

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

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

**CIV-2016-404-765  
[2018] NZHC 3238**

BETWEEN

CULLEN GROUP LIMITED  
Plaintiff

AND

THE COMMISSIONER OF INLAND  
REVENUE  
Defendant

Hearing: On the papers

Appearances: M C Smith and M H A Ho for Applicant, Kea Investments Ltd  
J W A Johnson for the Plaintiff  
A B Goosen for the Defendant

Judgment: 10 December 2018

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**JUDGMENT OF PALMER J**

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*This judgment was delivered by me on 10 December 2018 at 3.30 p.m.  
pursuant to r 11.5 of the High Court Rules 2016.*

*Registrar/Deputy Registrar*

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*Counsel/Solicitors:*  
Gilbert Walker, Auckland  
David Cooper, Barrister, Auckland  
Gillian Coumbe QC, Auckland  
Wynn Williams, Auckland  
Crown Law, Wellington

## Summary

[1] Kea Investments Ltd (Kea) is considering its options for enforcing a judgment of the High Court of England and Wales against Cullen Group Ltd. Kea applies for access to the formal court record and documents on the court file in this New Zealand tax avoidance proceeding. I consider access by Kea is in the interests of open justice and facilitates the orderly and fair administration of justice in contributing to enforcement of a foreign judgment. The documents sought were the basis of, and presented in, the public hearing of this proceeding, brought by Cullen Group Ltd, in open court over several weeks and were accessed by the media. I grant Kea's request for access subject to its undertaking to use the documents only for the purpose of the English and related proceedings without leave of this Court.

## The proceedings and application

[2] This proceeding is a challenge by Cullen Group Ltd (Cullen Group), associated with Mr Eric Watson, to the Commissioner of Inland Revenue's assessment that Cullen Group avoided tax. The proceeding was tried before me in August and September 2018. During the hearing, media requested access to documents on the court file, including the pleadings and closing submissions. Each party abided the decision of the Court. I granted access. I have yet to issue the judgment.

[3] Sir Owen Glenn is the sole shareholder in Kea Investment Ltd (Kea), incorporated in the British Virgin Islands. Sir Owen and Kea sued Mr Watson and others in the High Court of England and Wales over an investment arrangement between Kea and entities associated with Mr Watson. On 31 July 2018, Kea succeeded.<sup>1</sup> Nugee J, in the Chancery Division, set aside certain agreements for deceit and held them voidable. He held Mr Watson owed Kea a fiduciary duty which he breached and he held two loan agreements were liable to be set aside for want of authority and/or having been executed by a Kea director for an improper purpose.<sup>2</sup>

[4] On 14 September 2018, the Court made orders including that Kea is entitled to equitable compensation from Mr Watson in a maximum sum of £43,495,891.33 with

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<sup>1</sup> *Glenn v Watson* [2018] EWHC 2016 (Ch).

<sup>2</sup> At [442].

annually compounding interest at 6.5 per cent per annum.<sup>3</sup> There were also orders for interim payment of £25,259,986.49 by 27 September 2018 and £3,837,356.57 on account of costs.<sup>4</sup> And there were tracing orders, disclosure orders and an undertaking that Mr Watson would not dispose of, or deal in or diminish, assets over £100,000 without notice.<sup>5</sup>

[5] Mr Watson has appealed the interest rate awarded. If he succeeds, Kea advises the compensation award will be approximately £20 million lower. Kea says Mr Watson did not make the interim payment or payment on account of costs, and his solicitor stated Mr Watson was “unable to pay the sums ordered by the Court as he does not have the assets to do so”.

[6] On 4 October 2018, Kea says the shareholder of Cullen Group, and of another company in Mr Watson’s structure, changed. Kea applied to the High Court of England and Wales for without notice freezing orders restraining identified companies, including Cullen Group, from disposing of, dealing with or diminishing the value of assets up to the value of £47,333,247. The English Court granted the orders.

[7] Kea is now considering its enforcement options, including whether to invite the English court to appoint receivers in respect of Mr Watson’s interest in the Valley Trust, which Kea understands holds the shares in Cullen Group. Cullen Group and the Valley Trust features in the factual matrix of the proceeding before me.

[8] Kea applies to access the court file in this proceeding. The Commissioner of Inland Revenue abides the Court’s decision. Cullen Group abides the Court’s decision as to access to the court record but opposes the rest of the application as to access to other documents.

