. There is nothing to suggest that he was, in making the request, aware of the arbitration agreement and of the stay of the proceeding.

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[12] *Grayburn v Laing* (1991) 3 PRNZ 195 (HC).

Outcome

[28] Accordingly, I decline the application of Mr Clark for a search of documents filed or issued in this proceeding.

Associate Judge Osborne

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