IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 49
ARC 45/09

IN THE MATTER OF	proceedings removed
AND IN THE MATTER OF	an application for orders regarding admissibility of affidavit evidence and certain documents
BETWEEN	SEAN MILLER Plaintiff
AND	FONTERRA CO-OPERATIVE GROUP LIMITED Defendant

Hearing: 20 February 2012
(Heard at Auckland)

Counsel: Tony Drake, counsel for Mr Miller
John Rooney, counsel for Fonterra Co-Operative Group Limited

Judgment: 19 March 2012

INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The defendant applies for orders that certain documents be ruled inadmissible. The application is opposed.

[2] The application arises in the context of a claim brought by Mr Miller against his former employer, Fonterra Co-operative Group Limited (Fonterra). He held positions in Kiwi Co-operative Dairies Limited (Kiwi) and then with the defendant company following amalgamation in October 2001. He, along with a number of other employees, was the subject of investigation by the Serious Fraud Office and was subsequently charged. The charges arose out of what has become colloquially known as "Powdergate". Mr Miller was ultimately discharged without conviction.

He essentially claims that he was drawn into litigation that he should never have been involved in, that Fonterra has an obligation to indemnify him against losses he says he suffered and that his employer was in breach of contract.

[3] Mr Miller wishes to use certain documentation in his proceedings in this Court. The documentation falls into three categories:

(a) A witness statement and transcript of evidence given in District Court proceedings by one of the defendant's former counsel (Mr Mehrtens) (document 76);

(b) Three documents which are said to contain legal advice and which were created in contemplation of litigation (documents 47, 54 and 57);

(c) An affidavit from a deponent (Mr Young) who has since passed away.

The documentation

[4] In 2002, the Serious Fraud Office compelled Fonterra to disclose a number of documents to it, including documents 47, 54 and 57. This was done pursuant to s 9 of the Serious Fraud Office Act 1990. On 5 November 2002, Fonterra waived privilege over the documentation provided to the Serious Fraud Office "insofar as it attaches to any of the documents solely for the purposes" of the investigation.

[5] Document 47 is a memorandum from legal advisers (Mr Harmos and Mr Gailbraith QC) to Fonterra dated 1 November 2002 relating to the stance taken on behalf of Fonterra in a meeting with the Serious Fraud Office. Document 54 comprises emails from Mr Mehrtens (then a partner with Russell McVeagh) to Fonterra containing advice on dealing with employees of Fonterra charged on related matters. Document 57 is a memorandum from Mr Smith (a partner with Russell McVeagh) to Mr Mehrtens analysing the application of the Dairy Board Act 1961 to Fonterra's situation and prepared for the purpose (Fonterra says) of giving advice to it.

[6] In 2004, former employees of Fonterra, including Mr Miller, were charged with criminal offending by the Serious Fraud Office. A depositions hearing in the District Court followed. Mr Mehrtens was subpoenaed by the Serious Fraud Office to give evidence, which he did on 16 May 2005.

[7] Mr Mehrtens initially declined to answer questions at the District Court hearing, on the basis of legal professional privilege. There was a brief adjournment, from 2.50pm to 3.15pm. Mr Matthews (General Counsel for Fonterra) was contacted and a request was made that he waive privilege on behalf of Fonterra to enable Mr Mehrtens to give evidence. Mr Matthews sought advice on the issue from Mr Smith, and he subsequently agreed to a limited waiver, which was expressed to be strictly for the purpose of Mr Mehrtens giving evidence in the Serious Fraud Office proceedings in the District Court.

[8] The limited nature of the waiver is reflected in an email from Mr Smith to Mr Mehrtens. That email was sent at 3.22pm on 16 May 2005. It recorded that Fonterra had waived privilege in the documents it had provided to the Serious Fraud Office (which included documents 47, 54 and 57) for its investigation and prosecution but that:

> The waiver is limited to these purposes. This releases you from your duty as a lawyer in respect of privilege to Fonterra in relation [to] this prosecution and any co-existing duty of confidentiality in relation to this prosecution. I have asked Gus Andre-Wiltens to make this clear to the Court and he has agreed to do so.

[9] Mr Andre-Wiltens was counsel for the Serious Fraud Office.

