

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2010] NZEMPC 116
ARC 45/09**

IN THE MATTER OF for preliminary issues

AND IN THE MATTER OF further and better disclosure

BETWEEN SEAN MILLER
 Plaintiff

AND FONTERRA CO-OPERATIVE GROUP
 LIMITED
 Defendant

Hearing: 1 September 2010
 (Heard at Auckland)

Appearances: Tony Drake, counsel for the plaintiff
 John Rooney, counsel for the defendant

Judgment: 6 September 2010

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS (NO 2)

[1] The defendant has applied to the Court for further and better disclosure of documents said to be relevant to the proceedings and which have not been provided by way of informal disclosure in the lists of documents exchanged by the parties.

[2] The Court had recorded the parties' agreement to endeavour to complete disclosure by informal means, but following inspection of the exchanged lists the defendant served a form 6 notice under the Employment Court Regulations 2000 relating to five classes of documents concerning the Serious Fraud Office prosecutions of the plaintiff. The plaintiff in response served a form 7 objection. Counsel were agreed on a timetable in which the defendant would file and serve an application for further and better disclosure accompanied by an affidavit and the

plaintiff would file and serve a notice of opposition and any affidavits in opposition. The application for further disclosure would be heard on 1 September.

[3] The defendant sought orders declaring the plaintiff's objections to disclosure to be ill-founded and directing that all documents, whether in hard copy or electronic form, including all memoranda, file notes, letters, emails, meeting minutes, facsimiles and any other documents in any form whatsoever relating to the following items be disclosed:

- (i) the Serious Fraud Office's (**SFO**) investigation into the scheme under which dairy product was exported overseas in a way which circumvented the Dairy Board regime (**Scheme**), including (but not limited to) the SFO investigation into the Plaintiff's involvement in the Scheme;
- (ii) The SFO's decision to prosecute the Plaintiff and the grounds on which this decision was made;
- (iii) The guilty plea entered by the Plaintiff to Customs and Excise Act charges and the circumstances in which that guilty plea was made;
- (iv) Interactions between the SFO and the Plaintiff arising out of the SFO's investigation into the Plaintiff and its subsequent decision to prosecute the Plaintiff; and
- (v) All District Court documents and records relating to the SFO prosecution against the Plaintiff and including, but not limited to, affidavits filed, Court minutes and judgment.

[4] In support of the application, Mr Rooney submitted that the documents sought by the defendant were relevant when assessed against the pleadings in the case, that the requests were not oppressive and that the documents could not all be subject to legal privilege. He submitted that relevance is the key issue citing *Gilbert v Attorney-General in respect of the Chief Executive of the Department of Corrections (No 1)*.¹ As Mr Drake has observed, the test for relevance is dealt with expressly in reg 38 which provides:

38 Relevant documents

- (1) For the purposes of regulation 37 and regulations 40 to 52, a document is relevant, in the resolution of any proceedings, if it directly or indirectly—
 - (a) supports, or may support, the case of the party who possesses it; or

¹ [1998] 3 ERNZ 500.

- (b) supports, or may support, the case of a party opposed to the case of the party who possesses it; or
- (c) may prove or disprove any disputed fact in the proceedings; or
- (d) is referred to in any other relevant document and is itself relevant.

[5] Mr Rooney referred to paragraph 8 of the plaintiff's statement of claim where it is pleaded that the defendant is obliged to indemnify the plaintiff against losses and liabilities suffered "in consequence of him obeying his employer's orders or arising out of the reasonable performance of him carrying out his employer's work".

[6] This allegation is denied in the statement of defence which raises the issue of whether the plaintiff could have been said to have been obeying his employer's instructions and reasonably performing his duties at the relevant time. Mr Rooney submitted that the documents the defendant was seeking were relevant as they tended to support the defendant's contention that, as he was acting outside the Dairy Board regime, the plaintiff could not be said to have been reasonably performing his duties. They would also disprove the plaintiff's contention that he was acting in the normal course of his duties. The documents were also said to be relevant to causation issues because the defendant's claim is that it was the plaintiff's breaches of his employment obligations which resulted in the SFO laying charges against him and that it was the SFO's actions and his subsequent guilty plea to certain customs charges which caused any damage the plaintiff had suffered.

[7] Mr Rooney submitted that this was not a "fishing exercise" in the context of a disclosure action, referring to the following definition in *Matthes v New Zealand Post Ltd (No 1)*:²

A "fishing expedition", in the sense in which the phrase has been used in the law, means, as I understand it, that a person who has no evidence that fish of a particular kind are in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any there or not.

[8] Mr Rooney also cited *Polperro Corporation Ltd v International Marine Services Ltd*³ that the test for fishing is whether it is for a presently unpleaded cause of action as opposed to a disclosure request relating to an existing cause of action

² [1992] 3 ERNZ 145 at 156.

³ HC Auckland CIV-2006-404-2390, 22 November 2006.

and that the pleadings are central to the determination of that action. He then submitted that the documents were not listed by the plaintiff and took the Court through the lists that had been exchanged. He also submitted that the disclosure of the documents would not be oppressive.

