

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2023] NZEmpC 195
EMPC 278/2023**

IN THE MATTER OF	an application for pre-commencement discovery
BETWEEN	P.I.C. INSURANCE BROKERS LIMITED Applicant
AND	LEILANI MAREE PEPPER First Respondent
AND	GEOFFREY VICTOR COOPER Second Respondent
AND	OCEANIA INSURANCE BROKERS LIMITED Third Respondent

Hearing: 21 September 2023
(Heard at Auckland)

Appearances: J Baigent, counsel for applicant
S Laphorne, counsel for respondents

Judgment: 9 November 2023

JUDGMENT OF JUDGE KATHRYN BECK

Background

[1] P.I.C Insurance Brokers Ltd (PIC), has applied for pre-commencement discovery in relation to claims which it wishes to commence against two of its prior employees, Ms Pepper and Mr Cooper, and their new employer, Oceania Insurance Brokers Ltd (Oceania), the third respondent.

[2] Ms Pepper and Mr Cooper were longstanding senior employees of PIC. Ms Pepper resigned in March 2023. Mr Cooper resigned in July 2023. Subsequently, both began employment at Oceania.

[3] PIC is now concerned that Ms Pepper and Mr Cooper have breached their duties of good faith, misused PIC's confidential information, and breached their restraint of trade and non-solicitation obligations. PIC intends to bring proceedings against them in the Employment Relations Authority.

[4] PIC also contemplates bringing proceedings against Oceania and possibly other employees who it says may have incited, instigated, aided or abetted Ms Pepper and Mr Cooper in their actions.¹

Principles

[5] Schedule 3 cl 13 of the Employment Relations Act 2000 (the Act) states:

13 Discovery

- (1) The court may, in relation to discovery that relates to proceedings brought or intended to be brought in the court, or intended to be brought in the Authority, make any order that the District Court may make under section 105 or 106 of the District Court Act 2016; and those sections apply accordingly with all necessary modifications.
- (2) Every application for an order under section 105 or 106 of the District Court Act 2016 (as applied by subclause (1)) is to be dealt with in accordance with regulations made under this Act.
- (3) Nothing in subclauses (1) and (2) limits the making of rules under section 212 or regulations under section 237.

[6] Section 105 of the District Court Act 2016, as referred to in cl 13, states:

105 Pre-discovery

- (1) The court may, in the circumstances set out in the rules, make the orders set out in subsection (2) if—
 - (a) a person (**A**) has made an application for those orders in accordance with the rules; and
 - (b) it appears to the court that A is or may be entitled to bring a proceeding in the court; and
 - (c) it appears to the court that another person (**B**) is likely to have or have had in B's possession, custody, or power a document

¹ Employment Relations Act 2000, s 134.

or class of documents that is relevant to an issue arising or likely to arise in A's proceeding.

- (2) The court may order B—
 - (a) to disclose to the court and to any other prescribed person whether the document or documents are in B's possession, custody, or power; and
 - (b) if a document has been but is no longer in B's possession, custody, or power, to disclose to the court and to any other prescribed person when B parted with it and what has become of it; and
 - (c) to produce such of those documents as are in B's possession, custody, or power to the court or to any other prescribed person.

[7] Finally, the District Court Rules 2014 also provide:

8.20 Order for particular discovery before proceeding commenced

- (1) This rule applies if it appears to a Judge that—
 - (a) a person (the **intending plaintiff**) is or may be entitled to claim in the court relief against another person (the **intended defendant**) but that it is impossible or impracticable for the intending plaintiff to formulate the intending plaintiff's claim without reference to 1 or more documents or a group of documents; and
 - (b) there are grounds to believe that the documents may be or may have been in the control of a person (the **person**) who may or may not be the intended defendant.
- (2) The Judge may, on the application of the intending plaintiff made before any proceeding is brought, order the person—
 - (a) to file an affidavit stating—
 - (i) whether the documents are or have been in the person's control; and
 - (ii) if they have been but are no longer in the person's control, the person's best knowledge and belief as to when the documents ceased to be in the person's control and what has become of them; and
 - (b) to serve the affidavit on the intending plaintiff; and
 - (c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the intending plaintiff.
- (3) An application under subclause (2) must be by interlocutory application made on notice—
 - (a) to the person; and
 - (b) to the intended defendant.
- (4) The Judge may not make an order under this rule unless satisfied that the order is necessary at the time when the order is made.

[8] In summary, the Court may make a pre-discovery commencement order against any person on application by an intending plaintiff if it appears to the Court that:

- (a) the intending plaintiff is or may be entitled to claim relief against an intended defendant; and
- (b) it is impossible or impracticable to formulate its claim without reference to one or more documents or a group of documents; and
- (c) there are grounds to believe that the documents may be or have been in the control of a person who may or may not be the intended defendant; and
- (d) the order is necessary at the time when the order is made.

