

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 33/2021  
[2021] NZSC 64

BETWEEN	JOHN GOODWIN SMITH Applicant
AND	ELECTRIX LIMITED First Respondent
	THE FLETCHER CONSTRUCTION COMPANY LIMITED Second Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: J A Farmer QC and M Heard for Applicant  
K M Quinn for First Respondent  
M N Rathod for Second Respondent

Judgment: 16 June 2021

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JUDGMENT OF THE COURT

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- A**     **The application for leave to appeal is dismissed.**
- B**     **There is no order as to costs.**
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REASONS

**Introduction**

[1]     Mr Smith is writing a book on the construction of the Justice and Emergency Precinct in Christchurch. The proposed appeal relates to access to documents in the Electrix/Fletcher construction litigation.

## Background

[2] Before judgment in the substantive case was delivered, Palmer J in a judgment on 18 October 2019 (*Electrix (No 1)*) granted a media application giving access to:<sup>1</sup>

- (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 any redactions for commercial confidentiality;
- (d) the Notes of Evidence, once they are complete; and
- (e) the closing submissions, when delivered.

[3] Access to the briefs of evidence of the experts was declined for reasons of commercial confidentiality as they largely related to cost and pricing information. Both parties were invited to redact any other commercially sensitive information in other briefs before they were provided to the media.<sup>2</sup>

[4] Blanket access to the 5000 documents in the electronic bundle was declined on the basis that they may not all become evidence, but it was said:<sup>3</sup>

If Ms Young, or other media, wish to request any particular documents mentioned in a brief of evidence or submissions, they may do so. *I would expect a document would be made available unless counsel advise there is good reason, such as commercial confidentiality, not to do so.*

[5] Judgment in the substantive litigation (*Electrix (No 2)*) was delivered on 6 May 2020.<sup>4</sup>

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<sup>1</sup> *Electrix Ltd v Fletcher Construction Co Ltd* [2019] NZHC 2678, (2019) 25 PRNZ 137 (Palmer J) [*Electrix (No 1)*] at [19].

<sup>2</sup> At [17].

<sup>3</sup> At [18] (emphasis added).

<sup>4</sup> *Electrix Ltd v The Fletcher Construction Company Ltd No 2* [2020] NZHC 918 (Palmer J) [*Electrix (No 2)*].

[6] After the substantive litigation judgment was delivered, Mr Smith applied for access to the whole of the Court file. By minute of 13 July 2020, Palmer J declined that application but granted him access to the same material that had been provided to the media.

[7] Mr Smith then applied for access to the documents cited by the witnesses in the case (some 1000 documents).<sup>5</sup>

[8] In a judgment of 9 September 2020 (*Electrix (No 3)*), Palmer J said that there is commercial sensitivity in the documents requested, and the time and expense involved for the parties in assessing 1000 documents for redaction to excise those commercially sensitive parts would be significant.<sup>6</sup> He said:<sup>7</sup>

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.

[9] He held 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 s 5 of the New Zealand Bill of Rights Act 1990.<sup>8</sup>

[10] Mr Smith then applied for access to approximately 135 documents. By minute of 5 October 2020, Palmer J declined this application, accepting Fletcher Construction's submission that this request had been effectively dealt with by *Electrix (No 3)*.

[11] Mr Smith did not receive the 5 October 2020 minute until 5 November 2020. He applied to the Court of Appeal for an extension of time to appeal against the decision recorded in that minute.

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<sup>5</sup> *Electrix Ltd v Fletcher Construction Co Ltd (No 3)* [2020] NZHC 2348, (2020) 25 PRNZ 483 (Palmer J) [*Electrix (No 3)*] at [3].

<sup>6</sup> At [14].

<sup>7</sup> At [14].

<sup>8</sup> At [15].

[12] The Court of Appeal accepted that the delay was not long and not Mr Smith's fault.<sup>9</sup> It held that the appeal was, however, hopeless and an abuse of process in that the extent of access had been dealt with by *Electrix (No 3)*. It said that Mr Smith's decision not to appeal *Electrix (No 3)* most likely reflected the lack of understanding by a lay litigant as to the appropriate response.<sup>10</sup> The Court said that Mr Smith was still entitled to apply under r 29A of the Court of Appeal (Civil) Rules 2005 for an extension of time to appeal *Electrix (No 3)*.<sup>11</sup>

### **The parties' submissions**

[13] Mr Smith argues that a request for some 1000 documents (which he now accepts was excessive) is quite different from a request for 135 documents including, according to Mr Smith, 45 documents that were not sought in the original application for the 1000 documents. Mr Smith points out that Palmer J said in *Electrix (No 1)* that he would expect supporting documents referred to in evidence that were not commercially sensitive to be disclosed.<sup>12</sup> He submits that Palmer J and the Court of Appeal were wrong to hold that his two applications were essentially the same.

[14] The respondents submit that Palmer J's judgment in *Electrix (No 3)* held that disclosure should be limited to those documents already provided. This, it is submitted, complied fully with the principle of open justice, and private litigants should not be vexed with repeated disclosure applications. Further, it is submitted that the interests of Mr Smith are purely private.

### **Our assessment**

[15] We accept that there may be an issue of principle as to the extent to which the possibility of commercially sensitive documents, the inconvenience of redacting documents and the likelihood of discouraging commercial litigation should weigh against granting an applicant who is not a party to the proceedings access to documents referred to in the course of litigation. The current application does not, however, raise

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<sup>9</sup> *Smith v Electrix Ltd* [2021] NZCA 67 (Courtney and Goddard JJ) [CA judgment] at [5].

<sup>10</sup> At [5].

<sup>11</sup> At [5]. The Court noted that this observation obviously said nothing about the likely outcome of such an application.

<sup>12</sup> See above at [4].

those issues. The only issue is whether the Court of Appeal should have granted Mr Smith's application for an extension of time to appeal. This Court has set out the principles to be applied in *Almond v Read*.<sup>13</sup> The Court of Appeal applied those principles in this case.<sup>14</sup>

[16] We accept there may be some possible scope for argument as to whether *Electrix (No 3)* did in fact cover the current application in light of the smaller number of documents now sought and the indication in the earlier judgment of *Electrix (No 1)* that further documents should be provided if they were not commercially sensitive. But this does not mean the criteria for leave to this Court are met given that the significance of this argument is confined to the particular circumstances of this case.

[17] Mr Smith is not without remedy. He can still apply for an extension of time to appeal against *Electrix (No 3)* as the Court of Appeal noted.<sup>15</sup>

## **Result**

[18] The application for leave to appeal is dismissed.

[19] Given the circumstances, we make no orders as to costs.

Solicitors:  
Lee Salmon Long, Auckland for Applicant  
Burton Partners, Auckland for First Respondent  
Craig Griffin & Lord, Auckland for Second Respondent

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<sup>13</sup> *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

<sup>14</sup> CA judgment, above n 9, at [4]–[5].

<sup>15</sup> At [5].