[10] The transcript of the depositions hearing (document 76) does not record that counsel did make this clear. While it appears that the transcript does not reflect a verbatim record of the exchanges with counsel, Mr Miller (who was present in Court on the day in question) says that Mr Andre-Wiltens did not advise the Court that Fonterra had given a limited waiver.

Parties' submissions

[11] The defendant submits that documents 47, 54 and 57 are privileged, that privilege in them has not been waived, and that Mr Mehrtens's statement and the transcript of evidence given in Court are inadmissible as they contain hearsay and relate to privileged matters, over which privilege has not been waived.

[12] The plaintiff submits that privilege has been waived. In this regard it is said that whatever Fonterra thought the position was in relation to the scope of waiver, that was not communicated in Court and nor was there any agreement with others present in Court (including the public and the media) as to the basis on which the evidence was being given. It is submitted that, absent such agreement or suppression orders having been made, there was effectively a wholesale waiver of privilege.

[13] The plaintiff further submits that the Evidence Act 2006 does not apply to proceedings in the Employment Court and nor does it, in any event, apply to Mr Mehrtens's statement and transcript of evidence which was made prior to the Evidence Act coming into force.[1]

[14] Mr Drake, counsel for the plaintiff, also developed an argument that if the Evidence Act 2006 did apply, the transcript and statement were admissible. He said that Mr Mehrtens would be summonsed to give evidence in this Court. If he declined to answer questions, his previous statement in the District Court would be put to him. In these circumstances, it was submitted that the previous statement would be admissible under the Evidence Act 2006 as a previous statement.

Does the Evidence Act 2006 apply?

[15] It is clear that the Employment Court has a very broad discretion to admit or to refuse to admit evidence. The interests of justice in the particular case will be the ultimate determiner.[2] While the Court has the power to admit such evidence as in equity and good conscience it thinks fit,[3] there is a recognised utility in having

[1] Mr Mehrtens gave evidence on 16 May 2005, and his statement is dated 14 October 2004.
[2] *Auckland District Health Board v Bierre* [2011] NZEmpC 108 at [7].
[3] Section 189(2), Employment Relations Act 2000.

regard to how the courts of ordinary jurisdiction deal with issues relating to the admission of evidence and "what, if anything, the Evidence Act says about it."[4] I consider that the desirability of this approach is particularly pronounced where, as here, significant but uncertain issues arise in relation to waiver of privilege. In my view, there is a broader public interest in a consistency of approach, and of lawyers being in a position to advise their clients with a degree of certainty.

[16] Counsel for the plaintiff referred to *Todd Pohokura Ltd v Shell Exploration NZ Ltd*[5] and *Fresh Direct Ltd v J M Batten & Associates*[6] as authority for the proposition that ss 54 and 56 of the Evidence Act 2006 do not apply retrospectively to communications made before the Act came into force. The privileges at issue in those cases (legal professional privilege (now s 54) and litigation privilege (now s 56)) were held to be substantive legal rights which existed prior to the introduction of the Evidence Act.[7]

[17] While not referred to by counsel, the Court of Appeal considered the issue of waiver of privilege in *R v Bain*,[8] in terms of s 65 of the Evidence Act 2006. The limited waiver at issue in that case had occurred before the Evidence Act 2006 came into force. The Court observed that privilege might be thought to be substantive rather than procedural, so there was scope for the question as to whether the waiver issue should be determined under the Evidence Act. However, the Court stated that this was a "dry debate as there is no indication that s 65 was intended to change the existing law in any material respect."[9]

Privilege

[18] At common law, confidential communications between a client and his/her legal adviser, made for the purpose of obtaining or giving legal advice, were in

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[4] *Ravnjak v Wellington International Airport Ltd* [2011] NZEmpC 31 at [53]. See too *Mana Coach Services Ltd v NZ Tramways and Public Passenger Transport Union (Wellington Branch) Inc* WC13A/08, 30 June 2008 at [13]; *Bierre* at [7] .
[5] (2008) 18 PRNZ 1026.
[6] (2009) 20 PRNZ 126.
[7] See also *Jung v Templeton* HC Auckland CIV-2007-404-5383, 30 September 2009.
[8] [2008] NZCA 585.
[9] At [70]; see the Court of Appeal's later judgment in *R v E(CA113/2009)* [2009] NZCA 554 at [31].

