

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2017] NZEmpC 153
EMPC 377/2015
EMPC 277/2016
EMPC 215/2017**

IN THE MATTER OF challenges to determinations of the
Employment Relations Authority

AND IN THE MATTER of proceedings removed

AND IN THE MATTER of interlocutory applications

BETWEEN PETER D'ARCY LORIGAN
Plaintiff

AND INFINITY AUTOMOTIVE LIMITED
Defendant

Hearing: 27 October 2017, and on documents filed on 2, 8, 10, 13, 20, 23
24 November, and 4, 5 December 2017
(heard at Auckland)

Appearances: P Lorigan, in person
R Towner and B Norrie, counsel for defendant

Judgment: 6 December 2017

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves several interlocutory applications which, broadly summarised, relate to a request for further and better particulars brought by the defendant against the plaintiff; and to contested disclosure of documents based on objections raised by both parties.

[2] The case has had a prolonged history. It is necessary to briefly summarise the background facts, then the procedural history.

[3] According to the pleadings, it is common ground that Mr Lorigan was employed by Infinity Automotive Ltd (Infinity) from 24 March 2009 to 31 January 2010, working in the role of fleet sales-person.

[4] Certain changes were undertaken by Infinity in late 2009, necessitating a restructuring process. Two sales positions, one of which was occupied by Mr Lorigan, were disestablished and replaced by one position.

[5] Mr Lorigan asserts that Infinity's decision to terminate his employment as a result of the restructuring was confirmed by a letter dated 22 December 2009. Infinity says the effective date of redundancy was 31 January 2010.

[6] Subsequently, Mr Lorigan instituted proceedings in the Employment Relations Authority (the Authority), which as amended by counsel then acting for Mr Lorigan, alleged that Infinity had breached its obligations of good faith, that diverse unjustified actions amounting to a continuing pattern of conduct towards him meant that he had an unjustified disadvantage personal grievance, that he had been unjustifiably dismissed, and that there had been an unlawful enforcement of a restraint of trade provision. A range of remedies were accordingly sought.

[7] For its part, Infinity issued proceedings alleging that after the termination Mr Lorigan breached express terms of his individual employment agreement (IEA); it claimed an injunction, a compliance order, and a range of financial orders, including a penalty.

[8] As the Authority has acknowledged, there was unreasonable delay in it dealing with the proceedings before it. The current Chief Member of the Authority has recorded in relevant determinations that he discovered the file when he was clearing out the Auckland office of the former Chief Member of the Authority. He said it "evidently had been completely lost sight of".¹

[9] Member Crichton then issued a total of five determinations. Two of those relate to a disadvantage grievance which had been purportedly raised for

¹ *Lorigan v Infinity Automotive Ltd (No 2)* [2016] NZERA Auckland 357 at [19].

Mr Lorigan. In the second determination, the Authority concluded that a disadvantage grievance had not been raised in time; nor had there been an application for leave to proceed out of time.² The claim was accordingly dismissed. This conclusion resulted in a challenge being brought to this Court: EMPC 377/2015. It was brought on a non de novo basis, since there were two other findings which were not challenged.

[10] Subsequently, the Authority considered an application brought for Mr Lorigan to raise a disadvantage grievance out of time, under s 114 of the Employment Relations Act 2000 (the Act).³ The Authority determined there were no exceptional circumstances and that the justice of the case did not require the granting of leave.⁴ The application was dismissed. This determination resulted in a second challenge to this Court: EMPC 277/2016. This was brought on a de novo basis.

[11] The Authority was also invited to consider several times the removal of the entire proceeding to this Court. On two occasions, that application was declined.⁵ However, on 16 August 2017, such an order was made on Mr Lorigan's application. At that point, Infinity consented to such an order because there were by then two proceedings between the parties involving the same or similar issues before the Court and the Authority; and the Authority agreed with this contention.⁶

[12] By this stage, Mr Lorigan was self-represented. Because it was apparent that he would have difficulty in re-pleading the removed matters, and on the acquiescence of Mr Towner, counsel for Infinity, I ruled that the statements of problems and statements of reply regarding the proceedings in the Authority would now be pleadings in this Court.⁷

[13] For some time, the Court had been attempting to resolve interlocutory applications regarding the challenges in this Court: a request for further and better

² *Lorigan v Infinity Automotive Ltd (No 4)* [2016] NZERA Auckland 340 at [1].

³ *Lorigan v Infinity Automotive Ltd (No 3)*, above n 1, at [52] and [84].

⁴ At [46].

⁵ *Lorigan v Infinity Automotive Ltd* [2015] NZERA Auckland 169; *Lorigan v Infinity Automotive Ltd (No 3)* [2016] NZERA Auckland 145.

⁶ *Lorigan v Infinity Automotive Ltd (No 5)* [2017] NZERA Auckland 239 at [22] – [28]; and minute of 9 October 2017.

⁷ Minutes of 4 September and 10 October 2017.

particulars in challenge EMPC 377/2015, and disclosure issues in respect of both challenges.

[14] These applications needed to be recast following the removal; the following documents were then filed:

- a) First, an amended application for further and better particulars of Mr Lorigan's amended statement of problem dated 19 December 2012, and his statement of claim in EMPC 377/2015 dated 11 December 2015.
- b) Second, several applications relating to disclosure being:
 - a challenge dated 29 September 2017 brought by Infinity in respect of an objection to disclosure which Mr Lorigan had made;
 - a challenge dated 2 October 2017 brought by Mr Lorigan regarding an objection as to disclosure made by Infinity; and
 - an application by Mr Lorigan for an order regarding certain without prejudice communications, contained in a document dated 28 September 2017.
- c) Third, Mr Lorigan filed a document dated 3 October 2017 which was described as an "election to have Court order ... Penalties for certain breaches of minimum duty of good faith". It was not clear that this was an interlocutory application, but I indicated to the parties that I would discuss it with them at the hearing on 27 October 2017.

[15] In this judgment, I will deal with each set of issues sequentially.

Application for further and better particulars

[16] Before turning to the detail of the application, it is worth referring briefly to the applicable principles.

