IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-001818
[2022] NZHC 3408

UNDER	the Defamation Act 1992
BETWEEN	GRAHAME CHRISTIAN Plaintiff
AND	MURRAY IAN BAIN Defendant

Hearing: On the papers

Appearances: C T Patterson and E J Grove for the Plaintiff
J Dickson, D Dustan and A Cox for the Defendant
M Hardy for Applicant - Smart Environmental Limited
T Goatley for NZME and Michael Valintine

Judgment: 14 December 2022

JUDGMENT OF WALKER J
[Application for access to Court file]

This judgment was delivered by me on 14 December 2022 at 3.30 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

[1] Smart Environmental Ltd (**Smart**) requests access to Court documents in this proceeding. The application relies on rr 11–13 of the Senior Courts (Access to Court Documents) Rules 2017 (**the Access Rules**).

[2] Th application was made after trial but before issue of the substantive judgment. This judgment is issued in conjunction with the substantive judgment.

[3] This proceeding is a defamation claim brought by Grahame Christian, a director and shareholder of Smart. Mr Christian's claim relates to two articles published in the *Weekend Herald* and republished in the *Bay of Plenty Times* and *Hawke's Bay Today.* The articles, a front-page news article and a feature article, related principally to Smart and its commercial relationship with Thames-Coromandel District Council (**TCDC**). Smart had an interest in the articles and consequently in the litigation but is not a party to the litigation.

[4] The original defendants to this claim were NZME Publishing Limited (**NZME**); Michael Valintine, the journalist under whose by-line the articles in question were published; and Murray Bain. Mr Christian settled (and discontinued) his claims against NZME and Mr Valintine. This left the claim against Mr Bain for determination following a three-week trial.

[5] It follows that NZME, Mr Valintine and Mr Bain also have an interest in Smart's application and an entitlement to respond to it.

[6] Mr Christian consents to Smart's application for access. For the purposes of this application, I assume that his interest is materially the same as Smart's interests. NZME, Mr Valentine and Mr Bain oppose the application for access save that Mr Bain is agnostic in respect of access to the formal court record.

[7] In my substantive judgment, I held that the articles were defamatory of Mr Christian and that Mr Bain was in law a joint tortfeasor[1]. It followed that he had legal responsibility for the articles subject to any available defences. I upheld Mr Bain's defence of responsible communication on a matter of public interest.

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1 *Christian v Bain* [2022] NZHC 3394.

Consequently, I dismissed Mr Christian's claim in defamation. This does not of course mean that I found that the sting of the articles to be true or the underlying facts accurate. The defence of responsible communication on a matter of public interest protects the publication of defamatory imputations which are not proved to be true.[2]

[8] Smart's initial application for access was broad. It includes:

(a) briefs of evidence;

(b) affidavits, including discovery affidavits and any supplementary affidavit;

(c) notes of evidence;

(d) common bundle of documents;

(e) pleadings, including statements of claim and defence;

(f) written submissions; and

(g) any judicial orders, minutes and decisions (to the extent not available online).

Smart's contention

[9] Smart argues that the proceeding directly concerns statements made about the company and it wishes to see the relevant evidence. It expresses concerns that council procurement processes have been improperly affected by the defamatory comments at issue in the case and that the evidence at trial may support those concerns. It explains that it is engaged with councils on these concerns and that those councils have sought further information. It suggests that evidence adduced in the proceeding may be required to respond to particular issues. Smart emphasises the principles of open justice in support of its application to access documents relied on the in the hearing.

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[2] Mr Bain did not plead truth as a defence. He did plead the defence of honest opinion but it was not necessary to determine that defence in the light of the successful defence of responsible communication on a matter of public interest.

[10] Smart's initial application proposed no restrictions on the use of documents to which access is granted.

The defendants' opposition

[11] NZME and Mr Valintine's opposition focuses on the potential that the documents requested contain information which could be used to identify confidential journalistic sources. They contend that it appears that Smart is concerned about statements that may have been made in the proceedings, wants to obtain evidence of these and intends to disclose the evidence to third parties. They also argue that:

(a) Documents provided on discovery can only be properly used for the purposes of the particular proceeding, save where leave is granted.

(b) An attempt to obtain such documents for the purposes of a future potential proceeding is an abuse of process and therefore contrary to the orderly and fair administration of justice.

(c) A finding of fact in one proceeding is inadmissible in another proceeding to prove the existence of facts at issue.

(d) Statements made in the course of proceedings, whether written or oral, are absolutely privileged.[3]

(e) There is also a separate wider immunity from action of any kind for statements made by witnesses or arising from what has been said or done in preparing evidence for trial.

[12] They also refer to the confidential settlement agreement between Mr Christian, NZME and Mr Valintine.

[13] Mr Bain's opposition is based on concerns around publication restriction orders made during the course of this trial and the privacy interests of Mr Bain and

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[3] Defamation Act 1992, s 14.

other witnesses. Ms Dickson points out that since Mr Christian attended the trial, Smart will already be well aware of statements relating to Smart during the trial and certainly aware of the articles. She emphasises that Smart is a private party seeking access for commercial purposes so the principle of open justice has less weight. She also suggests that the reasons given obliquely signal a fishing exercise in contemplation of further litigation. She makes the point that the application is broad in scope and light on details.

