IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 2**

	Reference No. HRRT 024/2012
UNDER	**THE HUMAN RIGHTS ACT 1993**
IN THE MATTER OF	**AN APPLICATION BY A NON-PARTY FOR ACCESS TO THE TRIBUNAL FILE**
BETWEEN	**IHC NEW ZEALAND**
	PLAINTIFF
AND	**MINISTRY OF EDUCATION**
	FIRST DEFENDANT
AND	**SECRETARY FOR EDUCATION**
	SECOND DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Dr SJ Hickey, Member
Mr RK Musuku, Member

REPRESENTATION:
Ms J Ryan for Plaintiff
Ms M Coleman for First and Second Defendants
Ms M Chen for Chen Palmer, a Law Firm

DATE OF DECISION: 31 January 2013

DECISION OF TRIBUNAL GRANTING NON-PARTY ACCESS TO STATEMENT OF CLAIM AND STATEMENT OF REPLY

History

[1] On 15 November 2012 Chen Palmer, a Law Firm, requested copies of the statement of claim and statement of reply held on the Tribunal's file. The Chairperson's *Minute*

dated 23 November 2012 gave a preliminary indication of the legal framework within which that application was to be determined and afforded Chen Palmer an opportunity to elaborate on the application. The parties, in turn, were afforded an opportunity to file further or more particularised objections to the application.

The particularised application

[2] By email dated 30 November 2012 Ms Chen advised that her firm, Chen Palmer, does not represent anyone seeking to join these proceedings under s 108 of the Human Rights Act 1993. Rather access to the current pleadings is sought to assist lawyers in Chen Palmer to advise on issues involving Part 1A of the Human Rights Act 1993. It is not intended that the pleadings be released to anyone outside the firm. In terms of High Court Rules, r 3.16 emphasis is placed on the principle of open justice and the freedom to seek, receive and impart information. It is submitted that in the absence of compelling reasons for denying access to the Tribunal record, the presumption of disclosure should apply. Confidentiality, privacy interests and privileged information can be adequately protected through the redaction of words or passages likely to breach those interests.

The plaintiff's position

[3] By email dated 7 December 2012 Ms Ryan for the plaintiff advised that in the light of the submissions presented for the non-party, including the assurance that the documents will not be disclosed to anyone outside Chen Palmer, the plaintiff no longer opposes the application and will abide the decision of the Tribunal.

Position of the first and second defendants

[4] The defendants oppose the application on the following grounds:

> **[4.1]** The statement of claim is likely to be significantly amended and therefore it is unclear whether the present pleadings will meet the stated objective of enabling Chen Palmer to advise clients on issues involving Part 1A of the Act.
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> **[4.2]** An amended statement of claim is likely to contain considerable private information regarding actual students and schools such that it would not be appropriate to release.
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> **[4.3]** The information is being sought for business purposes rather than in the public interest. Therefore the public interest in open justice has limited application.
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> **[4.4]** The defendants note the comment of Wild J in *BNZ Investments Ltd v Commissioner of Inland Revenue* (2009) 20 PRNZ 311 that granting access to those whose motive is one of personal advantage rather than the public interest is an unintended and perhaps unfortunate consequence of the change to the High Court Rules. The defendants submit that it is both unnecessary and inappropriate for the Tribunal to widen the rules regarding access to its documents and its files by private interests. It is not required to adopt the unintended consequence arising under the High Court Rules.

Non-party submissions in reply

[5] In their reply submissions dated 13 December 2012 Chen Palmer submit:

[5.1] While it is recognised that the statement of claim and statement of reply in these proceedings are likely to be significantly amended, nevertheless it is considered that the current versions will be useful for Chen Palmer's purposes.

[5.2] Insofar as the statement of claim may include personal information, that information can be redacted prior to release to protect the privacy interests of the individuals concerned.

[5.3] Characterisation of the non-party request as being "for business purposes rather than in the public interest" is disputed. Plaintiffs in discrimination proceedings against the Crown have an inherent disadvantage due to, inter alia, the Crown's superior access to relevant information, including precedent files. Redressing this imbalance must be in the public interest.

[5.4] In *BNZ Investments* the applicant was seeking access to the evidence of eight expert witnesses. The concern was that the applicant was attempting to access a large amount of research without having to pay for its true cost. The present case is distinguishable in that Chen Palmer seeks access only to the current statement of claim and statement in reply.