[17] In *Q v W*,⁸ Judge Travis dealt with a request for further and better particulars in respect of a statement of claim which had been filed in this Court; the principles which he summarised are also of assistance in resolving the request for particulars in respect of the amended statement of problem of 19 December 2012, since that document is now a pleading in this Court.

[18] Regulation 11 of the Employment Court Regulations 2000 (the Regulations) states:

11 Statement of claim

- (1) Every statement of claim filed under regulation 7 or regulation 8 must specify, in consecutively numbered paragraphs,—
 - (a) the general nature of the claim;
 - (b) the facts (but not the evidence of the facts) upon which the claim is based;
 - (c) any relevant employment agreement or employment contract or legislation and any provisions of the agreement or the contract or the legislation that are relied upon;
 - (d) the relief sought, including, in the case of money, the method by which the claim is calculated;
 - (e) the grounds of the claim;
 - (f) any claim for interest, including the method by which the interest is to be calculated;
 - (g) in the case of a statement of claim filed under regulation 7, whether a full hearing (a hearing de novo) is sought, and, if not, the matters required by section 179(4) of the Act, namely,—
 - (i) any error of law or fact alleged by the plaintiff; and
 - (ii) any question of law or fact to be resolved; and
 - (iii) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the court and the other parties of the issues involved; and
 - (iv) the relief sought.
- (2) The matters listed in subclause (1) must be specified with such reasonable particularity as to fully, fairly, and clearly inform the court and the defendant of—
 - (a) the nature and details of the claim; and
 - (b) the relief sought; and
 - (c) the grounds upon which it is sought.

⁸ *Q v W* [2012] NZEmpC 159.

[19] Of particular importance is reg 11(2), which emphasises the responsibility of a party bringing a claim to fully, fairly, and clearly inform the court and the defendant of the nature and details of the claim, the relief sought, and the grounds upon which it is sought.

[20] As Judge Travis observed, there is in fact no specific regulation by which this Court may order a more explicit pleading to be filed and served; but this is a situation where recourse to the High Court Rules may be appropriate under reg 6. That regulation provides that where the Regulations or the Act do not provide a form of procedure, the Court must dispose of the case as nearly as may be practicable in accordance with the Act or the Regulations or the provisions of the High Court Rules affecting any similar case. Judge Travis found that r 5.21 of the High Court Rules was the relevant rule to apply in the circumstances of this case, a conclusion with which I respectfully agree.⁹

[21] Rule 5.21 emphasises that a party, by notice, may require any other party to give further particulars which may be necessary to give fair notice of a cause of action or ground of defence, or particulars required by the rules. If the Court considers the pleading is defective, or does not give particulars properly required by the notice, it may order a more explicit pleading to be filed and served.¹⁰

[22] For present purposes, the main point raised for Infinity is whether it has been fully, fairly and clearly informed of the claim against it.

[23] In *Body Corporate 74246 v QBE Insurance (International) Ltd*, the court summarised the position by stating that the following questions could be asked:¹¹

- a) Has sufficient information been provided to inform the other party of the case to enable them to take steps to respond?
- b) Is there a real risk that the other party may face a trial by ambush if further particulars are not provided?

⁹ At [12].

¹⁰ High Court Rules 2016, r 5.21.

¹¹ *Body Corporate 74246 v QBE Insurance (International) Ltd* [2015] NZHC 1360 at [18](h).

- c) Is the request oppressive or an unreasonable burden upon the party concerned?

[24] Finally, I emphasise the point made in the Regulations, to the effect that there is a requirement to specify *facts* upon which a claim is based, but not the *evidence* of the facts: reg 11(1)(b).

[25] I begin by considering the requests regarding the amended statement of problem dated 19 December 2012. Mr Towner confirmed that three of the requests had in fact now been complied with.¹² Following discussion with the Court, four more were not pursued.¹³

[26] Turning to the remaining requests, I deal first with Infinity's requests dated 17 June 2015. The paragraph numbers are those of the amended statement of problem. Where a request for further particulars is allowed, I shall be directing Mr Lorigan to file a suitable memorandum. My rulings are:

- a) *Paragraphs 2.21(e) and 2.26*: these paragraphs focus on an allegation that a person who ultimately succeeded in obtaining the vacant position following restructuring, Mr Brady, was unfairly preferred during the redundancy process, and that Mr Lorigan was treated less favourably than that person. Express reference is made in para 2.26 to a letter from Mr Lorigan's previous counsel dated 28 January 2010. It is attached to the amended statement of problem. It also refers to disparity of treatment. It says that Mr Brady was treated differently from Mr Lorigan not only during the restructuring, but during his employment; and that Mr Brady had been assisted in ways that Mr Lorigan was not. Particulars of the alleged disparity were not provided in the amended statement of problem, or the letter. Mr Lorigan will now need to provide a short summary of those details.

¹² With regard to paras 2.30, 2.50 and 3.8 of the amended statement of problem.

¹³ With regard to paras 2.63, 3.11, 3.12 and 3.14 of the amended statement of problem.

- b) *Paragraph 2.43*: a request was made as to the identity of Mr Lorigan's new employer after the termination of employment; he has confirmed and it is accepted that Hyundai New Zealand was the new employer. The request goes on to request confirmation of the date on which Mr Lorigan received an offer of employment from Hyundai, and when he accepted that offer; and details of remuneration (including salary, commissions and other benefits) in the three-month period from 31 January 2010. I agree that these particulars should be provided.
- c) *Paragraph 2.49*: in this paragraph, there is an assertion that Infinity failed to pay commissions due to Mr Lorigan. Paragraphs 2.44 to 2.50 are a series of paragraphs outlining this claim. Mr Lorigan asserts that a list of sales opportunities provided by Infinity prior to Mr Lorigan's departure, estimated sales and estimated commission entitlements; he alleges that the list identified 569 possible sales opportunities. If all such deals had materialised, he says his total commission entitlements would have been \$109,695. However, he seeks 50 per cent of that figure only, namely \$54,847.

Mr Lorigan says that this assessment is based on his prior sales history. The request for particulars originally sought an explanation as to the basis on which Mr Lorigan was claiming 50 per cent. Infinity says that information has since been provided.

Now Infinity requests details as to the aspects of Mr Lorigan's prior sales history, which he says is relevant to the assertion he would have concluded at least 50 per cent of these transactions.

