IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 138
EMPC 112/2015

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	NEW ZEALAND MEAT WORKERS UNION INC Plaintiff
AND	SOUTH PACIFIC MEATS LIMITED First Defendant
AND	MICHAEL ANTHONY TALLEY Second Defendant

Hearing:	10 July 2015 and by written submissions filed on 14 July 2015 (Heard at Wellington)
Appearances:	P Churchman QC, counsel for plaintiff C Pidduck, counsel for defendants
Judgment:	7 August 2015

JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] This judgment decides a question of law posed by the Employment Relations Authority under s 177 of the Employment Relations Act 2000 (the Act). The Authority considers it necessary to obtain the answer to the question before it continues further with its investigation of the claims of the New Zealand Meat Workers Union Inc (the Union) against South Pacific Meats Limited (SPML) and Michael Talley.[1]

[2] Literally almost on the eve of the hearing, the defendants changed solicitors and counsel so that the synopsis of submissions filed in advance by the defendants'

[1] *New Zealand Meat Workers Union Inc v South Pacific Meats Ltd* [2015] NZERA Christchurch 54.

previous solicitor were adopted but also expanded upon by new counsel, Ms Pidduck. This had two consequences.

[3] The first was that when I asked Ms Pidduck whether there were indeed documents that would incriminate the defendants if disclosed, counsel could not respond without conferring with the defendants' former solicitor. Until then, the Authority, the plaintiff's counsel Mr Churchman, and the Court had assumed that there were such documents although this had not ever been confirmed by the defendants. On the hearing day, however, Ms Pidduck was able to confirm that there are several such documents held by the defendants although none seems likely to be incriminatory for the purpose of criminal prosecution of either of the defendants.

[4] The second consequence of the late change of representation was that Ms Pidduck referred to additional material for which Mr Churchman had not been prepared in advance so that he was allowed the period of seven days within which to consider and respond to that further material, principally Law Commission reports and some further cases which have now been dealt with in submissions filed subsequently.

The Authority's question of law

[5] This is as follows:

> … whether in an application by a party for orders seeking the disclosure of documents which would appear to be pertinent to a proceeding in the Authority, such an order can be granted even although it appears that the granting of such an order may have the effect of putting before the Authority material which could support an application against the party providing the documents, for the imposition of a penalty.

Parties' agreed background material and the Authority's factual findings

[6] On 18 May 2015 counsel for the parties filed an agreed summary of facts, the material parts of which are as follows:

> 1. This matter concerns proceedings brought by the plaintiff against the first and second defendants in the Employment Relations Authority ("the Authority").

2. The plaintiff is a trade union, incorporated under the Incorporated Societies Act 1908 and having its registered office at Christchurch.

3. The first defendant is a company incorporated under the Companies Act 1993 having its registered office at Horotiu.

4. The first defendant is a wholly owned subsidiary of AFFCO New Zealand Limited which in turn is a wholly owned subsidiary of AFFCO Holdings Limited. AFFCO Holdings Limited is a wholly owned subsidiary of Talley's Group Limited ("Talley's").

5. The second defendant is a director of the first defendant. The other directors are Andrew Ivan Talley and Samuel Lewis.

6. In these proceedings, it is alleged by the plaintiff, but denied by the defendants that the second defendant effectively controls the first defendant.

7. The first defendant operates meat processing plants at Awarua near Invercargill in Southland ("Awarua") and at Malvern near Rolleston in Canterbury ("Malvern").

8. The first defendant employs meat workers at both the Awarua and Malvern plants. These employees are members of, or eligible to be members of, the plaintiff. The first defendant alleges that it has to date only been notified of current members of the plaintiff at each plant.

9. The plaintiff alleges that the first defendant has interfered with the plaintiff's right of access to the first defendant's plants situated at Awarua and Malvern, in breach of s 20 of the Employment Relations Act 2000 ("the Act"). This is denied by the defendants.

10. The plaintiff also alleges that the second defendant has breached the Act by inciting, instigating, aiding or abetting the first defendant in breaching s 20 of the Act. This is also denied by the defendants.

Directions in the Authority

11. On 3 March 2015, a Notice of Direction was issued by Member Crichton following a telephone conference on 2 March 2015.

12. Paragraph 4 of the Notice of Direction stated that Mr Churchman was to write to Ms Webster[2] seeking disclosure. Leave was reserved for the parties to come back to the Authority in the event of any difficulties.