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<sup>3</sup> Order of Nugee J, *Glenn v Watson* EWHC (Ch) HC-2015-1647, 14 September 2018 at [4].

<sup>4</sup> At [10] and [21].

<sup>5</sup> Consent Order of Nugee J, *Glenn v Watson* EWHC (Ch) HC-2015-1647, 14 September 2018 at [4].

## **Law of accessing a court file**

[9] Under s 173(1) of the Senior Courts Act 2016, access to court information is governed by the Senior Courts (Access to Court Documents) Rules 2017.

[10] Rule 8(1) provides “[e]very person has the right to access the formal court record relating to a civil proceeding”. Under r 4, the formal court record includes a judgment, order or minute of the court, including a judge’s reasons. It does not include pleadings or affidavits. Under r 5, a judge may direct that judgments, orders, documents or files not be accessed without permission of the judge.

[11] Under r 11 a person may request access to any document, as Kea has done here. In deciding on that, under r 12, I must consider the nature of, and reasons for, the request and 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.

[12] Rule 13 provides:

### **13 Approach to balancing matters considered**

In applying rule 12, the Judge must have regard to the following:

- (a) before the substantive hearing, the protection of confidentiality and privacy interests and the orderly and fair

administration of justice may require that access to documents be limited:

- (b) during the substantive hearing, open justice has—
  - (i) greater weight than at other stages of the proceeding; and
  - (ii) greater weight in relation to documents relied on in the hearing than other documents:
- (c) after the substantive hearing,—
  - (i) open justice has greater weight in relation to documents that have been relied on in a determination than other documents; but
  - (ii) the protection of confidentiality and privacy interests has greater weight than would be the case during the substantive hearing.

[13] Rule 4 defines “substantive hearing”, in a relation to a civil proceeding relevantly, to mean:

- (i) a hearing ... at which issues that will decide the ultimate outcome of the proceeding are determined; and
- (ii) from the start of that hearing until the court finishes delivering its judgment in the proceeding ...;

[14] In *Schenker AG and Schenker (NZ) Ltd v Commerce Commission*, the Court of Appeal stated the fate of each application will ultimately depend on its context.<sup>6</sup> It declined a request for access by a third party, which might have suffered loss as a result of conduct alleged in a proceeding, to information that had been provided on a confidential basis. The Court considered the principle of open justice could have little relevance to a request by a private party pursuing a commercial purpose but observed it might not always have limited applicability to a non-party request.<sup>7</sup>

[15] In 2017, in *Greymouth Petroleum Ltd v Empresa Nacional del Petroleo*, the Court of Appeal declined a request for access by an overseas company to confidential documents in a settled proceeding filed by a party it was now seeking to join to a

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<sup>6</sup> *Schenker AG and Schenker (NZ) Ltd v Commerce Commission* [2013] NZCA 114, [2015] NZAR 1561 at [2].

<sup>7</sup> At [38].

private arbitration, where the Arbitral Tribunal had declined to order discovery.<sup>8</sup> The Court accepted “it is a reasonable and legitimate purpose to seek documents relevant to a parallel proceeding” but observed a court “will be reluctant to allow a properly constituted arbitral process, to which parties have by contract committed themselves, to be circumvented by parallel applications in court”.<sup>9</sup>

[16] In *Erceg v Erceg*, the Supreme Court stated:<sup>10</sup>

The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been described as “an almost priceless inheritance”. The principle’s underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice “imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges”.

[17] In *Crimson Consulting Ltd v Berry*, while confirming there is no presumption of disclosure of information, the Court of Appeal recently reiterated the first sentence of that quotation, in determining a media request to access court documents, and quoted other parts of the same paragraph.<sup>11</sup>

## **Submissions**

[18] Mr Smith, for Kea, requests copies of the documents held on the formal court record and for copies of both parties’ pleadings, both parties’ opening and closing submissions at trial and the index to the (open) agreed bundle of documents for trial. He submits the court file in this proceeding is likely to contain information material to Kea’s allegations in its English proceeding. The issues there apparently concern: whether the property of the Valley Trust belongs to Mr Watson beneficially; whether he intended to part with beneficial ownership; and whether the trust and other companies are merely nominees or otherwise invalid. Kea’s interest is in documents and evidence relating to Mr Watson’s direction and conduct of the affairs of Cullen

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<sup>8</sup> *Greymouth Petroleum Ltd v Empresa Nacional del Petroleo* [2017] NZCA 490, [2017] NZAR 1617.

<sup>9</sup> At [36] and [42].