I consider this matter to be an issue of evidence, and indeed evidence which Infinity should have within its possession. I disallow the request.

- d) *Paragraph 2.62*: this paragraph relates to the same issue. Mr Lorigan pleads that all the lost commission transactions have materialised into

sales, whether to Sime Darby Motor Group (NZ) Ltd (Sime Darby, a company related to Infinity) or to another motor vehicle dealer. At the hearing, Mr Lorigan said the motor dealer in question was Toyota New Zealand, but that he could provide details of these. I therefore allow the request and direct Mr Lorigan to provide a summary of the lost commission transactions on which he relies.

- e) *Paragraph 2.65*: this paragraph pleads that Mr Lorigan was devastated at the manner in which he was treated by Infinity, and that he had suffered serious health problems and a loss of confidence and self-esteem. He has provided a medical certificate on this issue, but it is illegible. Mr Lorigan has agreed to provide a legible copy. As the Court understands it, this will specify the nature of the condition he suffered. Mr Towner flagged an evidential issue as to whether any such medical condition could have been caused by any established personal grievance. It is at least implied in the existing pleading that the asserted claims caused those problems. The reality, however, is that further medical particulars as to causation are not able to be provided at this stage. The point is relevant to disclosure which I will consider shortly. At this stage, I disallow the request for further and better particulars.
- f) *Paragraph 3.7*: this is one of a sequence of paragraphs dealing with claims for particular breaches; it refers to damages arising from an alleged breach of the employment agreement by Infinity, in a sum to be quantified. It is not clear to what breach this relates. Mr Lorigan is to provide details of the breach of the employment agreement, as referred to in para 3.7. I allow the request.

[27] Next, I consider Infinity's notice requiring Mr Lorigan to give further particulars of his statement of claim dated 11 December 2015, which relates to several paragraphs in the statement of claim which raised the first challenge: EMPC 377/2015.

[28] Before dealing with these, it is necessary to describe context. This challenge relates to only part of the second determination of the Authority, which is brought on a non de novo basis. In that part, the Authority had to consider whether a disadvantage grievance had ever been raised. The Authority found:

- a) Although it was common ground that Mr Lorigan raised a personal grievance for unjustified dismissal by letter dated 28 January 2010, it was not until 15 July 2011 that his lawyers purported to raise a disadvantage grievance.¹⁴ Mr Lorigan said that the initial letter of 28 January 2010 raised both.¹⁵
- b) The Authority analysed the letter of 28 January 2010, concluding that the letter discussed only the process by which Infinity had disestablished Mr Lorigan's position, and the subsequent selection of another employee to fill the vacancy to which he aspired, and that it was not until 18 months later in the letter of 15 July 2011 that there was a reference to an unjustified disadvantage grievance, and then only in relation to one aspect.¹⁶
- c) With regard to the amended statement of problem of 19 December 2012, the Authority found there were 15 separate allegations purporting to be the unjustified actions which had caused Mr Lorigan disadvantage, as eventually raised in the letter of 15 July 2011. None of these were raised within the statutory period, and Infinity (as well as Sime Darby which was a party at that stage) refused to consent to these matters being raised out of time.¹⁷

¹⁴ *Lorigan v Infinity Automotive Ltd (No 2)*, above n 1, at [42].

¹⁵ At [43].

¹⁶ At [46] – [49].

¹⁷ At [51].

[29] The relevant statement of claim pleads background matters, which it is asserted give rise to the disadvantage grievance; most of the requests which are now made relate to those matters. The requests are contained in two notices.¹⁸

[30] Mention should also be made of a letter of 5 February 2016, sent by counsel then acting for Mr Lorigan, Mr Fleming, who had drafted the statement of claim in EMPC 377/2015. Mr Towner accepted that there were some clarifications in that letter, which are relevant to the requests I am required to consider. I shall refer to these, where appropriate.

[31] Unless otherwise stated the following discussion is based on the first notice requiring the provision of further particulars.¹⁹ As before, where a request for further particulars is allowed, I shall be directing Mr Lorigan to file a suitable memorandum. My rulings are:²⁰

- a) *Paragraphs 7, 21, 32, 37, 39, 40.1 and 40.3*: these paragraphs must be read in conjunction with para 20. They allege that during the course of his employment, Mr Lorigan was not dealt with in good faith by Infinity; was treated unfairly; suffered the removal of sales leads which he had generated which were allocated to others; and that he was frequently threatened with dismissal. The request seeks clarification as to whether these paragraphs raise four separate unjustified disadvantage grievances or one; and if multiple, asks when Mr Lorigan says each personal grievance was raised and how.

A number of other requests in the two notices seek similar clarifications.²¹ In the pleading which was before the Authority, as contained in the amended statement of problem dated 19 December 2012, the following assertion was made:

¹⁸ A notice requiring plaintiff to give further particulars of statement of claim dated 9 February 2016, and second notice requiring plaintiff to give further particulars of statement of claim dated 24 March 2017.

¹⁹ Dated 9 February 2016.

²⁰ The paragraph numbers are those of the amended statement of problem dated 19 December 2012.

²¹ That is, those relating to paras 21, 32, 37, 39, 40.1, 40.2, 40.3, and in the multiple requests of the second notice dated 24 March 2017.

Unjustified disadvantage

- 2.25 The matters referred to at paragraphs 2.4, 2.6, 2.8, 2.9, 2.10, 2.11, 2.12, 2.14, 2.15, 2.17, 2.18, 2.19, 2.20, 2.21, 2.22 above were unjustified actions which caused the applicant disadvantage in his employment, by causing him financial loss, undermining his credibility with clients and damaging his confidence.
- 2.26 The respondents' actions constitute a continuing pattern of conduct towards the applicant, the most recent event being the favouring of Mr Brady during the redundancy process which was raised as a grievance by a letter from the applicant's former counsel on 28 January 2010.
- 2.27 Had the respondent not disadvantaged the applicant in his employment he ought to have earned at least the sum of \$120,000 gross per annum during his employment with the respondents.

Significantly, this amended statement of problem, now a pleading in this Court, alleges that the multiple actions “constitute *a* continuing pattern of conduct towards the applicant”.