general protected from disclosure without the client's consent or waiver.[10] Litigation privilege provided protection against disclosure of communications between a person or his or her legal adviser, and a third party for the purposes of pending or contemplated adversarial litigation.[11] A "mere vague apprehension of litigation ... is not sufficient" but if documents are created in the "bona fide belief that litigation will probably ensue" then privilege will attach (provided other elements of the test are made out).[12] The common law position is largely reflected in ss 54 (Privilege for communications with legal advisers) and 56 (Privilege for preparatory materials for proceedings) of the Evidence Act 2006.

[19] There is no question that the relationship of solicitor/client existed at the time documents 47, 54 and 57 were made. Nor is there any doubt that they were made by a legal adviser to Fonterra. Document 47 is a memorandum from legal advisers (Mr Harmos and Mr Gailbraith QC) to Fonterra dated 1 November 2002 relating to the stance taken on behalf of Fonterra in a meeting with the Serious Fraud Office, and gives advice on issues relating to waiver of privilege/confidentiality. The document was prepared when litigation (namely prosecution by the Serious Fraud Office) was in contemplation. Document 54 is a chain of emails between Mr Mehrtens (acting as legal adviser for the defendant) and Mr Dale (of the defendant company). It contains advice on dealing with two other employees and disciplinary processes relating to them. This exchange occurred in contemplation of legal proceedings (namely claims by the employees referred to in the emails).

[20] Document 57 is a memorandum from Mr Smith of Russell McVeagh to Mr Mehrtens. The plaintiff submitted that this document contains no legal advice to a client and accordingly does not attract privilege. I do not accept that submission. The document was prepared for the purpose of providing legal advice to the defendant regarding possible offences under the Dairy Board Act 1961, and was prepared in contemplation of legal proceedings (namely a prosecution or civil proceedings for alleged breaches of the Act).

[21] I conclude that each of these documents is prima facie subject to privilege.

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[10] *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC) at [37].
[11] *Fresh Direct* at [45].
[12] *Laurenson v Wellington City Corporation* [1927] NZLR 510 at 511 .

Waiver?

[22] Section 65 of the Evidence Act 2006 provides that:

> (1) A person who has a privilege conferred by any of sections 54 to 60 and 64 may waive that privilege either expressly or impliedly.
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> (2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information opinion, or document in circumstances that are inconsistent with a claim of confidentiality.
>
> ...
>
> (4) A person who has a privilege in respect of a communication, information, opinion, or document that has been disclosed to another person does not waive the privilege if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.
>
> …

[23] Each of the above documents was provided to the Serious Fraud Office under compulsion under s 9 of the Serious Fraud Office Act. They were before the District Court in the depositions hearing undertaken in the context of the Serious Fraud Office prosecution and were referred to in Mr Smith's email to Mr Mehrtens dated 16 May 2005.

[24] The plaintiff argues that any privilege that may have existed in relation to the documents has been waived. Waiver is said to be reflected in an indication given by the defendant to the Serious Fraud Office in November 2002 at a meeting that privilege in those documents would be waived; the defendant's disclosure of the three documents to the Serious Fraud Office in December 2002; its failure to take up the Serious Fraud Office's offer to return a copy of the documents; and counsel's recorded advice to the District Court that Fonterra had waived all right to privilege in all documents in Court.

[25] I do not consider that the sequence of events relied upon by counsel for the plaintiff provides evidence of a waiver of privilege.

[26] The notes of the November 2002 meeting do not support the plaintiff's submission that a waiver had been given. The notes simply record that consideration had been given to waiver but that further consideration was to be given to the issue.

[27] While the defendant did not request a copy of the documentation from the Serious Fraud Office, that falls well short of conduct amounting to a waiver. Counsel for the plaintiff submitted that the defendant's failure to take up the offer of return of the documents would have resulted in more copies of the documentation being in existence. However, as Mr Rooney (counsel for the defendant) pointed out, s 9(2)(a) of the Serious Fraud Office Act enables the Office to return to a party "a copy" of any documentation it has received under its powers. The fact that Fonterra chose not to have a copy returned effectively reduced the number of documents in circulation, rather than increased them. And, as Mr Rooney noted, given Fonterra already held the documents, declining the offer from the Serious Fraud Office was not, in the circumstances, surprising.