13. At the teleconference on 3 March 2015 Mrs Webster noted that "she did not think that [disclosure] would be an issue".

[2] The defendants' former solicitor.

Disclosure of documents

14. The plaintiff sought disclosure on 9 March 2015 from the first and second defendant of the communications between the directors of the first defendant and its managers on issues of access to the Awarua and Malvern plants.

15. The disclosure was sought to ascertain exactly what the second defendant did or did not do in communicating with the managers of the first defendant in relation to access by the plaintiff's officials. The plaintiff asserts that this information goes to the heart of these proceedings.

16. On 12 March 2015 by email, Mrs Webster, on behalf of the defendants, refused to disclose the information requested, citing the privilege against self incrimination.

Orders sought

17. The plaintiff sought an order under s 160(1)(a) of the Act on 9 April 2015 that the defendants provide copies of all documentation including letters, emails, memoranda and notes of telephone conversations between the directors of the first defendant and managers of the first defendant in relation to the exercise of statutory rights of access by the plaintiff.

18. On 13 April 2015, the defendant responded to the plaintiff's application for direction, submitting that the order should not be granted as to do so would offend against the general law of discovery which recognises that a party is entitled to object to the production of documents that are likely to expose the party to any penalty.

[7] At the direction of the Court, on 21 May 2015 the Authority, by Minute, set out the statutorily required full, but concise, statement of material facts of the problem or matter to which the question of law relates. This is materially as follows:

> [4] The essence of the claim made by the applicant Union is that the first respondent has unlawfully interfered with the Union's rights to have access to two of the first respondent's meat works at Awarua and Malvern, that that interference constitutes a breach of the good faith obligation and further that the second respondent incited, instigated and aided and abetted the first respondent to commit the breaches alleged.
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> [5] In addition to resisting the Union's claims, the respondents also filed an application for a non publication order in respect to the second respondent on the footing that the allegations would damage Mr Michael Talley's reputation with *"unsubstantiated and spurious allegations"*.
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> [6] South Pacific Meats Limited is a wholly owned subsidiary of AFFCO New Zealand Limited which itself is a wholly owned subsidiary of AFFCO Holdings Limited which in turn is a wholly owned subsidiary of Talley's Group Limited.

[7] The second respondent, Michael Anthony Talley, is one of three directors of Talley's Group Limited (Talley's) and it is said for the applicant Union that Michael Talley *"effectively controls the first respondent"*.

[8] South Pacific Meats Limited operates meat processing plants, the subject of the employment relationship problem, at Awarua in Southland and at Malvern in Canterbury. Those two plants employ meat workers who are members of the applicant Union or who are eligible to become members of the applicant Union.

[9] Bargaining has been initiated for a collective employment agreement and in that context, the Union has sought access to the subject plants pursuant to s.20 of the Employment Relations Act 2000 (the Act) in order to engage with members and/or to recruit members.

[10] In two separate determinations of the Authority, respectively in 2012 and 2014, the Authority held that South Pacific Meats Limited had imposed unlawful restrictions on the exercise by the applicant Union of its statutory rights of access pursuant to s.20 of the Act.

[11] Those determinations are respectively *New Zealand Meat Workers Union Inc v. South Pacific Meats Ltd* [2012] NZERA Christchurch 21 (10 breaches of s.20 of the Act identified in a less than 12 month period), and *New Zealand Meat Workers Union Inc v, South Pacific Meats Ltd* [2014] NZERA Christchurch 141 (where the Authority found seven breaches of s.20 of the Act in a six week period between mid-October and late November 2013).

[12] Penalties were imposed by the Authority on each occasion and in the earlier determination, the Authority attempted to provide some guidance to South Pacific Meats Limited on its legal obligations in the matter.

[13] Despite those two determinations of the Authority, the Union alleges that South Pacific Meats Limited has continued to breach s.20 of the Act; the Union also alleges, relevantly to the position of the second respondent, Mr Talley, that Michael Anthony Talley disagrees with the Authority's determinations and seeks to encourage South Pacific Meats Limited to continue to breach s.20 of the Act.

[14] The present application encompasses allegations of breaches of s.20 of the Act pertaining to both sites. There are over a dozen individual claims of breach by the applicant Union. Characteristic of these alleged breaches were the artificially constraining of the time allowed for Union officials to attend at one or other of the sites, the requirement that a member of the management team of South Pacific Meats Limited be in attendance during some of the access visits sought, a failure to disclose to the applicant Union when new staff were being inducted so as to frustrate (it is said) the recruiting of those staff as Union members, a refusal on one occasion to allow the Union to distribute its newsletter, a refusal to accommodate an access visit at all on the date the Union sought, and a refusal to respond in a timely manner to an access request.

