**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2017] NZEmpC 96**
**ARC 22/14**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| AND IN THE MATTER | an application for further and better discovery |
| AND IN THE MATTER | of an application for strike-out |
| BETWEEN | SHABEENA SHAREEN NISHA<br>Plaintiff |
| AND | LSG SKY CHEFS NEW ZEALAND LIMITED<br>First Defendant |
| AND | PRI FLIGHT CATERING LIMITED<br>Second Defendant |
| AND | TERRY HAY<br>Third Defendant |

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| Hearing: | 26 and 27 July 2017<br>(heard at Auckland) |
| Appearances: | K Wendt, counsel for the plaintiff, abiding the decision of the Court<br>Ms Meechan QC and J Douglas, counsel for first defendant<br>N Scampion, counsel for third defendant |
| Judgment: | 4 August 2017 |

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**INTERLOCUTORY JUDGMENT (NO 23) OF JUDGE B A CORKILL**

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## Introduction

[1] Before the Court are three applications. Two have been filed by the third defendant, Mr Terry Hay. He seeks an order for further and better discovery against the first defendant, LSG Sky Chefs New Zealand Ltd (LSG NZ); and he also seeks an order of joining LSG Lufthansa Service Asia Ltd (LSG Asia).

[2] LSG NZ has in turn filed an application for an order of strike-out, asserting that Mr Hay's applications are frivolous and vexatious.

## Background

[3] Before describing the context of the applications, the evidence and the approach of the Court, it is necessary to summarise the background.

[4] On 30 September 2015, the Court issued its substantive judgment in this proceeding.[1]

[5] In November 2015, each of the then parties, the plaintiff Ms Alim, and the defendant LSG NZ, filed applications for significant orders for costs against each other.

[6] The Court was also required to consider an application for discovery, and joinder of, initially, PRI Flight Catering Ltd (PRI), and subsequently Mr Hay.

[7] The application for disclosure was resolved by a judgment issued on 20 June 2016, being Interlocutory Judgment (No 20).[2] Ms Alim and PRI were both ordered to file and serve affidavits of documents.

[8] Subsequently, the Court heard the applications for joinder, making orders which had been sought in its judgment of 14 December 2016, being Interlocutory Judgment (No 22).[3]

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1 *Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 171, (2015) 13 NZELR 185.
2 *Nisha v LSG Sky Chefs New Zealand Ltd* [2016] NZEmpC 77.
3 *Nisha v LSG Sky Chefs New Zealand Ltd* [2016] NZEmpC 166.

[9] On 2 May 2017, the Court of Appeal declined leave to appeal the findings made in Interlocutory Judgment (No 22).[4]

[10] Soon after, a telephone directions conference was convened on 11 May 2017, so that the cost issues could be timetabled for resolution. As a result, the Court scheduled two days for resolution of all outstanding cost issues; that hearing is scheduled for 6 and 7 September 2017.

[11] One of the steps that was timetabled to take place in the lead up to that hearing related to the provision of documents by LSG NZ to Mr Hay. That process did not proceed smoothly. The Court was required to revisit the timetabling arrangements, because it appeared some problems had arisen with regard to the provision of those documents. On 19 June 2017, and on 14 July 2017, the pre-hearing timetabling orders were adjusted to take account of these difficulties.

[12] At no time in the telephone directions conferences which were convened to manage pre-hearing matters was an indication given that Mr Hay proposed to file further applications.

[13] Five days after the last of those telephone directions conferences, Mr Hay filed his applications for further and better discovery, and for joinder, supported by an affidavit which had been sworn on 4 July 2017, some 10 days prior to the most recent telephone directions conference. Initially, I established a timetable for the hearing of these in a minute dated 19 July 2017, indicating I would hear them on 1 or 3 August 2017. It transpired that Mr Scampion, counsel for Mr Hay, would by that time be unavailable as he would be overseas. Accordingly, I convened a further telephone directions conference on 21 July 2017 to discuss timetabling issues. At that time, Ms Meechan QC, counsel for LSG NZ, indicated that LSG NZ took the view that the recently filed applications were frivolous and vexatious, and invited the Court to strike them out then and there, since they should be regarded as an abuse of process. I indicated I was not prepared to deal with such an allegation on a summary basis, and that LSG NZ would need to file and serve an appropriate application if it wished to advance this assertion.

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4 *Hay v LSG Sky Chefs New Zealand Ltd* [2017] NZCA 153.

[14] I accordingly directed a prompt timetable for the filing of all necessary documentation; given Mr Scampion's pending unavailability, an early hearing was scheduled.

[15] This resulted in there being three applications before the Court when the hearing began.