[28] It is clear from the documentation that Fonterra was granting a limited waiver to Mr Mehrtens to enable him to respond to questions in the District Court and that it was strictly for the purposes of those proceedings. This is reflected in Mr Smith's email to Mr Mehrtens (copied to Mr Matthews), shortly after discussions had taken place on the issue during the afternoon adjournment and is further reflected in subsequent documents sent to Mr Mehrtens referring to the limited nature of the waiver.

[29] While counsel for the plaintiff sought to rely on Mr Mehrtens's emailed response (referring to a waiver simpliciter) to a communication from Mr Matthews dated 18 December 2008 querying why Mr Mehrtens had prepared a witness statement in the Employment Relations Authority (which he advised he had not in fact done), that overlooks the content of Mr Matthews's letter (which Mr Mehrtens was responding to) where he specifically refers to a limited waiver having been given.

[30] Counsel for the plaintiff essentially argues that because the defendant voluntarily decided to waive privilege for the purposes of the District Court

proceedings, although under no compulsion to do so, the cat was effectively out of the bag and could not be put back in. That is an argument that did not find favour with the Privy Council in *B v Auckland District Law Society*.[13]

[31] *B v Auckland District Law Society* involved a disclosure of documents to the Law Society on "the express basis that, in doing so, privilege is not waived, and that the documents will not be further copied".[14] The Privy Council considered that the sanctity of privilege required a balancing of the public interest in the maintenance of the integrity of the legal profession through holding such professionals accountable and the public interest in the administration of justice. Their Lordships considered that this balance had been struck in the favour of the administration of justice and, in particular, that a lawyer should be able to give his/her client an absolute and unqualified assurance that whatever the client tells him/her in confidence will never be disclosed without his/her consent.[15] The Privy Council accepted that privilege was not waived generally simply because it had been waived for a limited purpose, and that:[16]

> The question is not whether privilege has been waived, but whether it has been lost. It would be unfortunate if it were. It must often be in the interests of the administration of justice that a partial or limited waiver of privilege should be made by a party who would not contemplate anything which might cause privilege to be lost, and it would be most undesirable if the law could not accommodate it.

[32] The approach adopted by the Privy Council is consistent with the observations made by Tipping J in his dissenting judgment in the Court of Appeal in *B.* There he emphasised that partial waiver is about the use of information in certain circumstances, and observed that:[17]

> The right to withhold necessarily carries with it the right to prevent use. There is in reality therefore no necessary inconsistency in agreeing to disclose while at the same time reserving privilege in relation to the use that can be made of the disclosed material. In such circumstances the purpose of the exercise is clearly to prevent use, either absolutely or according to the tenor of the reservation. There does not seem any reason of principle why

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[13] [2004] 1 NZLR 326 (PC).
[14] At [9].
[15] At [47].
[16] At [68], citing *British Coal Corporation v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113 (CA) and *Bourns Inc v Raychem Corp* [1999] 3 All ER 154 (CA).
[17] *Auckland District Law Society v B* [2002] 1 NZLR 721 at [157].

> the common law right to withhold privileged information cannot be waived subject to conditions. This is often referred to as a partial waiver.

[33] The Court of Appeal has most recently considered the issue of partial waiver in *R v Bain.*[18] Mr Bain had consented to a waiver of privilege over a notation made on summarised evidence material supplied by his counsel, for the purposes of a Ministry of Justice inquiry into issues raised by his petition to the Governor-General. The notation was referred to in the subsequent Thorp report, the Ministry of Justice report, and the Order in Council referring the matter to the Court of Appeal. At the subsequent first Court of Appeal hearing no objection was taken to the admission of expert Crown evidence relying on the notation, and Mr Bain's counsel expressly raised the notation in cross-examination. The Court of Appeal held that the original release of the notation to the inquiry was covered by the limited waiver, and that that waiver was not inconsistent with maintaining privilege in terms of s 65(2) of the Evidence Act 2006 at the retrial.[19] The Court held too that it was clear that privilege had been waived entirely for the purposes of both Court of Appeal hearings.[20] The more difficult issue, the Court concluded, was whether privilege could be reasserted at the retrial. It found that it could not.

