

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

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

**CIV-2017-404-002073
[2018] NZHC 1043**

BETWEEN

FUJI XEROX NEW ZEALAND LIMITED
First Plaintiff

FUJI XEROX FINANCE LIMITED
Second Plaintiff

FUJI XEROX ASIA PACIFIC PTE
LIMITED
Third Plaintiff

AND

NEIL WHITTAKER
First Defendant

MARK DONALD ALLRIGHT
Second Defendant

GAVIN POLLARD
Third Defendant

Hearing: [On the papers]

Appearances: K C Francis for Plaintiffs
A M Callinan for First Defendant
D P Hoskin for Second Defendant
S M Hunter for Third Defendant

Judgment: 14 May 2018

JUDGMENT OF JAGOSE J

*This judgment is delivered by me on 14 May 2018 at 4.30 pm
pursuant to r 11.5 of the High Court Rules.*

.....
Registrar / Deputy Registrar

Introduction

[1] The law firm, Gibson Sheat, asks to access documents in relation to the present proceeding, currently in interlocutory phases. The documents are “the Statement of Claim and the proceedings index”.

Access to court documents

[2] Access to court documents is controlled by the Senior Courts (Access to Court Documents) Rules 2017. People may obtain access to court documents either by right, or with the Court’s permission, but in either case (as may be relevant here) subject to any limit or prohibition imposed by the Court.¹

[3] Rule 8(1) gives “[e]very person ... the right to access the formal court record relating to a civil proceeding”. Rule 4 defines:

- (a) ‘civil proceeding’ as meaning “any proceeding other than a criminal proceeding; and ... does not include an interlocutory application”; and
- (b) ‘formal court record’ as relevantly meaning “any of the following kept in a registry of the court: ... (a) a register or an index ...”.

[4] If Gibson Sheat has no relevant general right to access documents, r 11 otherwise applies to its request. Under r 11(2), the person asking to access any document must provide “[a] written form of request that”:

- (a) identifies the person and gives the person’s address; and
- (b) sets out sufficient particulars of the document to enable the Registrar to identify it; and
- (c) gives reasons for asking to access the document, which must set out the purpose for which the access is sought; and
- (d) sets out any conditions of the right of access that the person proposes as conditions that he or she would be prepared to meet were a Judge to impose those conditions (for example, conditions that prevent or restrict the person from disclosing the document or contents of the document, or conditions that enable the person to view but not copy the document).

¹ Senior Courts (Access to Court Documents) Rules 2017, rr 5 and 6.

[5] Subject to a judge's dispensation with the requirement, r 11 also requires the Registrar to copy requests for access to documents not covered by general rights to the parties to the relevant proceeding, to enable their timely objection.

Gibson Sheat's request

[6] Gibson Sheat's request is ambiguous as to whether it is seeking access for itself, or for a client. Its explanation is:

We act for a client who is currently in a dispute with Fuji Xerox. Based on publicly available reports detailing the plaintiff's claims against the defendants in the [present] proceeding, we reasonably apprehend that the Statement of Claim will contain allegations relevant to the dispute between our client and Fuji Xerox.

[7] The Registrar copied Gibson Sheat's request to the parties, each of whom provided written objection to the request:

- (a) the plaintiffs say the request is "broadly cast and vague" in the sense criticised by the Court of Appeal in *Schenker AG v Commerce Commission*.² They are concerned it is "a fishing expedition". They say the claim contains commercially sensitive and personal information. They contend, inferentially by reference to the indicated "dispute", Gibson Sheat is attempting "to circumvent the requirements of the High Court Rules for obtaining discovery in ordinary civil proceedings". And they rely on my 9 February 2018 judgment in this proceeding, in which I declined another person's application for access to the pleadings as "premature, at least until the pleadings are finalised"; and
- (b) the defendants support the plaintiffs' reasons for opposing Gibson Sheat's access. The second defendant includes correspondence with Gibson Sheat, in which Gibson Sheat minorly expanded on its explanation to the Court:

We act for a client who is in a commercial dispute with Fuji Xerox. Our client believes there have been aspects of the way

² *Schenker AG v Commerce Commission* [2013] NZCA 114, [2015] NZAR 1561 at [33].

Fuji Xerox has managed its account and relationship with it that may parallel the allegations contained in the Statement of Claim about the way some Fuji Xerox staff have operated.

Analysis

—*access to the proceedings index*

[8] It is not entirely clear what r 4 means by “a register or an index”. None of the duties or powers of the Registrar – who is appointed under s 33 of the Senior Courts Act 2016 – expressly require the keeping of a register or index in a registry of the court as the formal court record.³ The High Court Rules only require the Registrar to ‘keep’ lists of proceedings either that have had their first case management conference, or have been allocated a hearing or trial date (the latter also to record the close of pleadings date),⁴ and “an appropriate record book” in which to register judgments under the Reciprocal Enforcement of Judgments Act 1934. There does not appear to be any other relevant statute or regulation.