## Description of applications

[16] It is necessary first to describe Mr Hay's applications, the opposition to them, and the evidence which has been adduced. Then, I will outline the details of the strike-out application brought by LSG NZ, and its opposition by Mr Hay.

*Mr Hay's application for further and better discovery*

[17] Mr Hay seeks what he describes as further and better discovery from LSG NZ in respect of three categories of documents.

[18] First, he seeks documents within LGS NZ's power, possession and control that relate to cost issues in these proceedings, including but not limited to invoices rendered by Anja Borchardt and by Goodwin Yallop litigation support services.

[19] Secondly, documents are sought from LSG NZ that relate to the funding, direction and control of the proceedings. These documents include but are not limited to documents that relate to whether LSG Asia, or some other entity but not LSG NZ itself, "controlled the funding, directed and controlled these proceedings" on behalf of LSG NZ.

[20] Thirdly, documents are sought that relate to whether Ms Park, Manager of Human Resources (HR) for LSG NZ, was authorised to make affidavits on its behalf.

[21] Mr Hay's application states that the application for further and better discovery should be determined after notices of opposition have been filed, but before any further steps are taken. The grounds relied on are to the effect that parties should have all relevant documents for cost purposes. The notice of application also states that the documents which would be disclosed "will likely

impact the Third Defendant's approach and be relevant to his submissions in relation to the issues".

[22] In Mr Hay's application for joinder of LSG Asia, it is asserted that LSG Asia directed the funding and directed and controlled LSG NZ throughout the proceedings, so that it should be regarded as the real party to the proceedings; that LSG NZ and LSG Asia failed to advise the parties that LSG Asia was directing the funding, and direction and control of the proceeding; and that it is in the interests of justice that LSG Asia be joined.

*LSG's notice of opposition to Mr Hay's applications*

[23] LSG NZ's notice of opposition responded first to the three categories of documentation which are sought.

[24] As to the request for certain invoices, it stated that the fees charged in the Borchardt invoices do not form part of LSG NZ's claim for costs since the hearing. However, the Goodwin Yellop invoices could be provided.

[25] As to the application for further and better discovery, brought for the purposes of Mr Hay's application for joinder of LSG Asia, LSG NZ stated that:

(a) This would be an exercise in futility given that the Court cannot make an order for joinder against that entity, there being no evidence that the company is within the Court's jurisdiction.

(b) In any event, there is no issue in the proceeding as to the "control of funding, direction and control of these proceedings" with regard to LSG NZ, such as would warrant joinder. Whilst these questions are germane to LSG's claim for costs against Ms Alim, and against PRI and Mr Hay, there is no "mutuality" in respect of these issues.

(c) As to the request for documents relating to whether Ms Park was authorised to make affidavits, LSG NZ pleaded that this was not relevant to the applications currently before the Court for costs; moreover, her ability and authority to give evidence for LSG NZ had never been challenged to date, and the evidential foundation upon which Mr Hay now purported to do so was unreliable.

(d) Finally, any order which the Court might make would have to be exercised in equity and good conscience, and the exercise of that discretion would be inappropriate in this case.

[26] Turning to the application for joinder, LSG NZ pleaded that LSG Asia cannot be joined on the basis of the current application. There are, it is asserted, jurisdictional and evidential barriers to joinder, and no reason for any related company of LSG NZ to be before the Court since:

(a) LSG NZ was named as a defendant in the proceeding and has had to defend them, in contrast to Ms Alim and her funder(s) who initiated and pursued unmeritorious claims.

(b) There is no mutuality in terms of the funding/control questions.

*Evidence adduced by the parties*

[27] Evidence in support of Mr Hay's applications has been given by Mr Andrew Sellar, who until May of this year was employed by LSG NZ as Director Sales and Services New Zealand, and as Global Key Account Manager for Air New Zealand.

[28] His evidence was directed at the three categories of information for which discovery orders were sought. He described his understanding of the governance relationships between LSG NZ and LSG Asia. He said that there is a pairing system between senior managers at LSG NZ, and relevant members of LSG Asia. He believed that there would have been a significant degree of control over HR activities within LSG NZ, and that LSG Asia would have made key decisions in relation to the strategy, direction and funding of this proceeding. He believed that

LSG Asia's degree of control of the New Zealand business was such that it must be concluded it would also have controlled and directed LSG NZ's spending on legal fees. He described the nature of documents which he thought would have been produced by Ms Park in the course of the present litigation, including reports, often supported by PowerPoint presentations to Senior Leadership Team (SLT) meetings, and to communications between her and senior members of LSG Asia by email. He also referred to the fact that Ms Park was a careful note-taker. The thrust of this evidence was that all these types of documents would be available, and should be discovered.