[34] The Court had regard to a number of points in reaching that view, which it said "in their totality" were of controlling significance.[21] Namely, the fact that the evidence was adduced in open Court; there was no indicia of confidentiality or privilege being maintained or that waiver was for the hearings only; the expert's affidavit was part of the Court records; and the relevant passage was a matter of public record as it was part of the judgment of the Court resulting from the second Court of Appeal hearing. Confidentiality had been lost by the expert referring to the notation in open Court with the consent of Mr Bain's counsel.[22]

[35] Despite these findings, the Court of Appeal noted that:[23]

> We can conceive of situations where privileged material might be referred to in Court and produced in evidence without a general loss of privilege. But a

[18] The Privy Council's judgment in *B* is not referred to in the *Bain* judgment.
[19] *Bain* at [72].
[20] At [73].
[21] At [82].
[22] At [82]-[83].
[23] At [80].

> party who wishes to make only a limited waiver of privilege should act accordingly (for instance by making it clear that the waiver is limited and taking steps to ensure that the loss of confidentiality in the material is confined to what is necessary for the purposes of the limited waiver).

[36] The Court relied on s 65(2) in concluding that there had been consent to the disclosure of information in circumstances inconsistent with a claim of confidentiality. Mr Bain's actions following the limited waiver had effectively broadened the scope of the original waiver to the extent that the waiver had become unlimited. The Court observed that whether a limited waiver could be maintained turned "on what happened downstream" of the limited release.[24]

[37] Mr Drake submitted that while Fonterra may have chosen to provide a limited waiver over privilege for the purposes of enabling Mr Mehrtens to give evidence in the District Court, the fact that any such restriction on waiver was not communicated in Court by counsel was fatal. The submission overlooks the fact that counsel was appearing on behalf of the Serious Fraud Office, not Fonterra. The Serious Fraud Office was not in a position to waive privilege on Fonterra's behalf.

[38] There appears to have been no indicia of confidence or privilege being maintained or of limited waiver at the District Court hearing, in the sense identified by the Court of Appeal in *Bain*. However, what is plain is that Fonterra took steps to limit the use of its information, both in its earlier letter to the Serious Fraud Office in November 2002 and in its subsequent communications to counsel for the Serious Fraud Office in response to its request for waiver. Fonterra made it clear that waiver was for limited purposes, and strictly for the investigation and prosecution. It took the additional step of requesting that the Court be informed of the nature of the waiver that had been given and of seeking (and obtaining) an assurance that that would be done. Little more could have been done in the circumstances to reinforce the point.

[39] Notably in *Bain*, it was Mr Bain's counsel who took no objection to the admission of the notation, and who raised the matter in cross examination. In the present case, it was the Serious Fraud Office (rather than Fonterra) who put the

[24] At [72]. See too the approach adopted by Asher J in *Body Corporate 191561 v Argent House Ltd* (2008) 19 PRNZ 500 (HC), at [26].

documents before the Court and counsel for Mr Miller (through cross examination) who adduced further evidence. Accordingly, Mr Bain was the master of his own ship (and responsible for its subsequent sinking) in a way that Fonterra was not.

[40] Further, what occurred "downstream" in terms of the limited waiver in the present case cannot be regarded as fatal. Fonterra reasserted its limited waiver at the time the evidence was given (via Mr Smith's email). This can be contrasted to the circumstances that arose in *Bain*, where there was an apparent abandonment of the limitation earlier imposed. At no stage did Fonterra contemplate that its privilege had been lost and at no stage did it accept, either expressly or impliedly, that it had lost privilege.

