

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2018-404-378
[2020] NZHC 2348**

BETWEEN ELECTRIX LIMITED
Plaintiff

AND THE FLETCHER CONSTRUCTION
COMPANY LIMITED
Defendant

Hearing: On the papers

Appearances: K M Quinn and T L McKenzie for the plaintiff
K W Fulton and M N Rathod for the defendant

Judgment: 9 September 2020

**JUDGMENT NO 3 OF PALMER J
(Access to the court file)**

*This judgment was delivered by me on Wednesday, 9 September 2020 at 3.00pm.
Pursuant to Rule 11.5 of the High Court Rules.*

.....
Registrar/Deputy Registrar

Counsel, solicitors and applicants:
K M Quinn and S C I Jeffs, Barristers, Auckland
K W Fulton, Barrister, Auckland
Burton Partners, Auckland
Craig Griffin & Lord, Auckland
J G Smith, Rotorua
Mayweathers, Sydney

The applications

[1] On 18 October 2019, during the trial of these proceedings, I granted the media organisation BusinessDesk New Zealand access to:¹

- (a) the pleadings, including the counterclaim;
- (b) the parties' opening submissions, except for redactions in Electrix's submissions for commercial confidentiality;
- (c) the briefs of evidence of the witnesses of fact, subject to redactions;
- (d) the Notes of Evidence, once they were complete; and
- (e) the closing submissions, when delivered.

[2] I said:

[11] The proceeding is open to the public, as are most court proceedings. But that does not mean the public, or even the media, attends. In these days of 24/7 news by internet, the courts cannot realistically expect personal attendance at court to be the only, or even the primary, means of satisfying the principle of open justice. The transparency of court proceedings, that is necessary to maintain confidence in the administration of justice, demands more. Open justice today means providing access to information unless there are good reasons not to do so. That is especially so, as r 13(b) says, when information is requested during a substantive hearing.

[12] Accordingly, I consider as much of the information requested should be made available to Ms Young, a media representative, as is consistent with the interests of fair and accurate reporting of the proceeding and taking account of commercial confidentiality. With the exceptions explained below, I consider that includes the pleadings, opening submissions, briefs of evidence, Notes of Evidence and closing submissions.

[3] I issued judgment in these proceedings on 6 May 2020.² After that, Mr Jack Smith applied to access the court file in this proceeding. He thought it would assist with his research for a paper as to why the construction of the Christchurch Justice and Emergency Services Precinct “went so terribly wrong”. On 13 June 2020, consistent

¹ *Electrix Ltd v Fletcher Construction Company Ltd (No 1)* [2019] NZHC 2678 at [19].

² *Electrix Ltd v Fletcher Construction Company Ltd (No 2)* [2020] NZHC 918.

with my judgment of 18 October 2019, I granted Mr Smith access to the same information I had granted BusinessDesk. On 19 August 2020, Mr Smith made a further application for access to:

Those documents cited by witnesses in the case, as listed in the attached Excel Document "Combined list of cited documents", specifically witnesses Andrew Werrell; Peter Harris; Robert Ferris; Tim Harding; Daniel Kenna; Shane Anketell; Jeff Wilson; Neville Cleveland; Simon Chambers; Mike Tweedale; and, Esther Wallace.

[4] The Australian law firm Mayweathers has also requested access to the file. Mayweathers is conducting an investigation into possible claims against the parent company of Fletcher Construction, Fletcher Building Ltd, on behalf of a significant number of Fletcher Building shareholders. Mayweathers requests access to the entirety of the Court records or file or, alternatively:

- (a) the pleadings;
- (b) affidavits, including annexures or exhibits, to the affidavits filed or read in open court;
- (c) documents admitted into evidence or ready in open court;
- (d) written submissions filed in the proceedings and/or handed up in open court; and
- (e) transcripts of evidence.

The relevant law of access to a court file

[5] Section 173(1) of the Senior Courts Act 2016 provides “[a]ny person may have access to court information of a senior court to the extent provided by, and in accordance with, rules of court”. Rule 8(1) of the Senior Courts (Access to Court Documents) Rules 2017 (the Rules) provides every person has a right to access the “formal court record” of a civil proceeding. Under r 4 that includes judgments, orders and minutes by a judge. Rule 12 requires me to consider the nature of, and the reasons for a request for other information. I must take into account:

- (a) the orderly and fair administration of justice:
- ...
- (c) the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice:
- (d) the protection of other confidentiality and privacy interests (including those of children and other vulnerable members of the community) and any privilege held by, or available to, any person:
- (e) the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions):
- (f) the freedom to seek, receive, and impart information:
- ...
- (h) any other matter that the Judge thinks appropriate.

[6] Rule 13(b) provides that, after the substantive hearing, “open justice has greater weight in relation to documents that have been relied on in a determination than other documents” but “the protection of confidentiality and privacy interests has greater weight than would be the case during the substantive hearing”. In *Greymouth Petroleum Holdings Ltd v Empresa Nacional Del Petróleo* the Court of Appeal said:³

After the substantive hearing the need for public scrutiny diminishes in importance as time moves on. Parties are entitled to expect that the need for open justice has been met by full access during the substantive hearing stage, and that personal information not part of the formal court record or the decision will be given greater protection as the years go by. This is particularly so in a civil case as distinct from a criminal case where these considerations, while relevant, may have less weight because of the particular public interest in criminal prosecutions.