[29] A final aspect of Mr Sellar's affidavit related to the fact that he understood no documents had been disclosed in this proceeding showing that Ms Park had authority to make the various affidavits which she had sworn in the proceeding. On the basis of his experience, such authorities must exist. He believed there was a corporate requirement for written authorisations, due to the concept that no individual could self-authorise. Consequently, Ms Park would have needed an authorisation from a senior manager with a greater level of authority than her in order to present an affidavit in these proceedings. Moreover, he would have expected Ms Park to have discussed intended evidence with the relevant General Manager, thereby ensuring that an affidavit was reviewed and approved. This evidence was to support the request for documents which would indicate what authorisations Ms Park held, and from whom.

[30] For LSG NZ, evidence was given by Ms Park, and by Mr Neil Bryant, Finance Controller of LSG NZ.

[31] Each of those witnesses gave a response to most paragraphs of Mr Sellar's affidavit. The essence of their evidence was that whilst Mr Sellar could describe the practices which applied to his former roles, he did not have a complete understanding of the practices which applied to Ms Park's role as Manager HR. They said she was not required to obtain approval to defend a proceeding against LSG NZ, or incur costs to defend such a proceeding, as had occurred here. Both witnesses refuted Mr Sellar's contention that Ms Park was required to report to LSG Asia on a monthly basis. She said she did not do so – she provided only monthly

statistical reports. It was also confirmed that she gave a brief "one liner update[s]" as to the status of this proceeding to SLT meetings.

[32] Mr Bryant said that details of the proceeding were not given, and that comments as to legal issues were made at a high level only. He had never heard of a "pairing system". He said that regional and corporate offices have functional heads in areas such as finance; there are varying information lines to these functional heads. However, the primary reporting line is to the New Zealand General Manager.

[33] Both witnesses confirmed that the HR role did not require the same level of contact with LSG Asia as was required of Mr Sellar in his role.

[34] Ms Park confirmed that she rarely gave updates to LSG Asia. When she did so, it was usually by telephone. Nor was she subject to a requirement to obtain approvals in writing, as had apparently been the case for Mr Sellar with regard to his responsibilities.

[35] Ms Park confirmed that personnel at LSG Asia were not involved in any discussions as to strategy and direction of the defence of the proceedings brought by Ms Alim. She said there were no in-depth discussions as to these proceedings with relevant Hong Kong personnel.

[36] Mr Bryant confirmed that legal fees in the LSG NZ budget were not commented on specifically by LSG Asia; their review of the company's budget was on a total profitability basis only, and not on a line-by-line basis.

[37] Both witnesses also confirmed that there was no requirement for Ms Park to obtain authorisation from a senior manager in order to make an affidavit on behalf of LSG NZ in this proceeding; nor was there a requirement that her evidence be reviewed.

*LSG NZ's application for strike-out*

[38] On the basis of the various grounds spelt out by LSG NZ in its notice of opposition and on the affidavit evidence it had filed, both of which have been summarised earlier, LSG NZ sought an order that the Court strike out both of Mr Hay's applications, and award costs on an indemnity basis.

[39] This application was made upon the grounds that:

(a) The applications were without merit, and were frivolous and vexatious.

(b) The applications had been brought for an ulterior motive, that is, to obtain documents for use in other proceedings before this Court, known to the parties as the *Matsuoka* proceedings.[5]

[40] For Mr Hay, a notice of opposition to this application was filed stating that:

(a) The applications are reasonably arguable.

(b) Mr Hay seeks discovery of undisclosed documents relevant to costs. There is evidence those documents exist.

(c) Joinder is in the interests of justice where a non-party both funds (directly or indirectly) the proceedings and substantially controls the proceedings, and has committed an act of relevant impropriety. This principle applies equally to plaintiffs and defendants. The prerequisites are established in this case.

(d) LSG Asia is an overseas company, but that does not prevent the Court from assuming jurisdiction in granting joinder. Once joined, LSG Asia could raise any objection to the jurisdiction of the Court.

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5 *Matsuoka v LSG Sky Chefs New Zealand Ltd*, ARC 23/12 and ARC 102/13.

(e) Mr Hay had not delayed in bringing his applications. Further, the risk of prejudice to him in not allowing the applications to proceed outweighs the risk of prejudice caused by any delay in finally resolving all issues.

(f) The applications are not frivolous or vexatious.

(g) The applications have not been brought to obtain documents for other proceedings, and they have been brought in good faith.

(h) The applications are not an abuse of process.

[41] Mr Hay filed an affidavit in support of his notice of opposition. After referring to the history of the steps taken to have him joined, he stated that he needed access to the necessary documents filed in the proceedings, as well as discovery of relevant material. He referred to the fact that there had been delays in LSG NZ providing him with the relevant documents.