[41] Counsel for the plaintiff places particular reliance on the fact that the material is now part of the public record. This was a factor identified by the Court of Appeal in *Bain* but not one that it regarded as determinative.[25] And in *R v Marks*,[26] Chambers J accepted that a waiver had been made by the accused for the limited purpose of his legal counsel giving evidence at a hearing as to a change of plea, but held that the Crown could not lead evidence from the counsel in the context of a subsequent sentencing hearing as the privilege remained intact.[27]

[42] It is clear from Mr Matthews's affidavit and the material annexed to it, that Fonterra waived privilege over the documentation and allowed Mr Mehrtens to answer questions, for the limited purpose of the District Court proceedings, but not more broadly. Fonterra agreed to a limited waiver to assist in the administration of justice and it is apparent (from Mr Matthews's affidavit) that it would not have contemplated anything which might have caused privilege to have been lost. To adopt the approach of the Privy Council in *B*, it would be most undesirable if the law could not accommodate it.

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[25] Refer *Bain* at [80]. The earlier observation concerning the evidence being in the public domain, at [73], is plainly qualified by the Court's acceptance of circumstances where privilege may not be lost, despite production in open Court.
[26] HC Auckland S38/02, 17 April 2003.
[27] At [37] and [42]-[43].

[43] The legal professional privilege and litigation privilege otherwise attaching to the documents in issue was not lost, and can be relied on by the defendant in these proceedings.

[44] In light of my findings, I do not need to consider the defendant's secondary argument that the documents contain hearsay. The argument advanced on the plaintiff's behalf in relation to the extent to which Mr Mehrtens may be called to give evidence and documents may be put to him is effectively answered by the analysis in *R v Marks*. It would be contrary to principle to allow the rules of privilege that otherwise apply to be circumvented in the way that counsel proposed.

Mr Young's Affidavit

[45] Mr Young was the Chairman of Kiwi Co-operative Dairies Limited between 1994 and 2000. He became Kiwi's representative on the New Zealand Dairy Board.

[46] The plaintiff commenced proceedings in the Employment Relations Authority on 12 October 2007. He says he became concerned with delays in scheduling a hearing date and that those concerns were exacerbated by Mr Young's age and health, given that the plaintiff regarded him as an important witness. He says that he contacted Mr Young, and that Mr Young confirmed that he would be happy to provide an affidavit and that he was also giving evidence for another former employee of Kiwi, Mr Wackrow. Mr Miller says that Mr Young told him that he would provide the affidavit in a form that could be used for both sets of proceedings. Mr Young's affidavit is dated 29 May 2008.

[47] Twenty months after filing the claim, the plaintiff applied for removal to this Court, filing Mr Young's affidavit in support. Mr Matthews, General Counsel for Fonterra, swore an affidavit filed in opposition to the application in which he responded to various points in Mr Young's affidavit. No objection was taken to Mr Young's affidavit at this time, and nor was any objection taken in the context of a subsequent application for further and better disclosure. The removal application was granted.

[48] The plaintiff then applied for leave to have Mr Young's evidence taken at a distance. That application was granted but Mr Young died before he had the opportunity to give evidence.

Parties' submissions

[49] The defendant opposes the admission of Mr Young's affidavit, primarily on the basis that the circumstances surrounding its making do not provide a reasonable assurance of its reliability, and that admission of the affidavit would be unduly prejudicial. In relation to reliability, it is said that it was prepared in respect of separate proceedings before the Employment Relations Authority, brought by another former employee of the defendant (Mr Wackrow) and that there is nothing to suggest that Mr Young had the opportunity to review the pleadings or other documents before preparing his affidavit. Reference is made to the different nature of the pleadings in the Authority as opposed to this Court. It is further submitted that the defendant would be prejudiced if the affidavit was allowed in evidence as he would not be available for cross-examination.

[50] The plaintiff submits that the affidavit has been produced in evidence in this proceeding previously with no objection having been made by the defendant as to its admissibility. The plaintiff says that he will suffer prejudice if he cannot rely on the affidavit as Mr Young was in a "unique" position. Counsel also submitted that the affidavit was admissible under s 189 of the Employment Relations Act 2000 and that it would be unjust to exclude it.