The statement of claim in question²² made it clear that “*a* personal grievance for unjustified dismissal” was being pursued²³ although there is elsewhere some ambiguity in the pleading.²⁴

In his letter of 5 February 2016, Mr Fleming gave this explanation about para 40.1:

Paragraph 40.1:

- (a) At paragraph 2.26 the amended statement of problem alleges a *continuing pattern of conduct*, including the specific actions listed in paragraph 2.25 thereof. A grievance was raised in relation to that pattern of conduct. It is not suggested that Mr Lorigan raised a distinct grievance in relation to each and every one of those actions.

...

(Emphasis added)

²² EMPC 377/2015.

²³ At paras 21.1 and 37.

²⁴ Having regard to other paragraphs such as paras 24.3, 39 and 40.2.

Mr Lorigan confirmed this was the position at the hearing of the interlocutory applications before me.

Based on the clear statement by counsel for Mr Lorigan in his letter, and the confirmation of the position by Mr Lorigan himself at the hearing, Mr Lorigan is not required to give details of multiple unjustified action grievances, since that is not the allegation he makes.

There is, however, a remaining question which is raised in the request, which is when and how the disadvantage grievance was initiated. This is relevant to the issue which the Court will need to consider in dealing with the challenges as to whether that grievance was commenced in time, and if not, whether leave to allow it to be brought out of time should be given.

I have already mentioned the debate that occurred in the Authority on this point; for Mr Lorigan, it was asserted that this particular grievance was raised by letter dated 28 January 2010, while Infinity argued that this did not occur until the following year, 15 July 2011.

This is a matter which will require clarification by Mr Lorigan. I accordingly allow that part of the request which requires details as to when and how the disadvantage grievance was raised.

- b) *Paragraph 40.2*: this paragraph asserts that if any of Mr Lorigan's grievances were raised out of time, Infinity through its actions consented to the raising of those grievances.

Mr Fleming said of this pleading in the letter of 5 February 2016:

- a) From the outset, the issues between the parties were acknowledged to be wider than just an unjustified dismissal claim.
- b) Langton Hudson Butcher's personal grievance letter of 28 January 2010 referenced claims for disadvantage as well as for unjustified dismissal. This letter was responded to by Infinity on 8 February 2010. In that reply, Infinity

sets out “the relevant facts” traversing not just events relating to the redundancy process but also events relating to the bargaining for Mr Lorigan’s employment agreement, his dealings with customers, threats of disciplinary action and whether he was “used by the company and then discarded”.

- c) Subsequently correspondence between the parties continued over an extended period, the parties attended mediation, and offers for settlement were exchanged.
- d) At no point in this process were the issues between the parties narrowed to just the dismissal of Mr Lorigan.
- e) It is clear on the face of documents such as Langton Hudson Butcher’s letter to your client dated 21 December 2011 that Mr Lorigan was pursuing claims for unjustified disadvantage as well as unjustified dismissal, and no [objection] was raised in relation to this.

It is apparent that the allegation is not that express consent was given by Infinity, but that one should be implied from the sequence of events which were described by Mr Lorigan’s counsel.

In those circumstances, I do not consider that further particulars are necessary.

[32] I now summarise the requests for further particulars that Mr Lorigan is to provide.

[33] With regard to the amended statement of problem dated 19 December 2012:

- a) *Paragraphs 2.21(e) and 2.26*: in what respects was Mr Lorigan treated differently than Mr Brady:
 - (i) during the term of Mr Brady’s employment; and
 - (ii) during the restructuring?
- b) *Paragraph 2.43*: with regard to Mr Lorigan’s employment with Hyundai New Zealand:

- (i) on what date did he receive an offer of employment from that entity?
 - (ii) on what date did he accept the offer of employment from that entity?
 - (iii) what were the terms and conditions of his remuneration with that entity?
- c) *Paragraph 2.62*: what are the details, in summary, of the 569 new sales opportunities which Mr Lorigan has identified?
- d) *Paragraph 3.7*: for what breach of Mr Lorigan's employment agreement does he seek damages?

[34] With regard to the statement of claim in EMPC 377/2015 dated 11 December 2015: for the purposes of paras 7, 21, 32, 37, 39, 40.1 and 40.3, when and how did Mr Lorigan raise his unjustified disadvantage personal grievance?

Disclosure of documents

[35] I come now to the range of issues which relate to disclosure of documents by both parties.

[36] Most of the contentious issues relate either to relevance, or in some instances whether a legal professional privilege applies.

[37] The applicable principles are well known, and I need only summarise them briefly.

[38] Pleadings define the ambit of the proceedings, and therefore define the issues to which questions of relevance must be related.²⁵

[39] Regulation 38 defines relevance in this way:

²⁵ *Airways Corporaton of New Zealand Ltd v Postles* [2002] 1 ERNZ 71 (CA) at [5].

38 Relevant documents

- (1) ... a document is relevant, in the resolution of any proceedings, if it directly or indirectly—
 - (a) supports, or may support, the case of the party who possesses it; or
 - (b) supports, or may support, the case of a party opposed to the case of the party who possesses it; or
 - (c) may prove or disprove any disputed fact in the proceedings; or
 - (d) is referred to in any other relevant document and is itself relevant;

[40] It is well established a court will not order discovery, or disclosure as it is termed in this Court, where an applicant does no more than engage in a “fishing” exercise, that is when he or she seeks information or documents to discover a new cause of action or to discover circumstances which may or may not support a baseless or speculative cause of action.²⁶

[41] Even if documents are relevant, as defined, the Court retains a discretion to refuse unnecessary or undesirable disclosure, and whether disclosure would be oppressive is a matter which is to be considered.²⁷

[42] Disclosure is a function of relevance, proportionality and discretion.²⁸

[43] Regulation 44 defines objections to disclosure. That regulation makes it clear that the only grounds upon which objections may be based are that the document or class of documents is or are subject to legal professional privilege, if disclosed would tend to incriminate the objector, or if disclosed would be injurious to the public interest.

[44] As mentioned, Infinity has raised several objections on the basis of legal professional privilege. There are two types of legal professional privilege. These are conveniently summarised in the following statement taken from Thanki’s *Law of Privilege*:²⁹

²⁶ *AMP Society v Architectural Windows Ltd* [1986] 2 NZLR 190 (HC) at 196.