[42] He had brought his recent applications after counsel had provided him with careful advice as to the applications which he wished to bring.

[43] In response to a memorandum which had been filed for LSG NZ for the purposes of the telephone directions conference on 21 July 2017, he said he was not involved in changing PRI's name to LSG Ski Chits Ltd.

[44] With regard to the applications he has brought, he said that having reviewed evidence, it was his opinion that LSG NZ had implied, but never actually said, that Ms Park was responsible for managing the proceedings for that company, including all strategic decisions, and that she did so alone. LSG NZ had denied that Pieter Harting or Hing Kai Cheung of LSG Asia had played a role in the proceeding. He said that based on his knowledge of how LSG operates, as well as his past dealings with that entity and with Mr Cheung; he did not think this was true. He believed that LSG Asia had made all of the strategic decisions in relation to the case so that

they should be considered the guiding mind of the litigation. Accordingly, he considered that the joinder of LSG Asia would be appropriate.

[45] He said he therefore obtained an affidavit from Mr Sellar, which confirmed his beliefs. He believed that further and better discovery was necessary to obtain documents which had not been disclosed, and that these would demonstrate that LSG NZ had withheld relevant information from the Court.

[46] He denied that the applications were made for an ulterior motive, such as to obtain documents to use in the *Matsuoka* proceedings. He denied the basis of LSG NZ's opposition to his application for joinder. He said that, ultimately, he saw these issues as matters of fairness; they were not tactics, or strategy, or an attempt to waste time and resources.

[47] He then discussed the history of the costs issues, stating that it would be unfair for both his applications to be dealt with at once. He said he did not agree that the Court should do whatever is necessary to keep the September 2017 hearing dates that had been scheduled, where to do so would significantly disadvantage him.

[48] He stated that he did not believe he was being treated fairly because his applications were being heard on an extremely short timetable. This was to be contrasted with the different way in which LSG NZ's applications for discovery against non-parties and then joinder against him and PRI had been dealt with.

[49] He concluded by stating that he was making the applications after a great deal of thought, and wanted the Court to deal with his applications properly and fairly.

## Appropriate sequence for disposition

[50] At the commencement of the hearing, I heard counsel's submissions as to the order in which the applications should be considered.

[51] Mr Scampion submitted that Mr Hay's discovery application should be heard at the hearing with the intention that if it were granted, his application for joinder would be heard after discovery had been given.

[52] Ms Meechan's initial position was that the application for strike-out as filed by LSG NZ need not be heard at that stage, but in essence should stand adjourned so that the Court would first hear Mr Hay's recently filed applications. She said that if they were not granted, then the strike-out application would fall away; and that if they were granted, then it could not succeed anyway. I raised with Ms Meechan as to whether, in those circumstances, LSG NZ's application had any point. She said that LSG NZ wished to maintain the application because it sought indemnity costs, so that the application was potentially relevant. Following discussion with the Court as to whether that was an appropriate way of dealing with the application for strike-out, Ms Meechan told the Court she would, after all, advance the strike-out application on LSG NZ's behalf at the hearing.

[53] I then gave a ruling in which I recorded that I would receive submissions as to Mr Hay's application for further and better discovery; I accepted the submission that his application for joinder should not proceed until after the discovery application had been resolved. I would also hear LSG NZ's application for a strike-out order. I established a sequence for the provision of submissions on the two applications.

## Mr Hay's application for further and better discovery

[54] The Employment Court Regulations 2000 (the regulations) define disclosure processes prescriptively at regs 37-52. As is well known, there are various steps which have to be taken under those regulations. The first step is the serving of a notice of disclosure. Regulation 46 provides a procedure whereby a party who is dissatisfied with documents disclosed in response to a previously served notice, may apply to the Court for a verification order. This is required to be filed five clear days after any disclosure which has been given. If the Court, on receiving such an application, is satisfied of the probable existence of the document or class of document specified or described in the originating notice, it may make a verification order: reg 47.

[55] The application for further and better discovery made by Mr Hay is not brought on the basis of those regulations. The relevant application states that he

seeks the assistance of the Court with reference to r 8.19 of the High Court Rules 2016, which it is asserted should be applied by reason of s 189 of the Act, and reg 6(2) of the regulations.

[56] Regulation 6(2), which can mandate the use of provisions under the High Court Rules, may be used where there is no form of procedure in the Act or the regulations. That is not the case here.

[57] Nor do I consider that this is a case where it would be appropriate to put the regulations to one side on the basis that there are equity and good conscience factors which would justify such an approach.

[58] That said, I do not consider it appropriate to dismiss Mr Hay's application for further and better discovery for want of form. Rather, I approach the matter under s 221(b) of the Act, which allows the Court, in order to more effectually dispose of any matter before it according to the substantial merits and equities of the case, to waive the errors and defects in Mr Hay's application.