[9] I will deal with each element in turn.

Analysis

Does PIC have a potential claim?

[10] In the first limb of the r 8.20 criteria, the focus is on the probable existence of a claim. Discovery will not be available merely because it is possible that it may disclose a claim, but it is not necessary to consider the probability of the claim being established at trial. However, PIC must establish more than a mere speculative possibility as the rule “is not a mechanism to encourage fishing expeditions”.² Circumstantial evidence is enough if it shows a real probability that a claim exists.³

Ms Pepper and Mr Cooper

[11] Ms Baigent submitted on behalf of PIC that it is or may be entitled to claim relief against Ms Pepper, Mr Cooper, and third parties, including Oceania and other individuals who previously worked for PIC but now work for Oceania. She submitted

² *Hetherington Ltd v Carpenter* [1997] 1 NZLR 699 (CA) at 704.

³ *Time Ticket International Ltd v Hatwell* HC Christchurch CP284/92, 1 October 1992 at 11.

that there is evidence that Ms Pepper and Mr Cooper actively misled PIC about their reasons for resigning and that they breached their employment obligations.

[12] It is alleged that Ms Pepper and Mr Cooper breached their employment obligations to PIC as follows:

- (a) When they resigned, they misled PIC by failing to inform it that they were planning to work for a competitor, even though directly asked.
- (b) Prior to them resigning, they carried out suspicious and unusual printing of PIC's confidential information. They then took the information with them when they left.
- (c) After Ms Pepper joined Oceania, she communicated with former clients of PIC; in particular, she attended a client meeting with a former client of PIC, which subsequently transferred its business to Oceania (Nautica Shipping and Logistics Ltd).
- (d) At least 23 of PIC's clients for which Ms Pepper was responsible subsequently transferred to Oceania.
- (e) Mr Cooper transferred contacts of PIC's clients to his personal phone and, while on garden leave, was contacted by a former client. That client subsequently cancelled its policies with PIC.⁴

[13] Except for the first allegation, these allegations are disputed as facts or breaches.

[14] Mr Laphorne, for the respondents, submitted that there is insufficient evidence to support a claim against Ms Pepper and Mr Cooper. He argued that the restraint of trade clauses in their employment agreements are unenforceable and that there is insufficient evidence to indicate that PIC is or may be entitled to bring a claim against them for breaches of their employment obligations.

⁴ However, it does not appear to have transferred to Oceania.

[15] That argument in relation to Ms Pepper and Mr Cooper goes to the probability of the possible claim being established at trial, not the existence of the claim. Having reviewed the affidavits of the parties (including those of Ms Pepper and Mr Cooper) and without pre-judging the merits of the allegations, I conclude there is clearly a sufficient foundation for the intended claims against them.

[16] Accordingly, I find PIC is or may be entitled to bring claims against Ms Pepper and Mr Cooper. If established, the allegations could give rise to claims for breach of good faith, misuse of confidential information, and breach of restraint of trade and non-solicitation obligations.

Oceania

[17] In relation to Oceania, Ms Baigent submitted that Oceania was in discussions with Ms Pepper and Mr Cooper prior to their resigning from PIC, that Oceania's employment of Ms Pepper and Mr Cooper gives Oceania a competitive edge, and that since Ms Pepper's departure, at least 23 of PIC's clients for which she was responsible have moved to Oceania. Accordingly, PIC believes it may have a claim against Oceania for aiding and abetting Ms Pepper and Mr Cooper in their alleged breaches.

[18] In relation to other third parties, Ms Baigent submitted that PIC believes that it may be entitled to bring a claim against other employees of Oceania. In particular, there may be a claim against Ms Pierce, another ex-employee of PIC, because a number of PIC's clients for which she was responsible have moved to Oceania. Those possible third parties are not, however, named parties in these proceedings.

[19] The potential claims in relation to Oceania and the other employees as parties are more complicated than the intended claims against Ms Pepper and Mr Cooper. PIC submitted that other employees may have induced or assisted the alleged breaches of Ms Pepper and Mr Cooper. Third party liability is provided for in s 134 of the Act: "Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority." Potential claims must therefore be assessed under that provision.

[20] Mr Lapthorne submitted that there is no evidence that Oceania induced or assisted Ms Pepper or Mr Cooper to breach their employment obligations. I agree that the factors in relation to Oceania are circumstantial, but if Ms Pepper and Mr Cooper misused PIC's confidential information and breached any enforceable restraint of trade and non-solicitation obligations, it is possible that they did so with Oceania's support.