[9] Mr Drake, in opposition, relied on the affidavit of Mr Miller sworn on 12 August 2010 and in particular on a letter from the defendant's then solicitors to the SFO on 18 December 2002, confirming that the defendant had retained copies of all the materials made available to the SFO, other than four CDs and six floppy disks. In Mr Drake's submission this meant that all of the voluminous material sought by the defendant in group (i) above, which he contended would have entirely filled the Courtroom to overflowing, were already in the possession and control of the defendant. He further submitted that most of that documentation had not been disclosed in the defendant's lists, presumably because the defendant viewed them as irrelevant. It would therefore be oppressive to require the plaintiff to disclose any of the documents of that class which he held.

[10] That contention appeared to carry the day in relation to this class of documents because Mr Rooney abandoned the defendant's request for documents in group (i) to be disclosed.

[11] The argument then centred around the other classes of documents. Mr Drake stated that the plaintiff had deposed in his affidavit, in relation to the SFO's decision to prosecute him, that the SFO never explained to him why it had decided to include him as a defendant in the proceedings and that he did not have any documents in which the SFO had provided him with any reasons for its decisions. It was common ground that the SFO had initially charged the defendant and other persons with fraud under the Crimes Act 1961, but later abandoned those charges and instead proceeded with charges under the customs legislation. In light of this affidavit evidence, the defendant abandoned any attempt to obtain disclosure of the documents in group (ii) relating to the SFO's decision to prosecute the plaintiff.

[12] I turn now to the remaining classes of document relating to the guilty plea entered by the plaintiff to the customs and excise charges, in respect of which it is

said the plaintiff was convicted and discharged and therefore, in law, deemed to be acquitted of these charges. Any of those documents in groups (iii), (iv) and (v) which the plaintiff may have had in his possession, or communications to and from the SFO relating to any prosecutions, which might constitute evidence as to whether or not his actions could have been said to have taken in obedience to his employer's orders, or arising out of his reasonable performance of his work, are relevant and their existence and present whereabouts should be disclosed. Formal communications between the plaintiff and any other persons relating to Court attendances in respect of the various prosecutions would not be relevant, but any exchanges relating to the events which gave rise to the prosecutions would be.

[13] I therefore directed the plaintiff to file and serve by 4pm on Friday 8 October 2010, an affidavit dealing with the documents in groups (iii) to (v) inclusive, of the defendant's application for further and better disclosure. This affidavit must show whether or not any of those documents that may exist are in the possession, custody or control of the plaintiff and, if not, whether any such document, or class of documents, was ever in the possession, custody or control of the plaintiff and, if so, when it was parted with and what became of it. The plaintiff is also free to claim legal professional privilege if such applies to any of those classes of document.

[14] Mr Drake then raised the issue of whether the Court should direct the defendant to file and serve an affidavit stating whether any of the documents it supplied to the SFO were relevant, in the sense discussed above. Mr Rooney pointed out that one of the documents annexed to the plaintiff's affidavit had come from the lists of documents disclosed by the defendant.

[15] Mr Drake will consider whether or not the plaintiff now seeks further and better discovery of the documents not listed by the defendant and will file and serve such an application by 4pm on Friday 8 October 2010, together with any affidavit in support.

[16] Both sides have obtained a measure of success in relation to the defendant's application for further and better discovery and this might be reflected in any costs

award. In the meantime costs are reserved and may be the subject of an exchange of memoranda, if counsel cannot agree.

[17] At the conclusion of the hearing Mr Drake raised another matter which was only drawn to the attention of the Court and the defendant on 1 September. This was the plaintiff's request to have the evidence of a witness be heard by video conference in New Plymouth, preferably during the first half of October 2010. The witness in question is very unwell and the prognosis of his medical advisors is that he may die before the end of this year.

[18] Mr Rooney had to obtain instructions having only just been served. He sought the opportunity to be present in New Plymouth, where the witness resided, when the evidence of the witness is led, in order to have the opportunity to cross-examine.

[19] Mr Drake appeared to consider that the matter could be dealt with by having counsel in Auckland and the witness in New Plymouth with the evidence being taken by way of a video conferencing facility. It was not clear from Mr Drake's submissions whether the trial Judge was intended to be present in New Plymouth while that evidence was being taken.

[20] In the event, the Court has made arrangements, on the basis of Mr Drake's application, for a Courtroom to be available in New Plymouth for a hearing commencing at 10am on Tuesday 5 October 2010, with the following day held in reserve if necessary. This will enable the evidence of the witness to be taken and the trial Judge and counsel can be present.

[21] Mr Drake is absent from New Zealand for the next three weeks. Because of the urgent necessity for Mr Rooney to be able to obtain instructions during the period leading up to the New Plymouth hearing, Mr Drake advised that the affidavit sworn by that witness on 29 May 2008, which was apparently filed in the Employment Relations Authority, and a copy of which is annexed to the plaintiff's affidavit sworn on 12 August 2010, would be the basis of that witness's evidence. That is not to be taken to prevent a small measure of expansion on that witness's

evidence if necessary. Mr Drake is to use his best endeavours to ensure that, if there is to be any supplementary material, it is to be provided to Mr Rooney as soon as possible before 5 October.

[22] Leave is reserved to the parties to apply for any further directions.

B S Travis
Judge

Judgment signed at 12.30pm on 6 September 2010