The law to be applied

[6] Both the Human Rights Act 1993 and the Human Rights Review Tribunal Regulations 2002 are silent on the question of non-party access to the documents held on the Tribunal files. This is not unique. When the New Zealand Law Commission in *Access to Court Records* NZLC R93 (2006) reported on the rules governing access to court and tribunal records it observed in the Foreword at p 5:

> The rules governing access to court records are currently not easy to find, nor are they clear, comprehensive or consistent across jurisdictions. Although most court hearings are in public, access to court records is not so open. This report recommends a new approach. We consider that court record information should be more generally available in accordance with the principles of open justice and freedom on information, unless there are good reasons for withholding the information. This approach is consistent with that of the Official Information Act 1982, and we recommend the enactment of a Court Information Act that follows a similar policy framework: a presumption of open court records limited only by principled reasons for denying access. Such reasons would include protection of sensitive, private or personal information, particularly in cases involving children.

[7] We must now determine, according to principle, the rules which are to govern access to the Tribunal's files. We take as our starting point the two key statutory provisions referred to in the Chairperson's *Minute* at para [6], namely ss 107(1) and 108(1) of the Human Rights Act 1993:

[7.1] Section 107(1) of the Act stipulates that every hearing of the Tribunal shall be held in public subject to limited exceptions which are addressed in subs (2) and (3) of that section.

[7.2] Section 108(1) of the Act provides (inter alia) that any person who satisfies the Tribunal that he or she has an interest in the proceedings greater than the public generally, may appear and may call evidence on any matter that should be taken into account in determining the proceedings. A person who is not a party to the proceedings but who wishes to appear before the Tribunal must first give notice to the Tribunal and to every party, before appearing.

[8] The first point emphasises the open justice principle. The second point depends for its efficacy on the first. Unless the proceedings of the Tribunal are accessible to the public and to the legal profession the purpose of s 108 may be compromised or defeated.

[9] In fashioning a procedure for determining non-party access to a Tribunal file we must also give proper recognition to s 105 of the Human Rights Act which requires the Tribunal to act according to the substantial merits of the case, without regard to technicalities and in exercising its powers and functions the Tribunal must act, inter alia, in a manner that is fair and reasonable:

> **105 Substantial merits**
>
> (1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
> (2) In exercising its powers and functions, the Tribunal must act—
> (a) in accordance with the principles of natural justice; and
> (b) in a manner that is fair and reasonable; and
> (c) according to equity and good conscience.

[10] The duty of the Tribunal to act fairly and reasonably attaches not only to the parties to the proceedings but also to other participants, particularly witnesses. From time to time there will be good reason for the protection of personal privacy and the making of suppression orders. But these are not the only considerations to which the Tribunal must have regard, as may be seen from Chapter 2 of the Law Commission report.

[11] It is to be noted that the Law Commission recommendation that there be a Court Information Act has not been adopted. Rather the relevant rules of court have been updated and now prescribe in some detail the framework governing access to court records. While they draw to a large extent on the Law Commission recommendations, they do not adopt the key recommendation that there be a presumption of access and that open justice should be the key guiding principle. Rather the High Court Rules now stipulate a range of mandatory relevant considerations to be taken into account. The principle of open justice is only one of such considerations.

[12] We do not see any need for the Tribunal to duplicate or to re-traverse the work of the Law Commission and of the Rules Committee. Provided the specific statutory provisions of the Human Rights Act cited earlier are at all times given precedence, we propose to adopt, with all necessary modifications, the High Court Rules, Part 3, Subpart 2 – Access to court documents, being rr 3.5 to 3.16. The reason is that these rules prescribe a simple, clear and easy to follow procedure for determining requests by non-parties for access to a court (or tribunal) file.

[13] As no substantive hearing has yet taken place, the relevant Rule (by analogy) is r 3.13 which 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.
> (2) An application under this rule is made informally to the Registrar by a letter that—
> (a) identifies the document, court file, or part of the formal court record that the applicant seeks to access; and
> (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.
(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.
(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.
(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.
(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.

[14] This, in turn, brings into play High Court Rules, r 3.16 which prescribes the matters to be taken into account on such application:

3.16 Matters to be taken into account

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.

[15] Regrettably, decisions of the High Court have divided over the correct interpretation of r 3.16. In *Chapman v P* (2009) 20 PRNZ 330 (9 December 2009) Mallon J held at [31] that none of the r 3.16 factors are given special primacy over the other factors and so a balancing exercise is required. It would appear, however, that the attention of Mallon J was not drawn to the decision of Wild J given seven days earlier in *BNZ Investments Ltd v Commissioner of Inland Revenue* (2009) 20 PRNZ 311 (2 December 2009) in which Wild J at [36] held that the principle of open justice is paramount, effectively creating a presumption of disclosure. This presumption is easily displaced if the request is for documents that were not read in or read by the Court, because the principle of open justice rests on the premise that such documents have entered the public domain.

[16] Wild J came to the conclusion that:

[40] The amended High Court Rules governing access to Court documents represent the fulfilment of the progressive liberalisation of the area since the conservative approach in *Fourth Estate*. Whereas the focus was once upon the nature of the applicant, it is now firmly on the application and the documents it seeks, with the principle of open justice creating an effective presumption of disclosure.

