

The pitfalls of recovering stolen confidential documents disclosed in litigation

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The Court of Appeal has allowed a party's disclosure in Tribunal proceedings to be used in subsequent proceedings even

though the party seeking to rely on these documents erroneously forgot to ask the permission of the Tribunal to do so.

IG Index dismissed one of its employees, Mr Cloete. Mr Cloete then brought a claim for unfair dismissal against IG. As part of those proceedings, Mr Cloete disclosed various documents including a USB stick which contained copies of some of IG's highly confidential documents.

After the Tribunal proceedings, IG issued separate proceedings against Mr Cloete and asked the court to grant an order that its documents or copies of them be delivered to it. Mr Cloete attempted to have these proceedings struck out as an abuse of process under the Civil Procedure Rules (which do not allow documents which are disclosed as part of proceedings to be used for any other purpose, including subsequent proceedings). The policy reason for this is that disclosure in litigation is an invasion of privacy which should be matched by a limitation on the use of the documents disclosed.

The Civil Procedure Rules allow an exception to the above rule when the court in the original proceedings gives permission for the disclosed documents to be used in subsequent proceedings. However, on this occasion, IG failed to ask for permission from the Tribunal to use the documents in subsequent proceedings (probably because it had mistakenly thought that it did not need to because the documents were copies of its own documents). Despite this, the Court of Appeal held that IG was allowed to use the documents in subsequent proceedings against Mr Cloete and refused to strike out IG's claim against Mr Cloete. The Court of Appeal considered that it had an obligation to deal with cases justly, and, on balance, had IG sought permission from the Tribunal to use the documents in subsequent proceedings at the correct time, it seemed unlikely that this would not have been granted.

This is a useful point to bear in mind should it emerge in proceedings that an employee has taken confidential documents. Although on this occasion IG was able to rely on the documents disclosed, parties should always seek permission from the original court if further proceedings will be necessary.

IG Index Ltd v Cloete [2014] EWCA Civ 1128

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