Smart's response

[14] In response, Smart says that it has not requested access to any settlement agreement in the proceeding or to any information which may be subject to a non-publication order. It understands that such access may be refused or may be subject to restrictions. It denies seeking access in consideration of initiating its own defamation claim or any other Court proceeding.

[15] It also clarified that it is seeking access to documents that have been referred to in open Court given that many of these documents directly concern it but is not concerned with comments in the proceeding itself. It accepts such comments are subject to absolute privilege. It points out that access to such documents will be subject to the usual restrictions about how such information may be used (including as evidence in other proceedings).

[16] Smart pragmatically shifted its position. It says it is prepared to obtain access with restrictions on further publication or use in Court proceedings, despite not considering that such restrictions are warranted. It reiterates its wish to disclose relevant information to the Office of the Auditor-General and relevant local authorities for lawful and proper purposes directly related to their statutory functions.

Approach

[17] The Access Rules set out the approach to such applications. Any person may apply to access any document on the Court file under r 11. A Judge may grant the request, with or without conditions, after considering the nature of, and reasons for,

the request and taking into account those of the factors listed in r 12(a) to (h) that are relevant.

[18] This is a prescriptive regime. There is no presumption of disclosure and no hierarchy between the factors in r 12.[4] All relevant factors must be balanced with the weight given to each as a matter of evaluation.[5]

[19] Materially, for the purposes of this request, open justice has greater weight during the substantive phase than at other phases.[6] This application was made after trial but before the substantive judgment was issued. The operative period for the purposes of r 13 is therefore during the substantive hearing.

[20] Open justice also has greater weight in relation to documents relied on in the hearing as opposed to other documents. This principle does not however translate to a presumption of disclosure.[7] This Court has said that the Rules are "intended to promote the *public* interest in open justice".[8] Where the request is made by a private organisation pursuing its own purposes rather than a journalist or media organisation, the principle of open justice carries less weight.[9]

[21] Every person has the right to access the formal court record relating to a civil proceeding.[10] This is defined in r 4 and includes "a judgment, an order, or a minute of the court, including any record of the reasons given by a Judge".

[22] The documents requested by Smart in paragraph [8(g)] above fall within the definition of the formal court record. I grant Smart's request in respect of those documents with particular exceptions and/or comments as follows:

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4 *Crimson Consulting Ltd v Berry* [2018] NZCA 460, (2018) 25 PRNZ 447 at [32].
5 At [16] and [32].
6 "Substantive hearing" is defined as being "from the start of that hearing until the court finishes delivering its judgment in the proceeding (unless the proceeding is earlier discontinued, in which case until the discontinuance)": Senior Courts (Access to Court Documents) Rules 2017, r 4.
7 *Crimson Consulting Ltd v Berry,* above n 4, at [15] and [16]; and *Schenker AG v Commerce Commission* [2013] NZCA 114, (2013) 22 PRNZ 286 at [37].
8 *New Zealand Animal Law Association v Attorney-General* [2020] NZHC 2376, (2020) 25 PRNZ 488 at [20].
9 *New Zealand Animal Law Association v Attorney-General*, above n 8, at [21].
10 Senior Courts (Access to Court Documents) Rules 2017, r 8(1).

(a) Judgment dated 10 December 2021 (redacted to preserve certain confidential information pursuant to Minute dated 14 December 2014).

(b) Minute dated 11 February 2022 relates to a non-publication order and is withheld.

(c) The Minute dated 16 February 2022 relates to a non-publication order and is withheld.

(d) Minute dated 14 December 2022 relating to application for confidentiality orders.

[23] I record that the Minutes relating to the non-publication orders relate to ancillary procedural matters of no moment to the substantive issues.

Other documents

[24] The remainder of the documents requested by the applicant fall outside of the definition of the formal court record. The application for access is to be decided by reference to rr 11–13.

[25] The first issue is whether the request complies with r 11(2)(b).

[26] Reasons for requests for access should not be "broadly cast or vague".[11] In *Fuji Xerox New Zealand Ltd v Whittaker*, Jagose J stated:[12]

> The 'purpose for which access is sought' should be articulated in a way that allows me to weigh "the nature of, and the reasons given for, the request" in terms of the relevant factors set out at r 12, and against the mandatory countervailing factors of "the protection of confidentiality and privacy interests and the orderly and fair administration of justice" in r 13.

[27] The stated reasons for and purpose of this request is pitched at a high level of generality. They refer broadly to a need to engage with "councils" on procurement issues that may have been affected by the defamatory comments at issue in the case.

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11 *Schenker AG v Commerce Commission*, above n 7, at [33].
12 *Fuji Xerox New Zealand Ltd v Whittaker* [2018] NZHC 1043 at [16].