[15] When the applicant's Mr Carran attended at the Awarua plant on 12 December 2014, as part of an access visit, Mr Carran spoke with the Plant

Manager, Mr Kevin Hamilton, in which the two men discussed the initiation of bargaining for a collective agreement, according to the Union.

[16] The Union further contends that Mr Carran expressed frustration at the Union's attempts to gain appropriate access to discuss the proposed collective agreement and that within the course of the discussion, Mr Hamilton wished Mr Carran *"good luck"* and indicated that Michael Talley would never *"give up"* in his opposition to the Union's access to the plant and attempts to negotiate a collective agreement for the plant.

[17] Affidavit evidence before the Authority from Mr Hamilton denies any such observations of the sort alluded to in the preceding paragraph, were made, and denies having a conversation with Mr Carran about Michael Talley.

[18] Mr Tony Matterson is an organiser for the applicant Union in the Canterbury area and during an access visit on 28 January 2014 at the Malvern plant, Mr Matterson spoke with South Pacific Meats Limited's Wayne Lindsay about the Union's frustration at the employer's resisting its right of access and other associated frustrations and Mr Matterson alleges that Mr Lindsay confirmed that South Pacific Meats Limited's actions were *"about the company not wanting the union on site affecting Talley's right to pay an employee as they wished without union interference".*

[19] During an access visit at the Malvern plant on 9 October 2014, Mr Matterson claims to have suggested to Mr Lindsay (who was accompanying him), that Mr Lindsay read the 11 September 2014 determination of the Authority in relation to access at Awarua. Mr Lindsay is said to have responded by saying *"Michael Talley did not agree with that decision"*.

[20] An affidavit filed by South Pacific Meats Limited from Mr Lindsay denies making either remark, and denies ever having a conversation with Michael Talley about the Authority determination.

[21] It is said on behalf of the Union, but denied by the respondents, that Mr Michael Talley has incited, instigated, aided or abetted South Pacific Meats Limited's ongoing actions in breaching the Union's rights of access in the manner outlined above.

[22] It is further contended that Mr Michael Talley has made it clear to the management of South Pacific Meats Limited that he does not agree with the prior determinations of the Authority concerning access rights and in consequence he has encouraged management to continue to frustrate the Union's pursuit of access rights.

[23] Moreover, it is said for the Union that Mr Talley has indicated to South Pacific Meats Limited that it should be able to hire whomsoever it chooses and pay them whatever it wants without *"interference"* by the Union.

[24] Further and finally, the Union contends that Mr Michael Talley has taken those steps to ensure that South Pacific Meats Limited complies with its access obligations and with the determinations of the Authority previously referred to.

> [25] In pursuance of those allegations by the Union against Mr Michael Talley, the applicant Union made a further application to the Authority dated 7 April 2015 wherein counsel sought a direction that the respondents produce certain evidence. Counsel for the applicant Union put the matter thus in his application:
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> > *The issue of exactly what the second defendant did and didn't do in communicating with the managers of the first respondent in relation to access by the applicant's officials is therefore at the heart of these proceedings. For that reason, the applicant sought disclosure by the first and second respondents of the communications between the directors of the first respondent and its managers on issues of access.*
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> [26] The applicant Union sought an order from the Authority requiring the respondents to provide copies of all documentation between the directors of the first respondent and managers of the first respondent in relation to the exercise of statutory rights of access by the applicant Union.
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> [27] That application was opposed by counsel for the respondents on the footing that were the application to be granted, it would offend against the general law of discovery which recognises the parties being entitled to object to the production of documents that are likely to expose that party to any penalty.

Defendants' case on privilege of documents

[8] In support of their contention of a common law right to privilege in civil proceedings where disclosure of a document might give rise to liability for a civil penalty, the defendants rely first on the judgment of the Court of Appeal in *Port Nelson Ltd v Commerce Commission.*[3] That was a case in which the plaintiff faced a claim for pecuniary penalties, at the suit of the Commerce Commission, under s 80 of the Commerce Act 1986. The Court of Appeal described that penalty regime as having:[4]

> … some analogy to a criminal proceeding … [and] … some analogy to a civil proceeding; it has been called a hybrid; but we are content to take the Act's own term, a proceeding for the recovery of pecuniary penalty, and it is true that heavy maximum penalties are provided.