<sup>10</sup> *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2] (footnotes omitted).

<sup>11</sup> *Crimson Consulting Ltd v Berry* [2018] NZCA 460 at [32]-[33].

Group and his other interests held through trust or corporate vehicles. Mr Smith submits the proceeding is currently at the substantive hearing stage where the principle of open justice has greater weight. He submits it is difficult to see how information offered by Cullen Group in the proceeding could remain commercially sensitive. He submits the fact the request is being made to assist enforcement of an English judgment weighs powerfully in favour of its request, in facilitating the orderly and fair administration of justice. He offers, on behalf of Kea, an undertaking it will not use any documents it obtains other than for the purposes of the English proceedings and any related proceedings taken in other jurisdictions, without leave of the High Court of New Zealand.

[19] Mr Johnson, for Cullen Group, abides the Court's decision on the court record. He opposes the application for other documents, that are not part of the formal court record. He submits that, in terms of r 12(c), the pleadings contain large amounts of commercially sensitive material including, for example: details of the approved issuer levy tax amounts paid; the precise nature of Cullen Group's finance structure; and the trust structures associated with Cullen Group. He submits the Rules were not designed to facilitate private applicants pursuing commercial purposes. He submits other more appropriate mechanisms are available to Kea, such as pre-proceeding discovery.

### **Should Kea have access to the court file?**

[20] Under r 8.1 Kea is entitled to access the formal court record, including judgments, orders and minutes of the court. Its request to do so is not opposed. I direct it may do so.

[21] Kea also requests the pleadings, opening and closing submissions and the index to the agreed bundle of documents. While the Court of Appeal has determined the principle of open justice is not a presumption, it is a starting point. The principle of open justice is not relevant only to requests by media organisations but also to requests by individuals and groups who collectively constitute the public and who are the ultimate audience of reporting by the media. Kea's freedom to seek and receive information, recognised in r 12(f), is concomitant to the principle of open justice.

[22] The hearing of this proceeding was held in public over several weeks. The pleadings were the basis of the proceeding. The opening and closing submissions were presented in open court. The media was present for much of that and media organisations requested and were granted access to documents on the court file without opposition from either party. There was detailed reporting of the evidence and submissions by several national media outlets. There was no request for confidentiality over any of the documents involved. Under rule 4, this proceeding is still at the substantive hearing stage. Rule 13(b) provides open justice has greater weight during the substantive hearing than at other stages of the hearing.

[23] The confidentiality and privacy interests of Cullen Group in the information sought is a relevant consideration under r 12(d), as is the right to bring civil proceedings without disclosure of more information about commercially sensitive matters than is necessary to satisfy the principle of open justice. But there is little specificity to the claim of commercial confidentiality here. It is also relevant that Cullen Group initiated and pursued this proceeding, was aware of its public nature, sought no confidentiality orders over any information and abided media access to the court file. It is difficult to see why it is necessary to prevent disclosure of information that has been presented in open court and accessed by the media in these circumstances.

[24] I accept Kea's submission that the purpose for which they seek the information contributes to the orderly and fair administration of justice, which is a relevant consideration under r 12(a). Kea is not fishing for information in order to consider whether to initiate private litigation, as the applicant in *Schenker AG* may have been doing. The information sought was not provided on a confidential basis as it was in *Schenker AG* and it does not go behind a declined discovery order as did the application in *Greymouth Petroleum Ltd*. Rather, Kea's purpose is to seek to enforce a judgment of the High Court of England and Wales which has been issued and in respect of which that Court subsequently granted freezing orders and disclosure orders. That is a reasonable and legitimate purpose, as the Court of Appeal observed in *Greymouth Petroleum Ltd*.

[25] There is a reasonable basis to assume the documents sought may contain information relevant to that. Enforcement of a foreign judgment in these circumstances constitutes a public purpose, not just a private purpose. It contributes to the orderly and fair administration of justice. That is reinforced by the undertaking Kea offers, not to use documents it obtains other than for the purpose of the English and any related proceedings without leave of this Court.

### **Result**

[26] I grant the application. Kea Investments Ltd may access:

- (a) the formal court record of judgments, orders and minutes of the court;  
and
- (b) the pleadings of both parties, both parties' opening and closing submissions at trial and the index to the agreed bundle of documents, on the condition Kea does not use any documents other than for the purposes of the English proceedings and any related proceedings taken in other jurisdictions, without leave of the High Court of New Zealand.

Palmer J