²⁷ *Fox v Hereworth School Trust Board (No 6)* [2014] NZEmpC 154, (2014) 12 NZELR 251 at [41].

²⁸ *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760 at [14].

²⁹ Thanki Bankim *The Law of Privilege* (2nd ed, Oxford University Press, Oxford, 2011) at [1.10] (original emphasis). Further and extensive discussion of these concepts is found in *Zespri*

- Legal advice privilege – communications between *lawyer and client* for the purposes of giving or receiving legal advice, in both the litigation and the non-litigation context.
- Litigation privilege – communications between a client or his lawyer and *third parties* for the purposes of litigation.

[45] In New Zealand, the first of these privileges is known as solicitor-client privilege; it is described in s 54 of the Evidence Act 2006 (the EA), which relevantly states:

54 Privilege for communications with legal advisors

- (1) A person who requests or obtains professional legal services from a legal advisor has a privilege in respect of any communication between the person and the legal advisor if the communication was–
 - (a) intended to be confidential; and
 - (b) made in the course of and for the purpose of–
 - (i) the person requesting or obtaining professional legal services from the legal advisor; or
 - (ii) the legal advisor giving such services to the person.

...

[46] Section 56 of the EA provides guidance as to the scope of litigation privilege; it relevantly states:

56 Privilege for preparatory materials for proceedings

- (1) Subsection (2) applies to a communication or information only if the communication or information is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the **proceeding**).
- (2) A person (the **party**) who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of–
 - (a) a communication between the party and any other person;
 - (b) a communication between the party’s legal advisor and any other person;
 - (c) information compiled or prepared by the party or the party’s legal advisor;
 - (d) information compiled or prepared at the request of the party, or the party’s legal advisor, by any other person.

...

[47] I shall be applying these principles where appropriate.

Infinity's challenge to objections raised by Mr Lorigan

[48] On 13 September 2017, Infinity served on Mr Lorigan a notice requiring him to give disclosure. On 25 September 2017, he declined to provide any of the documents. This appears to be because he believes that Infinity has provided false affidavits, misled the Authority and in other ways has acted, he says, with significant impropriety.

[49] In its challenge, Infinity applies for orders declaring Mr Lorigan's objection to be ill-founded and requesting the Court to direct that the documents or class of documents be disclosed.

[50] I deal with each category contained in Infinity's notice as follows:

- a) *Category 1*: this category relates to the assertion in para 2.62 of the amended statement of problem of 19 December 2012, discussed earlier; as already noted, in that paragraph Mr Lorigan asserts that at the time of his termination he had identified 569 new sales opportunities which would have entitled him to substantial sales and commission. Documents are sought with regard to those sales opportunities, including those which led him to believe that they would have materialised into sales. Attached to the statement of problem was a schedule dated 11 December 2009 (Annexure 13) entitled "Outstanding Commitments/Sales Achieved", to which I have already referred.

Mr Towner stated that although the schedules refer to multiple customers, documents have been provided for six only.

Mr Lorigan told the Court that he has access to many documents relevant to this issue, which were generated prior to the production of the schedule.

It is not altogether clear whether Mr Lorigan does possess any documents that arose after the date of the report relating to the

transactions described in it. If he has, they are potentially relevant to the assertions made in para 2.62. They should be disclosed.

- b) *Category 2*: copies of any file notes or diary notes are sought regarding an assertion made in para 2.15 of the amended statement of claim that Mr Gilmour, a principal at Infinity, threatened Mr Lorigan with termination of employment; the allegation is that this occurred on three occasions, that is on 16, 23 and 27 October 2009. The notice claims that there must be some documentary basis on which Mr Lorigan can recall the specific dates and alleged words used in the pleading.

These documents are potentially relevant. Mr Lorigan confirmed that he could provide them.

Category 3: the next request relates to the asserted health problems, to which I have already referred.³⁰

As already recorded, Mr Lorigan has agreed to provide a legible copy of the medical certificate in question. He says that the certificate does not contain confirmation as to whether the medical condition was caused by employment events.

Apparently, there are not as yet documents in existence recording the opinion of a medical practitioner about the cause of Mr Lorigan's medical condition. He should be aware that if such a document were to come into existence, and if he wished to rely on it, he would need to disclose it.

- c) *Categories 4 and 5*: the next two categories relate to documents relevant to mitigation of lost earnings in the three-month period from 31 January 2010, including a copy of Mr Lorigan's employment agreement with his new employer, any correspondence or emails relating to the possibility of employment with that employer, the offer

³⁰ Above at para [26](e).

of employment and/or the acceptance of an offer of employment; and copies of any documents confirming actual earnings in that three-month period. Mr Towner specifically requested correspondence between Mr Lorigan and Fletchers which took place after termination; Mr Lorigan confirmed this would be disclosed.

Plainly, such documents are relevant to the pleaded claim.

Mr Lorigan said that these documents were on a USB storage device. Mr Towner agreed that disclosure could occur by way of provision of the device, or a copy of it. Documents with regard to these two categories are to be provided in this way.

- d) *Category 6*: finally, Infinity requests copies of any correspondence, emails, file notes, diary notes, audio recordings, testimony, soundbites or any other documents recording conversations Mr Lorigan alleges he had with a number of persons. Mr Towner stated that disclosure had been provided for all such persons, except for Arun Stanley and Jamie Wilson.

Mr Lorigan stated that these persons may give evidence. At this stage, the documents should therefore be disclosed. Subject to locating them, Mr Lorigan confirmed that he would do so.

Mr Lorigan's challenge to Infinity's objections to disclosure

[51] Mr Lorigan served a notice of disclosure dated 25 September 2017, which referred to some 42 categories of documents.

[52] Infinity has objected to disclosure of these on several grounds – it says that some of the requests do not relate to a document; some are irrelevant; some are legally privileged, and some relate to documents which are not in the possession, custody or control of Infinity. The Court must determine if these objections are ill-founded.