[21] Accordingly, I consider the evidence to be sufficient to support the proposition that there may be a claim which could be brought against Oceania as a party which either induced or assisted the alleged breaches.

Other third parties

[22] The current wording of the orders sought is intended to capture other third parties who may also be involved in breaches of their own obligations to PIC as former employees, or in aiding and abetting in Ms Pepper's and Mr Cooper's alleged breaches. However, because they are unknown, they are not named as parties.

[23] Rule 8.20(3) of the District Court Rules states that an application must be made on notice to any intended defendant.⁵ As the application has only been made on notice to Ms Pepper, Mr Cooper, and Oceania, no discovery orders can be made in relation to potential claims against other intended defendants whose identities are unknown. I observe that the Court of Appeal stated in *Exchange Commerce Corp Ltd v New Zealand News Ltd*, that pre-commencement discovery can be used to obtain the name of an intended defendant where there is evidence of wrongdoing.⁶ However, I do not consider there is a sufficient basis for orders that would extend to third parties.

[24] Mr Lapthorne submitted – and I agree – that any proposed claim is mere speculation. PIC's position seems to be that if there may be a claim against Oceania as a party, then there may also be a claim against some or all of Oceania's employees – Oceania is a company after all and cannot act without its employees.⁷ In those

⁵ Rule 8.20(1)(a) defines the intended defendant as the person who the applicant is or may be entitled to claim relief against in the Court.

⁶ *Exchange Commerce Corp Ltd v New Zealand News Ltd* [1987] 2 NZLR 160 (CA) at 164.

⁷ For example, Ms Pepper met with Nautica Shipping and Logistics Ltd on behalf of Oceania alongside Mr Garner.

circumstances, I consider that pre-commencement discovery orders made against Oceania will be sufficient to ensure that any involved employees come to light.

[25] The only individual specifically mentioned on this point was Ms Pierce. Some of the clients for which she was responsible have left PIC and have now joined Oceania, but no evidence has been provided to indicate that she was either involved in their transfer or in breach of her obligations to PIC. Without such evidence, any claims are purely speculative. Ordering discovery in relation to such claims would be inconsistent with the principle that discovery will not be available merely because it is possible that it may disclose a claim.

[26] I conclude that PIC has established that it may be entitled to bring claims against Ms Pepper, Mr Cooper and Oceania, but not Ms Pierce or, at this stage, any other unidentified third party.

Is it impossible or impracticable to formulate a claim against the intended defendants?

[27] When addressing the second limb of the test, the Court of Appeal stated in *Exchange Commerce Corp Ltd v New Zealand News Ltd*:⁸

Then there are the words “impossible or impracticable”. There is some, but not much, difference between these words in ordinary parlance. A thing is said to be impracticable when it cannot be done, when it is practically impossible to do it. The words “impossible or impractical” are used ... with reference to an inability to formulate a claim without resort to the document or class of documents sought to be discovered; that is to say an inability to plead the claim in accordance with the requirements of the rules. If without reference to the document that is impossible or not practicable then the condition will be satisfied.

[28] Similarly, in *Hetherington Ltd v Carpenter*, the Court of Appeal wrote:⁹

... this means an inability to plead in accordance with the requirements of the rules. The focus is on pleading, not on proof. Further and more general discovery can be sought once the pleadings have been completed. Precommencement discovery is limited to what is required to enable the intended claim to be properly pleaded. As Somers J pointed out, there is some, but not much, difference between the words “impossible or impracticable”. The fact that both are used shows that something less than

⁸ *Exchange Commerce Corp Ltd v New Zealand News Ltd*, above n 6, at 164.

⁹ *Hetherington Ltd v Carpenter*, above n 2, at 705.

impossibility will suffice: ... one of the purposes of the rule is to enable the intending plaintiff to consider prior to issue whether the proposed proceedings should indeed be issued, and if so whether their scope should be narrower than originally contemplated. That may be to the advantage of an intended defendant.

[29] In light of the Court of Appeal's statements, PIC must establish that the documents it seeks are necessary for it to be able to formulate its pleadings against the respondent(s).

[30] Ms Baigent submitted that PIC is unable to practicably finalise its pleadings against Ms Pepper and Mr Cooper because it lacks particulars of their breaches. Further, she submitted that discovery will assist PIC to find whether there is an appropriate basis to bring proceedings against third parties and to ascertain the identities of those third parties, if any.