[59] The result is that Mr Hay's application for discovery of specified documents must be assessed under the principles of the regulations, not those of the High Court Rules.

[60] I consider that although no notice requiring disclosure had been served, Mr Hay's application for specified documents is akin to an application for verification of disclosure under reg 46, which provides the procedure by which the Court may order a party to make a sworn or affirmed statement, stating whether specified documents or classes of documents were within that party's possession, custody or control, and if that is not the case, when it was parted with and what had become of it.

[61] The Court's powers have to be exercised in light of the objects of the disclosure regulations, as described in reg 37, which states that:

**37 Object**

> The object of regulations 40 to 52 is to ensure that, where appropriate, each party to proceedings in the court has access to the relevant documents of the other parties to those proceedings, it being recognised that, while such access is usually necessary for the fair and effective resolution of differences between parties to employment relationships, there are circumstances in which such access is unnecessary or undesirable or both.

[62] In short, whether disclosure of documents should be given is a matter of discretion. Judge Travis put the issue in this way, in *Matthes v New Zealand Post Ltd*:[6]

> The Court must also retain a discretion pursuant to reg 45[7] to prevent unnecessary or undesirable disclosure, even of relevant documents. If disclosure was being sought in an oppressive manner this would also be a consideration to be taken into account …

[63] Mr Scampion submitted that the Court should proceed according to the test which was discussed by the High Court in *Assa Abloy New Zealand Ltd v Allegion.*[8] There, the Court referred to r 8.19 of the High Court Rules; in that context, there was a discussion as to how grounds for believing that a document or class of documents, which may exist, is to be assessed.

[64] As I have stated, this issue has to be considered under the particular regulations that apply to disclosure in this jurisdiction, rather than those which may apply under the High Court Rules, so I am not directly assisted by the dicta in *Assa Abloy*.

## Submissions

[65] The essence of Mr Scampion's submissions was that the documents sought were relevant; there were grounds for belief that they exist, the onus not being a high one; discovery of the documents sought would be proportionate; and discovery would be appropriate in all the circumstances. These issues were to be assessed on the basis that a Court has the discretion to join a non-party to proceedings for the

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6 *Matthes v New Zealand Post Ltd* [1992] 3 ERNZ 145 (EmpC) at 150.

7 Regulation 45 of the Employment Court Regulations 1991 was in the same terms as reg 37 of the Employment Court Regulations 2000 now is.

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

purposes of a costs award where the non-party both funds and substantially controls the proceeding as far as the funded party is concerned, and joinder is in the interests of justice. The last of these factors may require a consideration of whether there has been a relevant impropriety on the part of the non-party. Insolvency of the funded party is not a prerequisite for joinder.[9]

[66] Ms Meechan submitted in essence that the application for discovery brought by Mr Hay was misconceived. There was no suggestion LSG NZ could not pay its legal fees, and no suggestion of insolvency. Moreover, the application ignored the fact that LSG NZ was the defendant in the proceedings, not the plaintiff. The application reflected a "tit for tat" approach, which had been criticised by Chief Judge Colgan, in Interlocutory Judgment (No 13).[10]

[67] Accordingly, I consider that the two related issues for resolution in this case are whether the Court is satisfied of the probable existence of the document or class of documents specified and secondly, the Court may consider whether access to documents would be unnecessary or undesirable or both.

## Analysis

[68] Before dealing with the issues which I have identified, it is appropriate to make a brief comment on the question of whether Mr Hay's current applications are being dealt with differently, and more expeditiously, than were LSG NZ's applications for discovery and joinder, which were heard in the course of 2016. As I indicated in the ruling I gave at the commencement of the present hearing, what happened at the earlier stage of the costs litigation was fundamentally different. The Court was required to deal with a raft of procedural applications. With regard to discovery, there had been an issue as to non-compliance by Ms Alim; and there was a highly contested application for non-party discovery against PRI. Other complicating factors were that at one stage, PRI was struck off the Companies Register. At another stage, Ms Alim's legal representative sought leave to withdraw,

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9 For these propositions, counsel relied on *Dymocks Francise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145; *Kidd v Equity Realty (1995) Ltd* [2010] NZCA 452; and *Hay v LSG Sky Chefs New Zealand Ltd*, above n 4.

10 *Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 118 at [23].

which proved to be far from straightforward. Before the application for joinder was finally able to be heard, there were difficulties as to service of documents on Mr Hay. All of these matters were time consuming, somewhat complex, and led to multiple difficulties which the Court had to resolve. Some 26 minutes had to be issued. These matters are all summarised in Interlocutory Judgments (No 20),[11] (No 21)[12] and (No 22).[13]

[69] Those processes are wholly different in nature from the process which has taken place since May 2017.