[7] As I said in Judgment No 1 in these proceedings, the freedom to seek, receive and impart information, a mandatory relevant consideration under r 12(f), is also guaranteed by s 14 of the New Zealand Bill of Rights Act 1990.⁴ Freedom of expression is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, under s 5. Because, under s 3, the Bill of Rights governs judicial decision-making, the guarantee means freedom of expression is not only a mandatory

³ *Greymouth Petroleum Holdings Ltd v Empresa Nacional Del Petróleo* [2017] NZCA 490, [2017] NZAR 1617 at [25] (citations omitted).

⁴ *Electrix Ltd v Fletcher Construction Company Ltd (No 1)*, above n 1, at [5].

relevant consideration but a requirement with which the judge's decision must be consistent.

[8] In *Crimson Consulting Ltd v Berry*, the Court of Appeal considered that, while there is no presumption of disclosure, “the principle of open justice is fundamental to the common law system of civil and criminal justice”.⁵ But it also said:

As we have set out, parties may be deterred from issuing proceedings that they should be able to put before a court because they are fearful of immediate and damaging publicity relating to recently formed and untested allegations. That endangers the orderly and fair administration of justice.

Submissions

[9] Mr Smith submits that he needs to see some of the documents relied upon in order to fully understand the briefs of evidence and court proceedings. He agrees that any commercially sensitive information can be redacted. He attaches a spreadsheet listing of what appear to me to be around 1,000 documents.⁶

[10] Mr Vrtkovski from Mayweathers submits it does not intend to use the court records in other potential proceedings but seeks them for information purposes to assist with the investigation, in a cost-effective manner. He submits the principle of open justice can be satisfied without disclosure of sensitive records.

[11] Mr Fulton, for Fletcher Construction Ltd, submits there is no public interest in Mr Smith's access to the documents and it is impossible to review that many documents given competing demands. Fletcher Construction specifically objects to the release of a schedule of 14 documents, consistent with my judgment of 18 October 2019. Initially, Fletcher Construction objected only provisionally to the balance of the documents requested and envisaged updating the Court as to further specific objections. Subsequently, Mr Fulton supported the objections advanced by Electrix in relation to both requests. He adds that, under no circumstances should there be disclosure of documents in the bundle that were not referred to in evidence.

⁵ *Crimson Consulting Ltd v Berry* [2018] NZCA 460, [2019] NZAR 30 at [33] and [39].

⁶ Counsel for both parties suggest the number is more like 1,700 or 1,800 documents but I think that may include double-ups.

He submits those objections should be ruled on before Fletcher Construction is put to the time and effort of reviewing all the other documents.

[12] Mr Quinn, for Electrix Ltd, does not oppose Mayweathers having access to the same documents already provided to BusinessDesk and Mr Smith. He opposes more extensive access by Mayweathers and by Mr Smith. He submits the right to seek, receive and impart information is adequately met by access to the court file granted to date. He submits open justice has greater weight after the substantive proceeding in relation to documents relied upon than in relation to other documents, but the protection of confidentiality and privacy interests has greater weight than during the substantive hearing a year ago. He submits the requests are not selective in what is sought, what particular line of investigation is pursued or how it would be assisted by access to all these documents. Electrix is concerned that releasing all of the documents could result in disclosure of commercially sensitive information unrelated to the issues in the proceeding, for example board papers regarding Electrix's financial performance and business strategy. Mr Quinn submits that having to review all the documents would be oppressive and expensive to Electrix in circumstances where the principle of open justice is not now engaged. He submits declining the requests is a reasonable limitation on s 14 rights.

Should I grant access to the entire file?

[13] I see no reason not to grant Mayweathers access to the documents already provided to BusinessDesk and to Mr Smith. These documents define the parameters of the proceeding, set out the factual evidence and set out the parties' submissions about the application of the law to the facts which constitute the foundations of the judgment, which is publicly available. These are the essence of the case.

[14] But I do not consider all the documents underlying that should be provided to Mayweathers or to Mr Smith. Open justice continues to mean providing access to information unless there are good reasons not to do so. But there is commercial sensitivity involved in the documents requested. The value of protecting commercial sensitivity is recognised in r 12(c). The time and expense to the parties involved in assessing 1,000 documents for redaction for that purpose would be significant. I do

not consider the principle of open justice requires so much when the documents constituting the essence of the case have been, or are being, made available. To require that would be disproportionate and may inhibit commercial parties using the courts to resolve disputes. That is particularly so after the substantive hearing has concluded and judgment has issued.

[15] I continue to consider that limiting the documents to be disclosed to those already disclosed is a reasonable limit prescribed by law which is demonstrably justified in terms of 5 of the Bill of Rights Act. I order accordingly.

Palmer J