[31] Mr Lapthorne submitted that PIC has sufficient information available to it already to file a statement of problem in the Authority. He noted that the draft statement of problem is fuller and more complete than most statements of problem typically received by the Authority. He submitted that if discovery is required, it can be applied for once the proceedings have been commenced against the respondents. Additionally, he submitted that PIC is seeking pre-commencement discovery as a commercial tactic to enable it to undertake a general trawl through Oceania's commercial documents and that the categories of documents sought are too broad and would not be relevant to the anticipated proceedings.

[32] I consider each category of documents sought by PIC in turn.

[33] The first two categories of documents sought by PIC are:

1. Documents identifying any PIC clients approached by Ms Pepper or Mr Cooper either directly or [in]directly.
2. All records of communications (including emails, text messages, instant messages, social media messages/posts, voicemails, calendar appointments and meeting requests, telephone call histories and records (both incoming and outgoing) including those held by any telephone service providers) between Mr Cooper and/or Ms Pepper to current or former PIC clients, including but not limited to Nautica

and the 23 clients listed in exhibit MM/74 to the affidavit of Michelle McBride.

[34] Ms Baigent submitted that the first and second categories of documents are relevant to PIC's claim that Ms Pepper and Mr Cooper had solicited its clients. I accept that disclosure of these documents is necessary to assist PIC in formulating its pleadings. Without these documents, PIC will be unable to provide in its statement of problem before the Authority the facts that have given rise to the problem in a full, fair, and clear manner as required by sch 1 form 1 of the Employment Relations Authority Regulations 2000. The High Court noted in *British Markitex Ltd v Johnston*:¹⁰

... there can be no hard and fast lines as to the practicability or otherwise of formulating a claim on known facts. It may well be practicable in one sense to formulate a claim, but only in such a way that it is done badly or inadequately. When the rule speaks of impracticability I think it must be assumed that the ultimate objective is to ensure that pleadings are properly drawn to ensure justice for the parties. It cannot be intended, nor is it in the interests of anyone, that the time and money of the parties and the Courts should be taken up unnecessarily by adopting an over strict interpretation of a word of imprecise meaning in the rule, and so creating the necessity for further pleadings as a result of discovery obtained under r 301, when prior discovery might just as well have been obtained under r 299 in advance of the proceedings to ensure that the proceedings were adequately commenced in the first place. For those reasons and because of its juxtaposition, and therefore, contrast with impossibility I do not think that the concept of impracticability should be interpreted in a strict and restrictive sense.

[35] Although, as submitted by the respondents, it may be possible for PIC to formulate a statement of problem without the discovery, I consider that it would likely be formulated poorly or inadequately. Accordingly, pre-commencement discovery is appropriate in the circumstances.

[36] The third class of documents sought is:

3. All records of communications (including emails, text messages, instant messages, social media messages/posts, voicemails, calendar appointments and meeting requests, telephone call records) between representatives of Oceania or individuals acting to further the interests of Oceania [and from them] to current or former PIC clients, including but not limited to Nautica.

¹⁰ *British Markitex Ltd v Johnston* (1987) 2 PRNZ 535 at 541; cited with approval in *Hetherington Ltd v Carpenter*, above n 2, at 705.

[37] Ms Baigent submitted that disclosure of this class of documents was necessary to uncover whether Ms Pepper and Mr Cooper have had assistance in breaching their obligations and whether or how they have sought to hide those breaches. The class of documents sought here is too broad. Oceania owes no independent obligations to PIC, and there is nothing to prevent representatives of Oceania approaching PIC's clients.

[38] However, I accept that PIC does have a legitimate interest in a subset of documents in this class. Where those documents refer to Ms Pepper or Mr Cooper, or where they are a party to the relevant communications, the documents or communications will assist PIC in formulating its claim against Ms Pepper and Mr Cooper and also against Oceania as a party. These concerns may already be covered off by the first two categories of documents, but I accept that to avoid uncertainty, orders can be made in relation to a narrowed subset of this category.

[39] The fourth category of documents sought is:

4. Documents identifying any PIC clients and including those referred to in [t]he affidavit of Michelle Kay McBride to which Ms Pepper, Mr Cooper and/or other representatives of Oceania have provided or offered to provide or arrange similar services to those offered by PIC.

[40] In terms of documents identifying PIC's clients which "other" representatives have approached, those representatives do not, at least for the purpose of this application, have any known obligations to PIC. As such, they are not clearly relevant to PIC's proposed claim against the respondents.

[41] Further, the first category of documents already relates to documents which identify any of PIC's clients approached by Ms Pepper or Mr Cooper, so this fourth category is repetitive and unnecessary. Pre-commencement discovery of this category is not appropriate.

