IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-341
[2021] NZHC 2832

UNDER	the Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules 2016
IN THE MATTER OF	an application for judicial review
BETWEEN	LAWYERS FOR CLIMATE ACTION NZ INCORPORATED Applicant
AND	THE CLIMATE CHANGE COMMISSION First Respondent
	MINISTER FOR CLIMATE CHANGE Second Respondent

Hearing:	On the Papers
Counsel:	J D Every-Palmer QC and M C Smith for the Applicant V E Casey QC, S A H Bishop and H M L Farquhar for the First Respondent A L Martin, P H Higbee and H T N Fong for the Second Respondent
Judgment:	22 October 2021

JUDGMENT OF PALMER J

Counsel/Solicitors:
J D Every-Palmer QC, Wellington
V E Casey QC, Wellington
Gilbert Walker, Auckland
Luke Cunningham Clere, Wellington
Crown Law, Wellington

Application to publish court documents

[1] These proceedings challenge decisions by the Climate Change Commission (the Commission) in proposing emissions budgets under the Climate Change Response Act 2002. Statements and amended statements of claim and defence and replies have been filed. A hearing has been set down for 28 February 2022.

[2] Lawyers for Climate Action NZ Inc (LCANZ), the applicant, published its statement of claim on its website because the proceedings address matters of public interest and importance. LCANZ now considers its amended statement of claim, the statements and amended statements of defence, and the replies and amended replies should be published, to ensure the public has a full and balanced understanding of the parties' positions. LCANZ also wishes to publish its evidence, the respondents' evidence, and the applicant's evidence in reply after it is filed and served. It seeks directions accordingly.

[3] The Commission, the first respondent, opposes the application. In exchanges with LCANZ, it proposed the respondents would separately publish their statements and LCANZ publish a link to them. It also proposed the parties agree commentary be limited to factual explanation of the pleadings on neutral terms. LCANZ did not agree.

[4] The Minister for Climate Change consents to the pleadings being published online, on the parties' respective websites and consents to LCANZ publishing a link to his pleadings. He abides the Court's decision on whether there should be restrictions on commentary and opposes the publication of affidavit evidence.

Law of access to court documents

[5] Section 173(1) of the Senior Courts Act 2016 provides "[a]ny person may have access to court information of a senior court to the extent provided by, and in accordance with, rules of court".

[6] Rules 8(1) and 4 of the Senior Courts (Access to Court Documents) Rules 2017 (the Rules) provide every person has a right to the formal court record of a civil proceeding which includes judgments, orders and minutes. Rule 9 entitles parties and

their lawyers to search, inspect and copy the court file at any time. Rule 11 entitles any person to ask to access documents and provides parties with the opportunity to comment on the request. I accept that LCANZ's request here is effectively made on behalf of the public but falls to be considered under r 11.

[7] Rule 11(7) empowers a Judge to refuse or grant a request with or without conditions. Under r 12, the Judge must consider the nature of, and the reasons for a request, and must take into account, relevantly:

> (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.

[8] Rule 12(f) effectively invokes the freedom to seek, receive and impart information under s 14 of the New Zealand Bill of Rights Act 1990 (the Act). That freedom is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, under s 5. The Bill of Rights guarantee means freedom of expression is not only a mandatory relevant consideration under r 12(f) but also a requirement with which the Judge's decision must be consistent, under s 3 of the Act.

[9] In applying r 12, r 13 requires the Judge to 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.

[10] In *Crimson Consulting Ltd v Berry*, the Court of Appeal accepted that the principle of open justice is fundamental to the common law system of civil and criminal justice.[1] It quoted the Supreme Court in *Erceg v Erceg*:[2]

> 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 … The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court. Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect …

[11] The Court noted that the need for transparency and public scrutiny is less at the pleadings stage, because the Court is generally not determining substantive issues.[3] But it stated that the principle of open justice and the freedom to seek information remain important factors which do not cease to work in the pre-trial stage.[4] It agreed that reporting on pleadings is one way of informing the public so the business of the courts is known and transparent.[5]

1 *Crimson Consulting Ltd v Berry* [2018] NZCA 460, [2019] NZAR 30 at [33].
2 At [33], citing *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2] (footnotes omitted).
3 At [39].
4 At [40].
5 At [41].

Submissions

[12] Dr Every-Palmer QC, for LCANZ, submits publication poses no unfairness to any party and it is appropriate the pleadings be made publicly available.

[13] Ms Casey QC, for the Commission, submits the request is effectively a request on behalf of the general public under the Rules to access court documents. LCANZ's advocacy objectives change the balance of considerations. She submits public access to the pleadings would not support the orderly and fair administration of justice and would be prejudicial and unfair to the Commission which would not engage in countervailing commentary while the matter is before the Court. She submits, if the pleadings are published that should be done on terms that avoid trial by media or by commentator. The Commission is also opposed to the publication of evidence before the hearing on any terms, as that publication is not necessary for open justice and would not support the orderly and fair administration of justice.

[14] Mr Martin, for the Minister, submits the information in the affidavits is far more detailed than would be gathered from watching the hearing. Therefore, it may obscure the focus of the case and may not be conducive to publish understanding of the issues before the Court.

Should the documents be published?

[15] As the Court of Appeal stated in *Crimson Consulting Ltd v Berry*, open justice and the freedom to seek and impart information are important even though these proceedings have not yet been heard. I do not consider public access to them is likely to impinge on the orderly and fair administration of justice. Nor do issues of confidentiality or privacy arise. Publication of the pleadings will inform the public about the issues involved in the proceedings. Whether or not the respondents engage in the public commentary about these issues which are public issues anyway is up to them.

[16] Each party may publish their own pleadings on their own website and may publish links to the other pleadings on the other websites. The parties have the right to freedom of expression. But I do remind counsel for all parties that the issues will

be the subject of a court hearing. The Court will not appreciate counsel making their submissions in the media rather than in the Court.

[17] The question of public access to the evidence is more a matter of timing. The evidence has not yet all been filed. Public and media understanding of the evidence is best enhanced by seeing it in the context of the submissions made in the case, which has not yet occurred. As r 13 suggests, open justice has more value during the substantive hearing. Accordingly, I direct that, subject to any other directions made by the Judge who conducts the hearing, each party may make their own evidence and submissions publicly available from the commencement of the hearing.

Palmer J