[70] The second preliminary matter which should be recorded is that there are no longer any issues as to Category 1 of the documents for which Mr Hay sought disclosure. It was agreed that invoices rendered by Goodwin Yellop would be provided to Mr Scampion, and that the Borchardt invoices are not relevant. On that basis, Mr Scampion accepted that the first category of documents which had been requested were no longer in issue.

[71] With regard to the second and third categories, I address now the question which was the focus of counsel's submissions, as to whether in fact LSG Asia funded LSG NZ's defence of the proceedings directly or indirectly; and whether that or another entity controlled it.

[72] An assessment as to whether documents exist on either of these topics requires consideration of the affidavits of Mr Sellar and Mr Hay on the one hand, and those of Ms Park and Mr Bryant on the other.

[73] Mr Sellar's affidavit is contradicted in significant respects by the responses given by the LSG NZ witnesses. Mr Scampion conceded that multiple paragraphs in Mr Sellar's affidavit were now to be regarded as "very weak", given the evidence from those two witnesses.

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11 *Nisha v LSG Sky Chefs*, above n 2.
12 *Nisha v LSG Sky Chefs* [2016] NZEmpC 77.
13 *Nisha v LSG Sky Chefs*, above n 3.

[74] A credibility assessment is required. It is of concern to the Court that Mr Sellar was, until his departure from his role on 7 May 2017, a senior employee of LSG NZ, and a member of its SLT. Ms Meechan advised the Court from the bar that a confidential settlement had been entered into with Mr Sellar at the time of his departure, the details of which could not of course be provided to the Court. Then Mr Sellar, a matter of only weeks later, provided detailed affidavit evidence to Mr Hay who was obviously known to be associated with the extensive litigation which followed the transfer of staff from PRI to LSG NZ in 2011. The circumstances in which Mr Sellar came to give his evidence mean that the Court must treat it with some caution.

[75] The events giving rise to the present litigation involved the transfer of 40 PRI employees, of which Ms Alim was one, to LSG NZ on 23 February 2011. Ms Alim instituted a personal grievance in the Employment Relations Authority (the Authority) in 2012, which was the subject of a determination on 15 October 2013.[14] The Authority dismissed all her claims. Ms Alim, supported by PRI, commenced the challenge which gave rise to this proceeding in November 2013.

[76] Mr Sellar did not commence his employment with LSG NZ until April 2015. Accordingly, he was an employee of LSG NZ for some five months prior to the substantive fixture, but was not such an employee at the time of the transfer of the affected staff, during the initial stages of the present litigation, nor indeed during litigation which had previously taken place in other proceedings in this Court or in the courts of general jurisdiction.

[77] It is also apparent that he was not involved in HR matters. He could only give evidence as to what he assumed were Ms Park's responsibilities as Manager, HR. His evidence does not disclose a detailed awareness of her obligations with regard to her contacts and communications with LSG Asia personnel. The evidence establishes that the practices with regard to HR matters were different from those which applied to Mr Sellar's role as Director of Sales and Services, and in respect of his responsibilities for Global Key Accounts. Although Mr Sellar said that he believed the level of oversight in relation to legal proceedings was at least the same,

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[14] *Alim v LSG Sky Chefs New Zealand Ltd* [2013] NZERA Auckland 472.

if not greater than that which related to his role, he did not have actual knowledge of those circumstances. All he could say was that it would be consistent with the way that he understood the LSG Group operated for Ms Park to be running the proceedings on a day to day basis but for actual decisions as to strategy and direction to be made by the General Manager, and by LSG Asia, sometimes with the input of LSG Corporate Legal Department in Germany. He also relied in part on an Approvals Policy to support this contention, which it transpired was introduced in 2016.

[78] By contrast, both Ms Park and Mr Bryant confirmed that Ms Park's HR role did not require the same level of contact with LSG Asia as was required of Mr Sellar. Most significantly, it was confirmed persons at LSG Asia were not involved in any discussions as to strategy and direction of the defence of the proceedings brought by Ms Alim. Ms Park also said there were no in-depth discussions on that case with Hong Kong personnel; she said that reporting to the regional office did not occur monthly, although she did give updates.

[79] At the trial, evidence was given as to the nature of the relationship between LSG NZ and related companies in the LSG Group. The Court was told, and it was not contested, that LSG NZ's ultimate parent is Deutche Lufthansa AG, which was described as being a global aviation company operating a passenger airline service, airfreight services and various airline catering and onboard management services throughout the world. It is in that context that Ms Park's description of LSG Asia as being a regional company to which updates were provided from time to time must be considered.