[42] The fifth category of documents sought is:

5. Documents relating to services offered to and/or provided by Oceania to Nautica.

[43] Ms Baigent acknowledged that this category was already picked up by prior categories. Insofar as this class of documents relates to the proposed claims against Ms Pepper, Mr Cooper or Oceania, I find that it is already covered by the other categories of documents and is unnecessary.

[44] Finally, the sixth category of documents is:

6. Documents recording details of PIC clients and/or their contact details (such as clients lists) and any other confidential information of PIC.

[45] Ms Baigent clarified that the purpose of this category is to cover documentation or information belonging to PIC. I accept that discovery in relation to this category of documents is appropriate. It has been alleged that Ms Pepper and Mr Cooper used and possibly removed PIC's confidential documents. The provision of any such documents would assist PIC in formulating its pleadings in a full and clear manner.

[46] A practical issue arose in the hearing as to how to effectively search for PIC clients in the absence of a list of names (which, for obvious reasons, PIC would be reluctant to provide). Ms Baigent suggested that the orders be limited to 41 clients listed in the parties' affidavits, followed by a general search using the term "PIC". I consider that to be sensible although I propose to word the orders in a slightly different fashion.¹¹

Are there grounds to believe that the documents may be or have been held by the respondents?

[47] Mr Laphorne submitted that there are no reasonable grounds to believe that the respondents have any documents within the first category of documents because Ms Pepper and Mr Cooper have both denied approaching or soliciting PIC's clients. However, in light of the printing of confidential documents and the alleged removal of those documents by Ms Pepper and Mr Cooper, followed by the defection of various customers from PIC to Oceania, I find that there are grounds to believe that the documents set out above may be or may have been held by the respondents.

¹¹ At [52] below.

[48] If that is not the case, the respondents will have the opportunity to attest to that effect in the affidavit sought as part of the discovery order.

Is an order necessary in all the circumstances?

[49] Finally, Mr Laphorne submitted that the orders were unnecessary because the information sought could be obtained from PIC's current or former customers. I accept that PIC could likely obtain some of the information sought from its customers, but there is no guarantee that such information would be complete or reliable. I therefore consider that an order is necessary in all the circumstances.

Conclusion

[50] In summary, for the reasons set out above, I consider that pre-commencement discovery is appropriate in relation to the following categories of documents:

- (a) documents identifying PIC clients approached by Ms Pepper or Mr Cooper either directly or indirectly;
- (b) documents recording communications between Ms Pepper and/or Mr Cooper to PIC clients;
- (c) documents recording communications among representatives of Oceania, or individuals acting to further the interests of Oceania, and from them to current or former PIC clients, in which Ms Pepper or Mr Cooper are either referred to or are a party to the communication, and which relate to PIC clients;
- (d) documents recording details of PIC clients and/or their contact details (such as PIC client lists) and any other confidential information of PIC.

[51] References to “document” in [50](a)–(d) mean:

- (a) any material, whether or not it is signed or otherwise authenticated, that bears symbols (including words or figures), images, or sounds, or from which such symbols, images, or sounds can be derived, and includes:
 - (i) a label, marking, or other writing that identifies or describes a thing of which it forms part, or to which it is attached;
 - (ii) a book, map, plan, graph, or drawing;
 - (iii) a photograph, film, or negative; and
- (b) information electronically recorded or stored, including but not limited to emails, text messages, instant messages, social media messages/posts, voicemails, calendar appointments and meeting requests, telephone call records, and information derived from that information.¹²

[52] Additionally, references to “PIC clients” in [50](a)–(d) mean:

- (a) the clients listed at page 74 in the affidavit of Ms McBride, which is dated 11 August 2023;
- (b) the clients listed at JPC-3 in the affidavit of Mr Chandler dated 1 September 2023;
- (c) any of Oceania’s clients, which Oceania is reasonably aware of as being current or former clients of PIC and with which Ms Pepper or Mr Cooper had dealings in the six months preceding the termination of their employment with PIC.

¹² The defendant also referred in its application to telephone call histories and records, including those held by any telephone service providers. However, I do not consider it necessary for information to be obtained from third party service providers.

[53] I make the following orders:

- (a) Within 20 days of the date of this judgment, the first to third respondents will each serve on PIC an affidavit stating:
 - (i) whether the documents identified in [50](a)–(d) are or have been in their control; and
 - (ii) if the documents have been but are no longer in their control, their best knowledge and belief as to when they ceased to be in their control and who now has control of them.
- (b) At the same time as serving the affidavit, each of the first to third respondents will make the documents that are listed in the affidavit and that are in their control available for inspection by PIC.

[54] Costs are reserved. In the event the parties are unable to agree on costs, PIC will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the respondents having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 10.50 am on 9 November 2023