Discussion

[51] The affidavit comprises a hearsay statement. It is being offered in these proceedings to prove the truth of its contents and Mr Young is not available to give evidence.[28] A hearsay statement is admissible in any proceeding if the circumstances relating to the statement provide reasonable assurance that the statement is reliable and the maker is unavailable as a witness.[29] Factors that are relevant to a

[28] Section 4, Evidence Act 2006.
[29] Section 18, Evidence Act 2006.

determination of reliability under the Evidence Act 2006 include the nature of the statement; its contents; the circumstances relating to the making of the statement; the circumstances relating to the veracity of the person making the statement and the circumstances relating to its accuracy (s 16(1)).

[52] Mr Young's statement is contained in a formal document, namely a sworn affidavit. Mr Young was the Chairman of Kiwi and was Kiwi's representative on the Dairy Board for three years. He undoubtedly had extensive experience and knowledge of the dairy industry. He also had some involvement in events that are relevant to the plaintiff's claim. The affidavit is internally consistent. There is nothing before the Court to suggest that Mr Young's veracity is in issue.

[53] However, much of the content of the affidavit is of peripheral, rather than direct, relevance. The affidavit traverses Kiwi's growth in the industry, deregulation of the industry, and Mr Young's perception of how effective the Board was in a number of areas.

[54] Reference is made in the affidavit to the Serious Fraud Office's investigation and Mr Young's view that the allegation of conspiracy to defraud against Mr Miller and three others was unfounded. It is said that:

> The work that those individuals carried out for Kiwi ... was in accordance with the encouragement Kiwi's Board gave to the executive group to aggressively grow sales ... The lower level staff, such as Steve Wackrow and Sean Miller, undertook their work as per the directions of their senior managers. In doing their work the four employees had the Board's authorisation and approval.

[55] No detail is provided in support of these assertions, including the nature of the directions said to have been made by senior managers; the identity of those persons; or the scope and nature of any authorisation or approval given by the Board.

[56] The affidavit also sets out Mr Young's belief that the charges stemmed from internal rivalries and jealousies, although no detail is provided in support of this assertion either. The affidavit contains hearsay, including reference to discussions Mr Young is said to have had with the Serious Fraud Office, advising investigators

that its investigation should focus on the chairmen of the boards of the dairy companies and of the Dairy Board itself, as the activities were corporate in nature.

[57] The affidavit was prepared some years after the key events complained about. It does not contain significant detail about events relating to Mr Miller's employment; rather it contains generalised statements about Mr Young's perception of pressure that was placed on employees such as Mr Miller by senior management. It does not contain any real detail in relation to Mr Miller (indeed Mr Miller is only mentioned twice), and does not expressly address the allegations in the statement of claim or defence. The latter omission is not surprising given that the affidavit pre-dates the filing of both documents.

[58] The defendant submitted that Mr Young's affidavit was prepared prior to the removal of proceedings to the Court, that the statement of claim is materially different from the grievance filed in the Authority, and that there is nothing to suggest that he had the opportunity to review the pleadings and respond to them in his affidavit. These factors, it is submitted, undermine the reliability of Mr Young's statement.

[59] I do not consider that the fact that a statement does not specifically address allegations in a set of pleadings, or pre-dates proceedings having been filed, of itself makes it unreliable. And while there are differences between the grievance filed in the Authority and the challenge in this Court, the key allegations are reflected in both – namely that Mr Miller was acting in accordance with instructions from his employer, and that his employer should have been aware of the potential for liability.

[60] It appears from Mr Miller's affidavit that Mr Young swore his affidavit in the knowledge that it would be available to be used in the plaintiff's proceeding. While Mr Miller was not cross-examined on his evidence as to the circumstances surrounding the preparation of Mr Young's affidavit, aspects of it were rightly criticised for containing hearsay, particularly in relation to conversations which Mr Miller says his counsel had with Mr Young, and to which he was not privy.

[61] While the Employment Court is not required to apply the provisions of the Evidence Act, they do provide useful guidance. Section 8 states that the Court must exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding. The defendant advanced arguments under both limbs. The submission that admission of the affidavit would needlessly prolong the hearing was not developed and lacks any real weight.

