

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

**CIV 2009-404-2808**

BETWEEN	WESTPAC NEW ZEALAND LIMITED Plaintiff
AND	GAO HUI (ALSO KNOWN AS LEO GAO) First Defendant
AND	HEIGHTS SERVICE LIMITED (IN RECEIVERSHIP) Second Defendant
AND	ZHANG HUAN DI (ALSO KNOWN AS HUANDI ZHANG) Third Defendant
AND	GAO LEI Fourth Defendant
AND	WYNN INTERNATIONAL MARKETING LTD Fifth Defendant

Hearing: 27 May 2009

Appearances: Mr Gapes for plaintiff  
Ms Goatley for New Zealand Herald

Judgment: 27 May 2009

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**JUDGMENT OF WINKELMANN J**  
**[on application by the New Zealand Herald for access to Court file]**

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Bell Gully, Auckland  
Simpson Grierson, Auckland

[1] In these proceedings the plaintiff has obtained freezing orders in respect of assets of the defendants. APN News Media Ltd (New Zealand Herald) makes application for access to the court file, an application opposed by Westpac New Zealand Limited (Westpac) The file is currently subject to orders made by Potter J on 14 May 2009 and continued and extended by Allan J on 20 May 2009, the combined effect of which is to prevent publication of the evidence offered in support of the application for freezing orders and to prevent search of the file without leave of a Judge. There are no reasons given for the orders made at that time as the orders were made within the context of an ex parte application.

[2] In the absence of reasons given on the earlier occasions by the Judges who dealt with the issue of suppression, (it would be unusual for reasons to be given) within the context of an ex parte application), I propose to approach this application for access on a de novo basis.

[3] The grounds upon which Westpac opposes the Herald having access to the contents of the file can be summarised as follows:

- (a) The file contains information in respect of which Westpac is subject to obligations of customer confidentiality, even in circumstances such as the present.
- (b) Names and identities of employees and counter-parties (that is to say recipients of funds) and their employees and their roles detailed in the affidavits are also private and confidential.
- (c) The affidavits describe the investigative methods used by Westpac to detect fraud, to locate the defendants and to recover the funds.
- (d) The affidavits set out and describe confidential communications with police and other identified third parties in New Zealand and in other jurisdictions.

[4] As to the latter two grounds, Mr Gapes for Westpac made clear that the fundamental objection to the application for access is that publication of the information contained in the papers filed will cut across Westpac's attempts to investigate the present circumstances and recover the monies, and impede an on-going criminal investigation. A secondary concern is that the disclosure of Westpac's internal processes could prejudice attempts to prevent and detect fraud in the future.

[5] Ms Goatley for the Herald emphasises that the Herald is a media organisation with ample experience in operating within the proper parameters of the law in relation to privacy and also within the proper parameters of the sub-judicae rule. While Westpac may have some privacy interests in the matters that would be reported, ultimately principles of freedom of speech and open access to justice trump those privacy interests. She also submits that, in reality, circumstances such as the present are rare so that the bank's stated apprehension in relation to the impact of revealing this information upon its internal fraud detection practices is overstated.

[6] The rules that regulate this application are set out at Rules 33.5 to 3.11 of the High Court Rules. These Rules will shortly be replaced by the High Court (Access to Court Documents) Amendment Rules 2009, but those do not come into effect until June 2009.

[7] This interlocutory application for freezing orders is not an application to which the applicant is entitled to search as of right. Rule 3.6(4) of the High Court Rules details interlocutory applications that may be searched without leave, and provides:

- (4) A person may search, inspect, and copy a document on a file relating to an interlocutory application -
  - (a) if the interlocutory application relates to -
    - (i) a proceeding that has terminated; or
    - (ii) an intended proceeding and leave to bring the proceeding is refused; or

(b) with the leave of the Judge if the interlocutory proceeding relates to an intended proceeding and a Judge is satisfied that the proceeding has not been commenced within a reasonable time.

[8] The Law Commission has clarified the meaning of this provision at para [428] of their 2006 final report on access to court records, stating:

Leave is presently required for non-parties to search court records in interlocutory matters before the proceeding is determined. Both the District Court and High Court Rules have been clarified to make it clear that the proceeding which must have been determined is the substantive proceeding, not the interlocutory application.

[9] As with the previous r 66(3) which allowed inspection of documents where a proceeding had been determined, leave is required where the conditions of the provision allowing inspection have not been met; (see *Smith v Covington Spencer Ltd* (HC AK CIV 2005-404-3020 10 February 2006) at para [8]. In regard to this application, as the substantive proceedings have not been terminated and there is no indication that leave to bring an intended proceeding has been refused, leave is required to allow the non-party (the applicant) to inspect the file. Rule 3.6(4) therefore excludes inspection of interlocutory applications as of right and the applicant would have required leave to inspect, with or without the current orders of Potter and Allan JJ.

[10] The starting point for consideration whether access should be granted is the principle of open justice. That principle must be weighed against the relevant privacy interests.

[11] I accept for the purposes of this application that the applicant has a genuine or proper interest in access to the contents of the file. The subject matter of this proceeding is of considerable public interest. Indeed, the search for the recipients of the funds has been playing out as a news story through the media for the last several days.

[12] I accept that the submissions Ms Goatley makes that as a responsible media organisation the applicant would be aware of the need to preserve customer confidentiality, and would properly respect the sub judice rule. But I consider that the concerns raised by Westpac in relation to the impact of any publication of the

contents of the application both on its own internal procedures and practices and upon the criminal investigation that is currently underway are valid. The material that has been filed in support of the application is very full and detailed both in relation to its internal procedures and in relation to the particular case. Westpac was required to be very full in its disclosure because it was asking the Court for without notice relief; full disclosure is an obligation imposed upon parties who seek the assistance of the Court in that way.

[13] The New Zealand Police have also provided a letter in support of Westpac's opposition. The police endorse Westpac's concern as to the impact upon the on-going criminal investigation of disclosure of the contents of the file. The police express concern that disclosure of the information contained within the file could severely prejudice the police investigation, including its ability to work through mutual assistance agreements with overseas authorities.

[14] I therefore accept the submission by Westpac that if the information is released at this stage to enable further media reporting it is likely that this would not only frustrate Westpac's attempts to recover the stolen funds, but also the investigations by the police and banks in various jurisdictions.

[15] It is also relevant that there is already a considerable amount of information already in the public domain as to what work has been undertaken by Westpac and the police in their recovery and detection efforts respectively. As Westpac submits, the police are providing the public with the information that they think is appropriate to release at this stage. There is also other information reporters are obtaining from the Rotorua community, obviously by means of their own investigative efforts. The refusal of access is therefore not likely to significantly inhibit reporting.

[16] To conclude, it is necessary that the existing limits on access to the court file and publication remain in place until further order of the Court, to protect Westpac's legitimate privacy interests in its internal fraud detection procedures, so as not to obstruct its efforts to recover its funds and finally, to allow on-going police investigations to continue without unnecessary disruption.

[17] I make clear that the existing non-publication orders remain in place and that those orders cover the contents of the police letter filed in support of the opposition to this application, except insofar as its contents are described in this judgment. They also extend to the submissions of Westpac in opposition, provided that publication of the following paragraphs is agreed to be allowed: paragraph 17 (amended as agreed between the parties), paragraphs 19 and 21.

[18] I further order that the contents of this judgment may be reported, including the description contained in the judgment of the grounds of Westpac's opposition, and the police concerns.

Winkelmann J