[9] The argument for the plaintiff in *Port Nelson* was not one of privilege in relevant documents to be disclosed but, rather, whether it should be required to exchange, in advance of the hearing, briefs of the evidence of its witnesses. In that

[3] *Port Nelson Ltd v Commerce Commission* [1994] 3 NZLR 435 (CA).
[4] At 438.

context, the Court of Appeal noted: "That there is a common law privilege against answering questions in such a way as to expose one to a penalty is clear enough: see for instance *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328." The Court of Appeal dismissed the challenge to the High Court's direction that briefs of evidence were to be filed.

[10] In this jurisdiction, the matter was considered by a full Court in *New Zealand Baking Trades Employees Union (Inc) v Foodtown Supermarkets Ltd*.[5] In that case, a union party to collective bargaining with an employer sought discovery of parts of employees' employment contracts. The Employment Tribunal dismissed its application, concluding that it had no jurisdiction to make an order for discovery of documents. The full Court held that a party required by the Tribunal to produce documents was entitled to the confidentiality protections of s 126(2)(c) of the Employment Contracts Act 1991. That was a quite different statutory provision to those now in effect and the judgment in *Foodtown Supermarkets* is therefore of little assistance in deciding the present question(s) of law.

[11] The defendants rely nevertheless on the following passage from the judgment of the full Court:[6]

> A body of law has been developed by the Courts designed to ensure full and honest disclosure but designed also to afford protection against discovery being used for purposes of oppression to cause delay or expense or having the effect of causing embarrassment to one party greatly in excess of the benefit in the public interest of full disclosure. Thus the law recognises that a party is entitled to object to the production for inspection of documents which are likely to incriminate that party or expose that party to any penalty or forfeiture, or which are privileged from production such as communications between that party and his, her or its legal adviser.

[12] The defendants submit that the privilege just described extends to the production (on discovery or disclosure) of an object such as a document, in addition to the production of such evidence at a hearing in court:

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[5] *New Zealand Baking Trades Employees Union (Inc) v Foodtown Supermarkets Ltd* [1992] 3 ERNZ 305.
[6] At 316.

> … where the act of producing an object might carry a sufficiently testimonial aspect to enable a claim of privilege to be made (eg, the act of producing a document might in some situations authenticate its existence, whereabouts, or validity) …

[13] The defendants also cite the judgments of the Court of Appeal in *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd*[7] and, in the United Kingdom, in *Rank Film Distributors v Video Information Centre*[8] in support of the foregoing proposition. They say that the privilege extends to information constituting a link in a chain of causation or an individual element of a given offence.

[14] The Court of Appeal, in the *New Zealand Apple and Pear Marketing Board* case, said under a heading "*The rule against self-incrimination"*:[9]

> There is a long established rule of common law, going back to the 17th century, expressed in the maxim "nemo tenetur prodere seipsum" (no man is bound to betray himself). The rule was conveniently put in *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass* (1934) Ltd [1939] 2 KB 395 by du Parcq LJ delivering the judgment of the Court of Appeal, as follows:
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> > "The law is well settled. It is a general rule that 'no one is bound to criminate himself,' in the sense that he is not to be compelled to say anything which 'may tend to bring him into the peril and possibility of being convicted as a criminal': per Field J in *Lamb v Munster* 10 QBD 110, 111" (ibid, 403).
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> See also *Blunt v Park Land Hotel Ltd* [1942] 2 KB 253. The rule extends to discovery (*Triplex Safety Glass v Lancegaye Safety Glass*) and to interrogatories (*Taranaki Co-operative Dairy Co Ltd v Rowe* [1970] NZLR 895).

[15] Then, under a heading *"Ousting of the rule by statute"*, McMullin J, delivering the judgment of the Court of Appeal, continued:[10]

> Unless an Act of Parliament imposes or authorises the imposition of a duty to the contrary, every citizen has in general a right to refuse to answer questions from anyone, including an official: *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 398, 406. However, Parliament can make the rule of no application or whittle it down by imposing a duty to supply information or answer an official's questions and provide penalties for a refusal to do so. Whether in any enactment it demonstrates an intention to take away that privilege is a matter of construction. The common law favours the liberty of

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[7] *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191.
[8] *Rank Film Distributors v Video Information Centre* [1982] AC 380, at 412.
[9] At 193.
[10] At 194.