[41] Cases decided in Britain and Australia, which have comparable rules, demonstrate an inability to reject those applicants who seek documents for their personal advantage, rather than in the public interest. They must be treated in the same way as, for example, the media. The access granted to such applicants under the guise of open justice is an unintended, and perhaps unfortunate, consequence of making the open justice principle paramount. Applied to Maddocks' application to search and obtain copies of expert evidence in this proceeding, the imperatives of open justice and freedom of information prevail. Maddocks is the unintended beneficiary, despite the reason for its request not being compelling, because it is entirely one of self interest.

[17] The two approaches were recently reviewed by Asher J in *Commerce Commission v Air New Zealand Ltd* [2012] NZHC 271. After a detailed consideration of the Law Commission report and of the rules he stated that the unambiguously non-hierarchical listing of the six r 3.16 matters led to the conclusion that the principle of open justice cannot be treated as paramount:

> [27] ... Rule 3.16 sets out six matters and the introductory words require the Judge to take into account "each ... [matter] that is relevant to the application, requests or objection". There is therefore nothing in the words of the rule to indicate that primacy is to be given to any of the six particular matters, only one of which is the principle of open justice. To the contrary, the rule states that they are all to be weighed in the balancing. As is usual with such lists of matters, some will be relevant to the particular request and some will not, and some matters may assume primacy given the particular facts. But none has automatic primacy.
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> …
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> [29] I conclude that open justice is not the paramount consideration in the new access regime. As has been observed, it is a principle and not a freestanding right. It is just one of the matters to be taken into account, and there is no presumption in favour of disclosure. In this regard I respectfully prefer the reasoning of Mallon J in *Chapman* to that of Wild J in *BNZ Investments Ltd*, and agree with the observation in *McGechan* that the r 3.16 factors "do not represent a hierarchy".

[18] He acknowledged, however, at [41] that in relation to *pleadings*, access can usually be expected to be in accord with the principle of open justice:

> [41] This factor is less persuasive in relation to the pleadings which should not contain detailed evidence. Their purpose of pleadings is to set out the key elements relied on by each side and access to them can usually expected to be in accord with the principle of open justice.

[19] In *Orlov v New Zealand Law Society (No. 7)* [2012] NZHC 452 Heath J at [8] agreed with the analysis of Asher J in *Commerce Commission v Air New Zealand Ltd*.

[20] In these circumstances there is some force to the submissions for the first and second defendants which challenge the *BNZ Investments Ltd* decision as being too widely framed.

[21] The submissions for the first and second defendants are possibly strengthened by the observation made by Asher J in *Commerce Commission v Air New Zealand Ltd* that while r 3.16 does not require that a non-party applicant establish a legitimate interest, the courts are likely to be less sympathetic to persons who cannot show a "recognisable and legitimate public or private purpose" for seeking access:

> [30] In addition to the six listed matters, r 3.16 requires the Court to consider the nature of and the reasons for the request. 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.

Conclusions on the law to be applied

[22] Although the Chairperson's *Minute* of 23 November 2012 at para [14] indicated an intention to apply the interpretation favoured by Wild J in *BNZ Investments Ltd*, the Chairperson was not then aware of the later decisions of Asher J in *Commerce Commission v Air New Zealand Ltd* and of Heath J in *Orlov v New Zealand Law Society (No. 7)* respectively. It is noted, however, that *Commerce Commission v Air New Zealand Ltd* has been appealed to the Court of Appeal. It is understood (at the time of writing) that no date has yet been set for the hearing of that appeal.

[23] Until the proper interpretation of r 3.16 has been determined by the Court of Appeal we intend applying the decision of Asher J because, as he correctly points out, there is nothing in the words of the rule to indicate that primacy is to be given to any of the six particular matters. To the contrary, the rule states that they are all to be weighed in the balancing exercise. In applying the rule, however, some matters will be relevant to the particular request and some will not and as Asher J pointed out at [27], some matters may assume primacy given the particular facts.

Applying the law to the facts

[24] We address first the nature of, and the reasons for, the present application. As noted, Chen Palmer does not represent anyone seeking to join these proceedings under s 108 of the Human Rights Act 1993. Had they represented such person the application would have been based on compelling grounds. Rather the request is based on the ground that access to the current pleadings will assist lawyers at Chen Palmer to advise on issues involving Part 1A of the Human Rights Act 1993. In our view this is an entirely bona fide and proper purpose. Not many lawyers in New Zealand practise anti-discrimination law and we see no proper basis for stigmatising the application as being motivated by personal advantage rather than by public interest. To the contrary, the request is responsibility made both as to the documents sought (it is limited to the current statements of claim and of reply) and as to the terms on which those documents are sought (it is readily conceded that the privacy interests of the individuals concerned need to be protected and that information can be redacted prior to release. It is not intended that the pleadings be released to anyone outside the firm).