[80] As already mentioned, Mr Bryant stated that legal fees in the LSG NZ budget were not commented on specifically by LSG Asia; and their review of the New Zealand company's budget was on a total profitability basis only, and not line by line.

[81] Evidence of these witnesses is specific, and based on direct involvement in the circumstances pertaining to this and other long-running and related proceedings, unlike that of Mr Sellar.

[82] Although this evidence was given by affidavit, the Court is in a position to make an accurate appraisal of it. Ms Park in particular has given extensive evidence to the Court previously, including orally at the trial. I have previously been satisfied that she is a careful witness, whose evidence to the Court could be relied on as to its essentials.

[83] Mr Scampion submitted that Ms Park's current evidence should be assessed with reference to earlier evidence she gave for the purposes of Ms Alim's challenge to LSG NZ's claims to privilege and/or irrelevance of certain documents, and which became the subject of Interlocutory Judgment (No 16) of this Court.[15] In her affidavit which was filed in support of LSG NZ's notice of opposition to the disclosure challenge, she stated that LSG NZ had been a party to a number of court cases arising from the transfer of staff. She said LSG NZ had reported these cases to its regional office, for the purpose of managing any media interest, financial budgets, and for the purpose of keeping the regional management informed. However, she went on to confirm that decision-making about issues relating to the transfer were managed at the local New Zealand level.

[84] It is apparent from Chief Judge Colgan's decision that the Court was required to consider whether certain emails sent by Ms Park to the regional office from time to time should be disclosed. Those documents were described by her as being "updates" or "status updates". Most of the documents were sent by Ms Park to persons in the regional office; there were few, if any, responses. The nature of the documents as described do not confirm direct control by LSG Asia to LSG NZ as to its conduct of the present litigation; or that there was direct or indirect funding of this litigation. I do not consider that her earlier evidence contradicts the evidence she gave for the purposes of the current application.

[85] It must be noted that LSG NZ was a respondent to the employment relationship problem as originally filed by Ms Alim in the Authority, and a defendant to her subsequent challenges. LSG NZ did not initiate the litigation; it simply responded to the proceedings which were initiated by Ms Alim. It is unsurprising that there were updates given to the regional office, as would be unexceptional in

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15 *Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 127.

respect of a network of companies forming a large multi-national, as is the case in this instance.

[86] Secondly, Mr Scampion referred to evidence given by Mr Jacob Roest, General Manager of LSG NZ, at a hearing before Judge Travis on 11 April 2011.[16] The evidence was recently set out by Judge Perkins for the purposes of a privilege argument he was required to consider.[17] It is unnecessary to set out the extract of evidence again here. It related to circumstances which occurred prior to the transfer of staff from PRI to LSG NZ in February 2011. Mr Roest confirmed that the decisions regarding the transfer took place between himself and Ms Park, and that there was a reporting line to Hong Kong personnel.

[87] I do not consider that Mr Roest's testimony undercuts or conflicts with Ms Park's evidence as to who had responsibility for managing the present litigation. Mr Roest was referring to the circumstances of the transfer of the staff. These were obviously controversial. It is unsurprising that these circumstances were reported to members of the regional office.

[88] Finally, I mention the opinions expressed by Mr Hay in his affidavit. He said that he believed that LSG Asia had made "all of the strategic decisions in relation to the case such that they should be considered the guiding mind of the litigation" and that "LSG Asia will have controlled LSG NZ's finances and directed how they would be used in relation to these proceedings."

[89] No particulars were given as to how Mr Hay would be able to reach such a conclusion. It is inherently improbable that Mr Hay, as one who has been held to be significantly involved in the activities of a competitor of LSG NZ, would be in a position to express a reliable opinion as to how this proceeding was funded and/or controlled.

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16 Resulting in the judgment of *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2011] NZEmpC 44, [2011] ERNZ 56.

17 Resulting in *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 68.

[90] Both this opinion and those of Mr Sellar have to be assessed alongside the more precise evidence of Ms Park and Mr Bryant who were directly involved in those matters.[18] I find that their evidence is reliable.

[91] LSG NZ was the entity which was directly affected by the circumstances which the Court was required to review in its substantive judgment. I found that the enhancement of Ms Alim's terms and conditions, and those of most of the other transferring employees, instigated by PRI shortly before the transfer was part of an anti-competitive strategy, which was intended to cause significant financial disadvantage to LSG NZ.[19] I concluded that Ms Alim's arrangements with PRI, which it represented as her terms and conditions applicable at transfer, were in fact a sham.

[92] The evidence now provided by LSG NZ to the effect that it sought to defend itself from allegations that it should be foisted with the false terms and conditions is entirely unsurprising. I consider that the evidence that there were reports as to this litigation by way of updates to a related company in the LSG Group is correct.