[9] Plainly “a register or an index” has to be given some contextual meaning. It cannot mean any register or index that happens to be kept in a registry – for example, the index of registry staff contact details, or a register of workplace accidents and incidents. That much is clear from the Rules’ reference to the register or index as part of the formal court record. The definition otherwise includes formal notices, judgments, orders, minutes, the permanent court record under Part 7 of the Criminal Procedure Rules 2012, and the rolls of barristers and solicitors kept under s 56 of the Lawyers and Conveyancers Act 2006.

[10] Notably absent from the definition is pleadings, the documents filed, in civil proceedings: notices of proceeding; statements of claim and defence; originating and interlocutory applications; affidavits; memoranda; etc. Rules 6 and 7 appear to identify a hierarchy of increasing generality from “a document”, to “a court file”, to “the formal court record”. Rule 4 defines ‘document’ in a civil proceeding as:

³ Section 33 enables appointment of a “Registrar ... for the conduct of the business of the High Court”, with duties and powers either conferred by any enactment or the High Court Rules, or “necessary or desirable to ensure the efficient and effective administration of the business of the High Court”.

⁴ High Court Rules, rr 7.12 and 7.13.

- (i) mean[ing] any written material in the custody or control of the court that relates to the proceeding (including any interlocutory application associated with the proceeding), whether or not it is kept on a court file; and
- (ii) includes documentary exhibits, video recordings, records in electronic form, films, photographs, and images in electronic form

and 'court file' as:

mean[ing] a collection of documents in the custody or control of the court that relate to a civil proceeding or a criminal proceeding (including an interlocutory application associated with the proceeding) or an appeal.

I take the view, by "a registry or an index", the Rules meant to include any list of those documents or court files.

[11] Formerly, the registry maintained a register, into which was entered the civil proceedings filed in each court's registry. It was effectively a list of the registry's court files. And each court file contained an index of the documents collected in it. Now the Ministry of Justice maintains a record of each registry's operation in an electronic database, known as CMS, from which may be generated user-defined lists of its contents. Among those is a document styled 'Register of documents filed', which is produced for each civil proceeding.

[12] I interpret Gibson Sheat's request for access to the "proceedings index" to be to the register of documents filed in the present proceeding.

[13] As a register kept in the registry of the court, subject to any applicable limitation or prohibition, Gibson Sheat has the right to access the register as part of the formal court record.

[14] I have reviewed the proceeding's register of documents filed. In terms of r 5, I cannot identify any qualification on, or reason to qualify, Gibson Sheat's access to the register.

—*access to the statement of claim*

[15] I apprehend Gibson Sheat’s only reason for seeking access is on its client’s behalf. If so, r 11(2)(a) is to be understood as requiring identification of its client and giving the client’s address.

[16] Further, Gibson Sheat’s explanation does not set out the purpose for which the access is sought, as required by r 11(2)(c). The ‘purpose for which access is sought’ should be articulated in a way that allows me to weigh “the nature of, and the reasons given for, the request” in terms of the relevant factors set out at r 12, and against the mandatory countervailing factors of “the protection of confidentiality and privacy interests and the orderly and fair administration of justice” in r 13. I cannot make that assessment from Gibson Sheat’s unparticularised apprehension (however “reasonable”) the claim’s allegations are indeterminately relevant to some unspecified dispute its anonymous client is said to have with Fuji Xerox.

[17] Gibson Sheat’s advice to the second defendant makes out the plaintiffs’ characterisation of the request as a “fishing expedition” – looking for, rather than at, the object of its interest – but that is not in itself disqualifying of its request. Neither is my earlier refusal of access determinative of Gibson Sheat’s request here. But the parties’ other objections are well made, and Gibson Sheat’s request sets out no proposed conditions of the right of access by which the objections could be met. Given r 11(2)(d) requires an access seeker to set out any conditions it would “be prepared to meet were a Judge to impose those conditions”, I might infer Gibson Sheat has no conditions to propose, or is not prepared to meet any such conditions.

[18] Given Gibson Sheat’s request does not meet the minima for consideration, I am not prepared presently to grant it access to the statement of claim.

Result

[19] I direct the registrar to give Gibson Sheat access to the register of documents filed in the present proceeding, subject to:

- (a) the registrar’s confirmation nothing in the register is “subject to ... any enactment, court order, or direction limiting or prohibiting access or publication”;⁵ and
- (b) Gibson Sheat’s payment of any prescribed fee.⁶

[20] Under r 11(8), I refuse Gibson Sheat’s request for access under r 11 to the statement of claim solely for the reason the request does not comply with r 11(2)(a), (c), and (d).

—Jagose J

Solicitors:
Meredith Connell, Auckland (Plaintiffs)
Simpson Grierson, Auckland (First Defendant)
Steindle Williams Legal, Auckland (Second Defendant)
S M Hunter, Barrister, Auckland (Third Defendant)

Copy to:
D Calder, Gibson Sheat, Auckland

⁵ Senior Courts (Access to Court Documents) Rules 2017, r 6(a).

⁶ Rule 6(d).