[25] Turning now to the first r 3.16 factor (orderly and fair administration of justice), we do not see the request as imposing any inconvenience or burden on the parties or the Tribunal. Contrast *Orlov* where, following a lengthy hearing, the writing of the judgment would have been seriously interrupted by the granting of non-party access to records simultaneously required by the Judge.

[26] As to the protection of confidentiality, privacy interests and any privilege held, we cannot see any confidential or commercially sensitive or other privacy interests that require protection and none have been drawn to our attention by the parties. In any event it is conceded by Chen Palmer that should any privacy interests be identified, they can be adequately protected through the redaction of words or passages likely to breach those interests. A further layer of protection is their advice that the pleadings will not be released to anyone outside the firm.

[27] We cannot presently see anything in the current statement of claim and statement of reply which would require redaction and nothing to the contrary has been suggested by the parties.

[28] Turning to the principle of open justice we respectfully agree with the view taken by Asher J in *Commerce Commission v Air New Zealand Ltd* at [31] that there is a real distinction between r 3.16(c) (the principle of open justice) and r 3.16(d) (freedom to seek, receive and impart information):

> The first, which is to encourage fair and accurate reporting and comment on court hearings and decisions, is relevant to applications by media organisations and commentators but has little relevance to an application by a private party pursuing a commercial purpose. It is significant that the principle of open justice is given a limited definition in the rule. The second, freedom to seek and receive information, is directly relevant when an interested private party is seeking information for its own purposes.

[29] However, while under High Court Rules, r 3.16(c) the principle of open justice is viewed through the prism of encouraging fair and accurate reporting and comment on court hearings and decisions, we must ultimately be guided by the terms, objects and purposes of the Human Rights Act. In this regard we make two points:

> **[29.1]** First, that ss 107(1) and 108(1) highlight the importance of the open justice principle in the Tribunal's processes.
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> **[29.2]** Second, that among the objects and purposes of the Act is the promotion and protection of the right to freedom from discrimination as set out in s 19 of the New Zealand Bill of Rights Act 1990. Where, in the context of a request for access by a non-party, the Tribunal is able to promote the right to freedom from discrimination it ought to do so, provided this can be done consistently with the rights of others, including the need to protect confidentiality, privacy interests and any privilege held by, or available to, any person.

[30] The freedom to seek, receive and impart information is specifically relied upon by Chen Palmer. In the human rights context the freedom in question is a significant one. Those working in the human rights field should not, without proper reason, be refused access to potentially significant information, particularly given that s 108 of the Human Rights Act provides that a non-party who satisfies the Tribunal that he or she has an interest in the proceedings greater than the public generally, may appear and may call evidence on any matter that should be taken into account in determining the proceedings. This necessarily presumes ready access to some or all of the documents held by the Tribunal both at the stage when the non-party is taking advice whether to "appear" and at the stage when preparations are being made for the appearance itself. Safeguards are in place. If necessary the documents can be redacted or released on terms. While s 108 does not have application on the present facts, the underlying principle remains and must inform the framework for determining non-party access to records. In this context there is no real distinction between those who wish to join existing proceedings and those who wish to commence proceedings of their own. Both categories have an interest in knowing what cases are in train and the basis on which those cases have been brought. There is also the point that, as submitted by Chen Palmer, plaintiffs in discrimination proceedings against the Crown have an inherent disadvantage due to, inter alia, the Crown's superior access to relevant information, including precedent files. Redressing this imbalance must be in the public interest.

[31] As to rule 3.16(e), this provision has no application as no orders to date have been made by the Chairperson or by the Tribunal relating to access or non-publication of documents on this file.

[32] Finally, as to "any other matter" under r 3.16(f), the first and second defendants properly observe that the statement of claim is likely to be significantly amended and may be expected to contain considerable private information regarding actual students in schools. Should a non-party seek access to any such amended statement of claim, the balance may well favour redaction of the document or the refusal of non-party access. But this is not the situation currently before the Tribunal. Chen Palmer emphasise that they are seeking only the original statement of claim and the original statement of reply. They further concede the potential need for redactions and there is an implied undertaking that the documents will not be released to anyone outside the firm.

[33] On the redaction point, neither the plaintiff nor the defendants have sought redactions and we ourselves can see no reason why redactions should be made.

Decision

[34] Weighing these various factors we are of the clear view that the application should be granted.

Order

[35] We direct that Chen Palmer be provided with a copy of the statement of claim dated 26 September 2012 and with a copy of the statement of reply dated 29 October 2012. Neither document is to be redacted.

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Mr RPG Haines QC	**Dr SJ Hickey**	**Mr RK Musuku**
Chairperson	**Member**	**Member**