> the subject and, if a Court is not satisfied that a statutory power of questioning was meant to exclude the privilege, it is in accordance with the spirit of the common law to allow it: *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 402, 406. The question must be whether Parliament has disclosed an express and direct intention in the statute itself to take away the right to silence; or alternatively has made that intention manifestly plain in the regulation-making power conferred upon the Executive. Relevant to that question will be the consideration that one of the prime purposes of the power given by a statute to ask questions about business or physical actions will be frustrated if the privilege can be invoked against it. In the end the divined statutory intent must prevail.

[16] The *New Zealand Apple and Pear Marketing Board* case is also authority for the proposition that the rule of privilege applies to corporations as well as to individual human persons,[11] a question raised, albeit obliquely, in this case in respect of the first defendant.

[17] In that regard, also, the defendants rely on s 29 of the New Zealand Bill of Rights Act 1990 (NZBORA) which says that, except where the provisions of legislation otherwise provide, the rights and protections therein shall be for the benefit of all legal persons as well as for the benefit of all natural persons.

[18] Turning to s 27(1) of the NZBORA, the defendants say that the Authority's statutory powers to direct the production of documents must be read in light of that section which provides:

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

[19] Although made in a criminal law context, the defendants rely on the statement in *Adams on Criminal Law* about s 27 that:[12]

> [Section] 27 provides a wide "catch-all" right to fair trials which may permit Courts to hold that rights not specifically covered elsewhere in the Bill of Rights are nevertheless implicit in the right of natural justice. An example would be the right not to make incriminating statements prior to trial and prior to arrest or detention.

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[11] At 196-197.
[12] Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at ch 10.16 (old edition).

[20] The defendants address ss 5 and 6 of the NZBORA, saying that their right to assert a privilege against self-incrimination should be found to exist unless there is clear statutory provision showing an intention to remove or modify that right. In particular, s 6 is said to apply to s 160 of the Employment Relations Act in this context where s 6 says: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning." That, too, assumes that the right asserted by the defendants is one encompassed by s 27, that is a right to natural justice.

[21] It is arguable whether an entitlement to assert privilege in a self-incriminatory document in civil proceedings is a principle of "natural justice". However, ss 27 and 29 of the NZBORA confirm a parliamentary intention, expressed after the Court of Appeal's judgment in the *New Zealand Apple and Pear Marketing Board* case, that there should be no distinction procedurally or substantively between corporations and natural persons when it comes to determining their rights, obligations or interests protected by law. This tends to confirm the continued application of the conclusion to this effect in the Court of Appeal's 1986 judgment in *New Zealand Apple and Pear Marketing Board*.

[22] Next, the defendants rely on the judgment of the Supreme Court in *Cropp v A Judicial Committee.*[13] This was a case about the lawfulness of a sport's rule requiring participants to provide urine specimens for the purpose of analysis to detect the presence in the participant's body of restricted drugs. At [47] the Supreme Court considered whether a participant's privilege against self-incrimination might invalidate the rule. The argument for invalidity of the rule turned not on liability for a civil pecuniary penalty, but on a contention of self-incrimination in potential criminal proceedings. Rejecting the submission, the Supreme Court noted:

> This argument was unsupported by reference to any authority and must be rejected. All the authorities are in fact the other way. Wigmore explains that the privilege against self-incrimination is intended "to prevent the use of legal compulsion to extract from a person a sworn communication of his knowledge of facts which would incriminate him". It is directed at testimonial compulsion. It does not justify an individual refusing to supply physical evidence which exists and can be found independently of any testimony of the individual, such as bodily samples. In the words of Justice

[13] *Cropp v A Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 (footnotes omitted).

> Holmes, "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material". Andrew Ligertwood comments that there must be some testimonial link in the act of production if the privilege is to apply. … The privilege is now dealt with by s 60 of the Evidence Act 2006. The definition of "information" in s 51(3) restricts the privilege to a right not to provide information that is in the form of an oral or documentary "statement". A refusal to produce real evidence emanating from a person in the form of a urine sample does not engage the privilege.

[23] That judgment does not assist the decision of this because the self-incriminatory documents held by the defendants are in the form of a documentary 'statement' as opposed to a sample of bodily fluid or the like. In this case, also, the jeopardy against which protection is sought is a penalty in civil proceedings, not prosecution for, or conviction of, a criminal offence.