[93] Accordingly, I find that there is no reliable evidence of LSG NZ being controlled for the purposes of this litigation by another party, whether LSG Asia or someone else.

[94] Nor is there any persuasive evidence that it was funded, directly or indirectly, to do so. Ms Meechan submitted that significant cost orders had been made against LSG NZ in the litigation which it initiated in the High Court. There was no evidence that the costs awards made in that context had not been paid, because it was not unreasonable to assume that if such sums had not been paid, enforcement by insolvency proceedings would have occurred. Plainly that had not happened.

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18 In the course of the hearing, counsel referred to a footnote which was endorsed on Mr Sellar's affidavit. I am not prepared to reach any conclusions about that note without specific evidence as to its provenance.

19 *Nisha v LSG Sky Chefs NZ Ltd*, above n 1, at [154].

[95] Even putting that matter to one side, there is no evidence of any sort of funding by LSG Asia; approval of a budget on a total profitability basis does not give rise to such a possibility.

[96] With regard to Category 2 documents, then, I am not satisfied as to the probable existence of documents showing that LSG Asia or some other entity funded, directed or controlled the present proceeding for LSG NZ.

[97] I consider that this application amounts to fishing for documents that it is hoped might exist, but which the Court is not persuaded do exist. It proceeds on the basis of speculation only. Disclosure in these circumstances is unnecessary and undesirable.

[98] A similar finding must be reached in relation to the third category of documents which are sought, namely those which relate to whether Ms Park was authorised to make affidavits on behalf of LSG NZ. Counsel did not elaborate on why these documents could be relevant, but it may have been considered that they might support an allegation of relevant impropriety.

[99] In any event, it is apparent that Ms Park informed her General Manager and the SLT as to the status of the litigation. There is no suggestion that she was not authorised to either take the steps she did, or to affirm her affidavits. She has done so transparently, since her evidence is recorded in numerous judgments of this Court in this litigation. No objections have been raised at any time by any party to the fact that Ms Park has affirmed affidavits for LSG NZ.

[100] For the foregoing reasons, I dismiss Mr Hay's application for discovery of documents. I reserve costs.

## Application for strike-out

[101] Since the application for discovery has been dismissed, the application for strike-out could only now apply to the application for joinder.

[102] Although I received submissions at the hearing as to the possibility of striking out the joinder application, I have decided not to rule on that application at this stage. I consider that it would be preferable to hear Mr Hay's application as to joinder on the merits, and in light of the conclusions I have reached as to his discovery application. I have reached this conclusion for a number of reasons.

[103] First, in the present circumstances, it would be inappropriate to deal with the remaining application on a strike-out basis. The authorities establish that it is generally not appropriate to resolve genuinely disputed issues of fact on such an application.[20] That is because pleaded facts, whether or not admitted, are assumed to be true. The Court has already been required to resolve disputed issues of fact when dealing with the application for discovery, so it would now be artificial to do otherwise purely for the purposes of a strike-out application.

[104] Secondly, this assessment is reinforced by the fact that a merits hearing can take place in the relatively near future. I discussed a range of possible outcomes to the applications that were before the Court at the conclusion of the hearing. Counsel confirmed they would be available to deal with any sequel to this judgment at a telephone hearing which is able to be convened on 21 August 2017. Given the imminence of that date, it is appropriate in my view to deal with Mr Hay's application for joinder then.

[105] Thirdly, Ms Meechan originally indicated to the Court that it was LSG NZ's preference for both of Mr Hay's applications to be determined, before consideration might be given to a strike-out application. For reasons already summarised, LSG NZ nonetheless maintained its application so that it could seek an order of indemnity costs. Hypothetically, an application for such costs is able to be made with regard to the outstanding application; I am not indicating that this should occur, merely that it would be technically possible to make such an application. The point is that there would be no prejudice to LSG NZ were the Court to resolve the outstanding issue of joinder under Mr Hay's application for joinder rather than under LSG NZ's application for strike-out.

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[20] *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.

[106] However, so as to give counsel an opportunity to address the Court further on these issues, I do not intend to dismiss the application for strike-out, at least yet. I adjourn it, so that counsel can advance further submissions about it in due course.

## Conclusion

[107] Mr Hay's application for discovery is dismissed.

[108] LSG NZ's application for strike-out is adjourned.

[109] Mr Hay's application for joinder will be the subject of a submissions hearing, to be held at 9.00 am on 21 August 2017 by telephone; I will hear further submissions as to LSG NZ's strike-out application at the same hearing.

[110] I reserve costs with regard to the matters referred to in this judgment.

B A Corkill
Judge

Judgment signed on 4 August 2017 at 2.30 pm