It does not identify the councils at issue. It does not articulate or particularise the connection between the "defamatory comments at issue in the case" and evidence in the proceeding in a way enabling the Court to engage with the relevant factors. (The comments at issue in the case are presumably the published defamatory imputations in the articles which were published more than two years ago and the subject of a retraction and apology). The basis for the belief that evidence adduced may support those concerns is not set out, nor does Smart identify the nature of the evidence it considers supports its concerns. Finally, Smart has not specified what information has been sought by councils that it requires access to court records to answer.

[28] I do not accept that Smart may be hampered in framing its grounds for access in any more detail because it does not know what transpired at the hearing. The plaintiff did attend. He is a director of Smart. The hearing was also open to the public. The conduct of proceedings remotely in the final week did not mean that non-parties were unable to attend. Attendance was in principle easier, not harder.

[29] From what I can discern, Smart's interest is directly related to the content of the articles. These alleged certain Smart historic business and reporting practices in carrying out services under a contract with three councils.[13] The allegations were subsequently the subject of investigation by a private investigator, PriceWaterhouseCoopers and Morrison Low on behalf of TCDC although the precise terms of those investigations are not known to the Court. Smart will be well aware of TCDC's findings and summaries in relation to those investigations. It was involved in lengthy negotiations and discussions with TCDC over an extended period in which these issues must have been aired and discussed. No one from TCDC gave evidence, with the exception of one single affidavit authenticating certain spreadsheet data. Information and documents responding to the assertions in the articles could be expected to be wholly within Smart's knowledge and power.

[30] I therefore conclude that the application fails at the first hurdle and must therefore be dismissed.

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[13] The allegations relate to a period between April 2018 and 2020.

[31] While strictly unnecessary to do so, I discuss the relevant matters to consider in the balancing test if I had been satisfied that the requirements of r 11(2)(b) had been met. These are the orderly and fair administration of justice, the principle of open justice and freedom to seek information, and privacy/commercial interests.

[32] Privacy interests are relevant because the claims against NZME and Mr Valintine were discontinued. The protection of their confidentiality and privacy interests has greater weight than would be the case had they been involved at the substantive hearing.[14]

[33] A second related issue is that of protection of confidential journalist sources. There was a so-called whistle-blower within a council and other confidential sources connected with Smart. As the Law Commission stated: "The protection of journalists' confidential sources of information is justified by the need to promote the free flow of information, a vital component of any democracy".[15] There must be a real risk that sharing of the evidence in the proceeding with "councils" and/or Smart may lead to the identification of sources by non-parties with special knowledge.

[34] The principle of open justice is relevant to most if not all requests for access to a court file but attracts more weight in the context of requests for access by media which wishes to report on the workings of the court. In this instance, Smart's application is to advance a private rather than public interest. The essentially commercial interests underpinning the request bears on the administration of justice factor.

[35] The orderly administration of justice is therefore a countervailing factor which outweighs Smart's interest in access. Given the concerns about identification of confidential journalistic sources, one would need to closely re-examine the briefs and notes of evidence to ensure that protected sources were not somehow disclosed in the hands of interested non-parties. That would impose a significant burden. It is also important for the orderly and fair administration of justice that documents are not

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14 Section 13(c).

15 Law Commission *Evidence: Reform of the Law* (NZLC R55 vol 1, 1999) at [301].

disclosed to third parties for ulterior purposes and that those who can assist in its administration are not deterred from giving evidence.[16]

[36] There are further issues in respect of specific categories of documents sought. There is no discernible connection between the stated reasons for and purpose of the request justifying access to affidavits of documents filed in the proceeding. I accept there would be a risk that disclosure of the affidavits would potentially undermine the intent and purpose of the principle that discovered documents may only be used for the purposes of the proceeding.

[37] The request for access to the common bundle of documents faces similar obstacles. Not all the documents in the common bundle of documents became evidence at trial. The High Court Rules 2016 provide that only documents referred to in opening submissions and by a witness are in evidence. Any request for access to the common bundle (of some 22 volumes), even if justified, would require an inordinate amount of work to extract the documents actually in evidence.

[38] Other affidavits sought relate to interlocutory applications in the life cycle of the proceedings. Judgments delivered on interlocutory applications are already available to Smart as part of the formal record. Even if there was sufficient connection between the stated purpose of access and this material, it would be unduly burdensome for the Registry to sift through the file to collate the various applications.

[39] It follows that, even if I had been satisfied that there were sufficiently particularised grounds showing a genuine interest, Smart would need to overcome the weighty countervailing factors militating against access. Without finally deciding that issue I consider on the present material, it does not do so.

Result

[40] Smart is entitled to access judicial orders, minutes and decisions save for those which relate to non-publication orders. In respect of the judgment issued in December 2021, it is entitled to the redacted publicly available judgment.

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16 *New Zealand Animal Law Association v Attorney-General*, above n 8, at [23].

[41] I decline to grant Smart access to all other documents referred to in its application on the basis that the requirements of r 11(2)(b) are not presently satisfied.

[42] I make no order as to costs on the application.

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Walker J