[53] During the hearing, Mr Towner confirmed that Infinity could provide an affidavit in support of its assertions. On 2 November 2017, Mr Towner filed a memorandum containing confirmation of instructions on two points – to which I shall refer shortly. On 6 November 2017, I issued a minute requesting affidavit evidence from Infinity with regard to a number of the categories which arise for consideration. That was filed by Mr Peter Leathley, head of HR for Sime Darby New Zealand and Australia, on 20 November 2017.

[54] Mr Lorigan then filed a memorandum, the essence of which was that the Court should not rely on the contents of Mr Leathley’s affidavit when considering the disclosure objection. Mr Lorigan said that he believed Mr Leathley was “cynically continuing to conceal crimes”, one of which was witness tampering by counsel for Infinity. No affidavit evidence in support of Mr Lorigan’s very serious allegations was filed.

[55] In a memorandum filed in response by Mr Towner, it was emphasised that although s 67 of the EA requires a judge to disallow a privilege where that is asserted for a dishonest purpose, a high evidential threshold would have to be met before the privilege would be disallowed under the section. Further, the hearsay evidence of criminal or fraudulent purpose was unlikely to be regarded as admissible.³¹ He submitted that the high threshold was not met.

[56] Mr Lorigan then filed another memorandum, which repeated much of what he had already said, and made further vague and unsubstantiated but very serious allegations.

[57] In short, Mr Lorigan invites the Court to leap to the conclusion that a broad range of criminal offences have occurred, as well as serious professional misconduct. No reliable evidence – as opposed to assertions of belief – has been filed. Mr Lorigan’s memoranda do not come anywhere near persuading the Court that asserted privileges should not be allowed under s 67 of the EA.

³¹ Relying on *Cross on Evidence* (10th ed), EVA 67.4.

[58] I shall make reference to the evidence in Mr Leathley's affidavit, where applicable.

[59] I emphasise that if Mr Lorigan wishes to argue at any substantive hearing of these proceedings that the content of the affidavit, or other evidence relied on by Infinity is incorrect, he will need to do so on the basis of admissible evidence which is reliable.

[60] Before dealing with the discreet categories of documentation which are in dispute, I mention a preliminary point made by Mr Towner. He submitted that some of the documents which had been requested from Infinity would only be relevant if the Court were ultimately to conclude that the disadvantage grievance could be advanced.

[61] Whilst that may be so, I am not prepared to postpone disclosure issues, given the very significant delay that has occurred with regard to claims brought both by Mr Lorigan and Infinity as long ago as 2012. In my view, the interests of justice require a timely disposition of the disclosure issues pertaining to the alleged disadvantage grievance.

[62] I deal now with each of the document requests made by Mr Lorigan, with reference to the document numbers listed in his notice of 25 September 2017:

- a) *Categories 2 and 10 – Sime Darby application forms*: Copies of the Sime Darby Group application forms which Mr Lorigan signed at the commencement of his employment are sought. Mr Lorigan says these documents are relevant because it has been asserted he was never employed by an entity other than Infinity; and such documentation is relevant to his start date.

Mr Towner pointed out that this is an uncontested fact in the Authority's second determination; the Authority determined that

Mr Lorigan had never been employed by Sime Darby, with the claim against that entity being struck out.³²

As to the commencement date of Mr Lorigan's employment, the amended statement of problem refers to an individual employment agreement having been provided. At this stage I assume that it will provide details of the correct commencement date of Mr Lorigan's employment with Infinity. I therefore accept the submission that the requested documents are not necessary or relevant for the purposes of the matters before the Court.

- b) *Categories 3 and 8 – Nissan New Zealand Bulletin*: Mr Lorigan placed considerable emphasis on the production of a document from Nissan NZ, which he said related to the restructuring issues he faced.

At the hearing, Mr Towner informed the Court that his instructions were that Infinity does not have any documents from Nissan NZ in relation to the restructuring, and that an affidavit from Infinity to this effect could be provided. Mr Leathley in his subsequent affidavit stated that Infinity did not have documents in these categories in its possession, custody or power. In the absence of any reliable evidence that it does, I make no direction for disclosure of such documents.

Category 4 – Without prejudice letter of 28 November 2012: Mr Lorigan next referred to a letter which was written by counsel for Infinity to counsel for Mr Lorigan on 28 November 2012, on a without prejudice save as to costs basis. Mr Lorigan is concerned that the letter, at least by implication, referred to the document from Nissan NZ.

Infinity's objection was that the letter was privileged, so that it could not be used as a basis for the request for documents. That said, the parties agreed at the hearing that I should inspect the letter to resolve the issue. I have done so.

³² *Lorigan v Infinity Automotive Ltd (No 2)*, above n 1, at [85].

In the paragraph in question, a statement is made which is consistent with subsequent statements made by Infinity in its pleadings; that is, that there was a restructuring in late 2009 which was driven by external factors which did not relate to Mr Lorigan personally, and that clear evidence of this would be produced. There was no express reference to a document produced by Nissan NZ. However, Infinity says it will produce clear evidence of the reasons for the restructuring. It has pleaded in its statement in reply to the amended statement of problem that the restructuring was “caused by changes made in late 2009 by Nissan New Zealand which were outside the control of [Infinity]”.³³

Although Infinity says there is no Nissan NZ Bulletin, as described in the previous request, there may be nonetheless relevant documents relating to the restructuring caused by changes made in late 2009 by Nissan NZ. Those documents should accordingly be disclosed.

- c) *Categories 5 – 7*: these apparent categories are either not documents, or are submissions, and I disregard them.
- d) *Category 11 – Material as to Sime Darby’s sales managers’ roles for June 2008 to October 2008*: Mr Lorigan says that these documents are relevant to the question of whether alternative roles within Sime Darby could have been offered to Mr Lorigan upon his redundancy. As Mr Towner submits, however, this period was at least a year prior to the restructuring. Such documents are unlikely to assist the Court; I do not consider they would be sufficiently relevant as to require their disclosure.
- e) *Category 12 – Copies of Sime Darby’s bulletins for internal employment opportunities, 1 September 2009 to 31 January 2010*: Infinity originally submitted that it does not have any such documents in its possession, custody and control, and that they are not relevant.

³³ Statement in reply, para 2.8 to amended statement of problem, 16 January 2012.

I find, however, that if they existed, they could be relevant to the question of whether alternative roles were available within the organisation.