[62] The ability to cross-examine witnesses called by any opposing party is part of the right to a fair hearing. The importance of this is increased where the evidence of the witness is crucial to the plaintiff's case. However, the right to cross-examine is not an absolute right. The Act specifically contemplates circumstances in which evidence will be admitted even when a witness is not available for cross-examination.[30]

[63] Counsel for the plaintiff asserted that the defendant would suffer no prejudice if Mr Young's affidavit was admitted, despite the fact that it would have no ability to test the contents of it through cross-examination. I do not accept Mr Drake's submission on this point. It is plain that some prejudice will flow, having regard to the content of the affidavit, the assertions contained within it as to the actions of senior management and the Board, and the fact that those assertions will not be able to be explored or tested through cross examination of Mr Young. Sweeping statements, unsupported by detail, are easy to make and difficult to refute. The generality of the statements made by Mr Young may make them difficult to respond to in the absence of cross-examination.[31]

[64] In considering the application in terms of s 189, I have regard to a number of other factors. Counsel for the plaintiff submitted that Mr Miller would be substantially prejudiced if he could not rely on Mr Young's affidavit. This was said to bolster the argument that admitting the affidavit would be just in the circumstances. However, Mr Young was one of a number of people who were on the

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[30] *R v L* [1994] 2 NZLR 54 (CA) at 61. *R v L* was decided under the Evidence Amendment Act (No 2) 1980, referring to s 3(1)(a). That provision is in similar terms to s 18 of the 2006 Act.

[31] See, for example, the discussion of the prejudice attaching to general statements in a deceased person's statements in *R v Reihana* HC Rotorua CRI 2005-070-7328, 9 May 2007 at [24].

Board at the relevant time. Counsel accepted that part of the evidence contained in Mr Young's affidavit can and will be given by others. It was said that Mr Young was in a "unique" position, as Chairman of the Board and as Mr Miller's employer. He was not, however, Mr Miller's employer, and although he was Chairman of the Board, his comments are directed to other Board members who may be well placed to give evidence on the matters referred to in Mr Young's affidavit. It was further said that Mr Young was the only person who could give evidence about his discussions with the Serious Fraud Office and, in particular, his advice to officials that they should be focusing their attention at a corporate level. However, any such evidence is of marginal relevance to the matters at issue in these proceedings.

[65] I refer to two further submissions advanced on the plaintiff's behalf. First, that it would frustrate Mr Young's intention that his evidence be taken into account if his affidavit was not admitted and that this would be contrary to the scheme of s 189 of the Act. Second, that the plaintiff is being put to formal proof as to the way the dairy industry was operating given that the defendant has not admitted these allegations contained within the statement of claim and that, in the circumstances, the plaintiff's job is being made harder by the position being adopted by the defendant. This, it is said, is also contrary to the scheme of s 189.

[66] While Mr Young's intentions in swearing his affidavit may be generally relevant to the circumstances surrounding its creation, and accordingly reliability, they cannot trump the other factors required for the Court's consideration. Probative value and prejudice are cornerstones of the Court's inquiry. Nor do I consider that a defendant is obliged to admit allegations simply to lessen the burden on a plaintiff to prove key elements of its claim. The defendant is entitled to put the plaintiff to proof, and that cannot in principle be contrary to s 189.

[67] Counsel for the plaintiff sought to make something of the fact that Mr Young's affidavit was already part of the evidence that had been produced and relied on in the context of these proceedings without any objection having been raised by the defendant as to its accuracy or reliability. That may be so but the issue of accuracy and reliability did not arise in the context of the applications being advanced, given that they related to removal of the case into this Court and the

subsequent application to take Mr Young's evidence in advance. As counsel for the defendant submitted, the time to challenge the accuracy or reliability of that evidence was at the hearing that was timetabled to occur but which did not for reasons outside the control of either party (or the Court).

[68] I consider that there is a risk of prejudice to the defendant in admitting Mr Young's affidavit. However, standing back and weighing the competing factors that have been identified, I am satisfied that any such prejudice (and the obvious shortcomings of Mr Young's affidavit) can be managed in terms of the weight that is accorded to it at the hearing.

[69] The affidavit is admissible but the weight to be given to it will be a matter for the trial judge.

Result

[70] Mr Young's affidavit is admissible. The weight to be accorded to it is for the trial judge.

[71] Documents 47, 54, 57 and 76 are not admissible.

[72] Costs are reserved.

Christina Inglis
Judge

Judgment signed at 9.45am on 19 March 2012