Mr Leathley confirmed in his affidavit that the company no longer has in its possession, custody or power any documents described in this category. However, he also said that since the interlocutory hearing, he had discovered a file of which he was not previously aware.

Mr Leathley said he believed that the job vacancy bulletins described in this category were originally on an electronic database, but in the last 12 months, these had been generally cleansed and old copies deleted, including the documents referred to in this category. He said that Mr Lorigan already has copies of these documents.

The recently discovered file does contain hardcopies of job vacancies that cover the period November 2009 to early January 2010. However, only the first page of each of the bulletins, being summaries, were on that file. Copies of those pages would be disclosed to the plaintiff.

- f) *Category 13*: a request is made for the employment agreement of Mr Brady, the person who Mr Lorigan asserts was unjustifiably preferred in the restructuring. Mr Towner submits that these are not relevant, and that they will not assist the Court in determining whether there was in fact unfairness in the restructuring process. Having regard to Infinity's agreement to provide the related documents in categories 19, 20 and 21, those in this category are to be disclosed.

- g) *Categories 14, 15, 16, 17, 18, 19, 20, 21, and 23 - 27 – range of documents concerning Mr Brady*: these documents relate to various aspects of Mr Brady's employment. The gist of the requests is for documents supporting the proposition that Mr Brady had been given certain guarantees of employment so as to support his application for a work permit.

Infinity says either that it does not have certain of the documents in its possession, custody or control, and/or that they are not relevant.

However, it is now confirmed in Mr Leathley's affidavit of documents that Infinity does not have in its possession, custody or power the documents described in categories 14 to 18 or 23 to 27.

That leaves categories 19, 20 and 21, which relate to Mr Brady's curriculum vitae, original New Zealand position employment application and copies of references. Mr Leathley says these documents do exist, and they will be disclosed to Mr Lorigan.

- h) *Category 22 – details of sales commissions from 20 October 2008 to 30 April 2010*: Mr Lorigan said that these documents were relevant because evidence as to what had happened from as early as October 2008 would support Mr Lorigan's assertion as the "crime of scalping".

Mr Towner accepted that documents of this character would be relevant to the claim that there was a failure to pay commissions.

That said, the statement of claim focuses on 569 possible sales opportunities as already discussed. Documents relating to those sales should be disclosed, but not otherwise.

- i) *Categories 28, 34, 35, 36 and 42*: these categories request documentation relating to the appointment of Dr W C Hodge to investigate allegations involving Mr Lorigan's manager. It appears from Mr Lorigan's submissions that he considers the subject matter of the investigation to be relevant to the general assertion of corruption which he wishes to advance.

At the interlocutory hearing, Mr Towner confirmed Infinity had appointed Dr Hodge who had commenced an investigation in late 2010.

In his supplementary memorandum of 2 November 2017, Mr Towner stated that the purpose of the appointment was to “investigate alleged irregularities occurring at City Nissan Takapuna, concerning the sale and purchase and/or transfer of cars”, following a complaint made shortly before Dr Hodge’s appointment by the defendant’s then New Car Manager, Mr Peter Ripley. All of the car sales investigated (but only in a preliminary way) by Dr Hodge occurred after Mr Lorigan was made redundant. He issued an interim report on 19 December 2010, which did not make any findings in relation to the issues, and which did not relate to Mr Lorigan’s redundancy of January 2010. This information was confirmed in Mr Leathley’s subsequent affidavit.

On the evidence which is currently before the Court, these matters are too remote to be relevant to the subject matter of Mr Lorigan’s claims. Accordingly, I uphold the objection.

- j) *Category 29*: this category relates to a complaint Mr Lorigan made to a related company of Infinity.

Mr Towner told the Court that the complaint was made under Infinity’s protected disclosure policy for confidential complaints, and that it related to allegations made by Mr Lorigan of corruption and fraud. Mr Towner stated that the complaint was investigated by the head office company to which it was directed, and that it was dismissed as being without merit.

In his affidavit, Mr Leathley elaborated. He said that the company had received an email from Mr John Manley at Nissan NZ dated 21 February 2015, to which was attached an earlier email from Mr Lorigan. The email had been sent to Nissan NZ, and it related to some matters which are the subject of Mr Lorigan’s pleaded claim: that is, his personal grievances of unjustified dismissal, and of unjustified advantage arising from his relocation from the defendant’s Takapuna premises to its West Auckland premises.

These documents are accordingly relevant and should be disclosed.

- k) *Category 30*: this category is described as relating to copies of correspondence surrounding Infinity's request to its counsel "for them to threaten the complainant".

In his affidavit, Mr Leathley said he was unsure what the alleged "threats" are as referred to in Mr Lorigan's notice, but he believed Mr Lorigan was referring to any one of the following correspondence, for each of which the company asserts legal professional privilege:

- i) On 10 March 2014, the company's solicitors wrote a letter to Mr Lorigan. I interpolate that it related to certain statements which Mr Lorigan had allegedly made, said to be of a defamatory and tortious nature. He was challenged to make those statements publicly, and that if he did, proceedings would be issued against him claiming damages and costs; otherwise, he was to retract those statements in writing. Then followed email correspondence between Mr Leathley and Infinity's lawyers on a number of occasions. I infer that the correspondence was intended to be confidential, and was for the purpose of obtaining legal advice. This correspondence is the subject of solicitor-client privilege.
- ii) On 19 January 2016, Infinity's lawyers sent an email to Mr Lorigan's then lawyer, which followed an email of 18 January 2016 from Mr Lorigan to a number of addresses. That resulted in a chain of correspondence between Mr Leathley and Infinity's lawyers. I infer that the correspondence was intended to be confidential, and was for the purpose of obtaining legal advice. That correspondence is also subject to solicitor-client privilege.
- iii) On 1 March 2017, Mr Towner spoke to Mr Fleming by telephone with regard to text messages which Mr Lorigan had sent to the

chief executive officer of Sime Darby, Infinity's parent company, one of which was defamatory of Mr Leathley. Again, correspondence occurred between Mr Leathley and Infinity's lawyers. I infer that the correspondence was intended to be confidential, and was for the purpose of obtaining legal advice. It is also subject to solicitor-client privilege.

- l) *Category 31*: a request is made for correspondence regarding Mr Lorigan between certain employees of Infinity, Ms Heather Kendall, Mr Leathley, Mr John Mackinlay and Mr Mike Gilmour between 30 September 2009 and 30 January 2010.

Infinity submitted that these documents are not relevant, and/or disclosure would involve disproportionate time and consequences.

However, following discussion with the Court, Mr Towner agreed that these documents should be disclosed.

- m) *Category 33*: this request related to information concerning Nissan Wingroad sales between 23 March 2009 and 30 April 2010. Although it was initially asserted these documents are not relevant, Mr Towner agreed they should be provided, since the request was relevant to the allegation that there had been a failure to pay commissions.
- n) *Categories 37 to 39*: Mr Towner submitted that these categories relate to the protected disclosure complaint, as referred to in category 29.

On the basis of the evidence tendered about category 29, it is appropriate to conclude that any category 37 documents should also be disclosed.

It is not clear that documents in categories 38 and 39, which relate to the resignation of two individuals, are in fact relevant. At this stage, I do not order disclosure but require an explanation from Infinity by

affidavit as to these categories; that is, whether any such documents are relevant, and/or whether there is a proper ground of objection under reg 44 of the Regulations. Inspection by the Court may be appropriate.

- o) *Categories 40 and 41*: in these categories, a request is made with regard to correspondence with staff members who may potentially give evidence for the company.

Mr Towner said that the documents should not be disclosed because they were subject to legal professional privilege. Mr Leathley in his affidavit states that there is correspondence between himself and the company's lawyers with regard to this topic. Dates for the correspondence are given. This material is subject to litigation privilege.

[63] For the sake of completeness, I refer to another document which Mr Lorigan filed on 29 September 2017, in which he sought what he described as a "special order" whereby the legal professional privileges which I have discussed should be overridden. He said that this was due to "perjury, contempt and witness coercion". This was a similar assertion to those raised in regard to Mr Leathley's affidavit, which I have already considered.³⁴ I repeat that there is no reliable evidence from which the Court could conclude that such a possibility is warranted. This application is dismissed.

Further documents filed by Mr Lorigan

[64] A further document was filed by Mr Lorigan, described as an election to have this Court order penalties for breaches of the duty of good faith, dated 3 October 2017. It also made very serious allegations with no supporting particulars, and no supporting evidence.

[65] Mr Lorigan appeared to indicate that he was seeking a pre-hearing order, but the specifics were not described.

³⁴ Above at paras [54] – [59].

[66] At the interlocutory hearing, I explained to Mr Lorigan that there is no procedural basis on which his application as framed could be considered. Apart from anything else, a claim for a penalty must be brought without 12 months of the cause of action becoming known, or should reasonably have become known, to the claimant;³⁵ there is currently no evidence which could satisfy the Court on this point. Furthermore, the application appeared to relate to the veracity of witnesses who would be called for Infinity; that is an issue which should be considered at any substantive hearing, when evidence can be properly tested.

[67] I am not prepared to consider this particular application further at this time, and I do not require Infinity to respond to it.

[68] Since the hearing, Mr Lorigan has filed yet further memoranda on 8, 13 and 23 November 2017. The first attaches a number of bulletins, which need no comment from the Court. The second proposes that Mr Lorigan's proceedings be "resolved without the need for trial". That is a completely untenable proposition, since it would obviously involve a significant breach of natural justice. Again, Infinity is not required to respond to it. The third is to be treated as a notice of disclosure; and should be responded to by Infinity accordingly in accordance with the Regulations.

[69] The content of several of these documents,³⁶ and the memoranda referred to earlier,³⁷ reinforces a statement I also made to Mr Lorigan at the hearing that if he wishes to advance very serious allegations of this kind, then he would be well advised to obtain independent legal advice, as he has done at earlier stages in this proceeding. It is obvious that Mr Lorigan does not understand aspects of the Court's procedures, and he should seek competent assistance. In particular, he would be well advised to obtain a proper understanding of the requirements of the Court as to proper evidence. This is not advice which the Court, including Registry staff, can give him.

³⁵ Employment Relations Act 2000, s 135(5).

³⁶ Those of 3 October and 8, 13 November 2017.

³⁷ Above at paras [54] – [59], and [63].

[70] Apart from anything else, if allegations are advanced which prove to be unsustainable, there are likely to be very serious cost consequences for him.

Conclusion

[71] The parties are to take the following steps within 14 days of the date of this judgment:

- a) Mr Lorigan is to file a memorandum providing the particulars which he is ordered to give, as referred to in paras [33] and [34] of this judgment.
- b) Mr Lorigan is to provide to Infinity's lawyers the documents he has been ordered to disclose at para [50] of this judgment.
- c) Infinity is to provide to Mr Lorigan the documents which it has either agreed to or has been ordered to disclose, at para [56] of this judgment.
- d) Infinity is to provide an affidavit with regard to the matters referred to in para [56](n) of this judgment. I will then consider and resolve the issue of relevancy.

[72] Given the unnecessary complexity which has arisen in dealing with the proceedings before the Court, I direct that no further interlocutory application is to be filed, except by leave of a judge. That means that were any application to be contemplated for filing, the party doing so would need to apply for leave of the Court to file the document, giving succinct reasons as to why this should occur. The Court will then determine whether the interests of justice require the application to be accepted for filing. This direction does not apply to the filing of documents under para [71] of this judgment.

[73] The Registrar is to convene a telephone directions conference with Mr Lorigan and counsel for Infinity, in the first week of February 2018. The purpose of this conference will be to discuss appropriate directions for the hearing of challenges EMPC 377/2015 and EMPC 277/2016, which I anticipate can be scheduled to take place in the second quarter of 2018. I will need to make a

direction as to the nature of the hearing on the non de novo challenge, EMPC 377/2015. The challenges will need to be resolved before the Court can move on to deal with the substantive claims brought by Mr Lorigan and Infinity.

[74] Both parties sought costs with regard to the interlocutory applications referred to above. I do not intend to determine those issues at this stage. Accordingly, costs are reserved, and will be dealt with at a later stage of the proceeding.

B A Corkill
Judge

Judgment signed at 12.45 pm on 6 December 2017