[24] The defendants acknowledge that the Evidence Act 2006 has largely codified self-incrimination rights and obligations in the courts of ordinary jurisdiction but point out, correctly, that the legislation is not applicable to proceedings in the Authority (or the Employment Court).[14] However, addressing delegated legislation under the Act, the defendants say Parliament not only removed the privilege against self-incrimination in penalty proceedings but, by virtue of reg 39(2) of the Employment Court Regulations 2000 (the Regulations), extended the right beyond that afforded by the common law. They say, in effect, that there is now to be no right of discovery (disclosure) at all in penalty proceedings.

[25] Regulation 39(2) provides as follows: "Nothing in regulations 40 to 52 applies to any action for the recovery of a penalty."

[26] However, the meaning of that provision has been interpreted otherwise than in the way the defendants contend for and will be analysed later in this judgment.

[27] Whether the defendants' broad proposition about the effect of reg 39(2) is correct (and recent case law in the Employment Court is against that bald proposition), the defendants are correct that there is no equivalent provision to that

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[14] See, for example, *New Zealand Air Line Pilots Association Inc v Jetconnect Ltd (No2)* [2009] ERNZ 207.

regulation applicable to the Authority. They say, however, that this does not demonstrate an intention that the common law right was to be extinguished in proceedings in that forum. At best, the defendants say, it could only be said that Parliament did not intend to extend the provision in the Court to matters before the Authority.

[28] The defendants, through counsel, submit that it is illogical that Parliament would have intended to distinguish between penalty proceedings before the Authority and those before the Court, so that the express provisions in the Regulations must be applied in the Authority's quite different document disclosure regime. That, too, is a debatable proposition.

[29] The defendants criticise the Court's statements about this issue in its judgment in *Aarts v Barnardos New Zealand Ltd.*[15] They summarise the statements as follows:[16]

> (a) The Court's role in discovery is related to the traditionally adversarial environment of the Court, in determining and enforcing disclosure obligations under relevant rules, whereas the Authority has an investigative/inquisitorial role and thus decides itself what evidence to call for and consider and how documents supplied to it were to be used. A fundamental difference between the Court and the Authority [is] in the Authority's control of the process in that forum as opposed to the parties' control of it in the Employment Court; and as
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> (b) Section 160 (2) of the Act expressly [allows] the Authority to "take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not".

[30] The Court's statements are said by the defendants to be erroneous because the privilege against self-incrimination relates to the consequence of the disclosure of documents or information and not the "body" before which the privilege is able to be exercised. The defendants submit that the consequences of a penalty are no different for the persons incurring the penalty, whether imposed by the Court or the Authority, so that there should be no reason why the existence of the privilege should differ between the two bodies.

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[15] *Aarts v Barnardos New Zealand* [2013] NZEmpC 85 at [98]-[101].
[16] Defendants' summary of [98]–[101].

[31] Next, Ms Pidduck submitted that the fact that the Authority is an inquisitorial body does not justify any abrogation of the right to assert a privilege against self-incrimination. If anything, the defendants say, the fact that it is "the State" directly exercising the power to call for evidence, strengthens the reasoning behind the preservation of that privilege. That is because, in the absence of legislation to the contrary, the privilege is a valid reason for refusing to respond to demands "from government officials" for information. Nor, the defendants submit, does the Authority's inquisitorial methodology detract from a need for clear statutory intent to be shown before the privilege can be seen to have been extinguished or modified.

[32] I should note that I do not accept that the Employment Relations Authority (or the Employment Court) can be said to be "government officials" in the manner I understood Ms Pidduck to suggest. Although part of the machinery of government, both the Authority and the Court are within the independent third branch, the Judicial as distinct from the Executive branch of government. That clarification does not, however, alter the defendants' fundamental argument that, whoever does it, self-incriminatory documents or evidence should not be required to be disclosed to the Employment Relations Authority sitting in its judicial branch role.

[33] Finally in this regard, the defendants say that the same broad discretionary powers of the Authority that exist under s 160(2), also apply to the Court under s 189(2) of the Act including, it is said, the power to act inquisitorially under subs (2) as follows: "The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not." That is so in one sense, but the reality of litigation in practice is that proceedings before the Court are significantly more adversarial, and those in the Authority, investigative. This is not a case about the Court's powers which differ from those of the Authority

[34] The defendants say that proceedings for penalty under the Act are "quasi-criminal" in character and that disclosure of documents should not be required if that may tend to incriminate the party possessing them.

The plaintiff's case

[35] The following is a summary of the plaintiff's submissions which I deal with either elsewhere in the judgment or, if not, immediately following each.

[36] First, the plaintiff says that the awarding of a penalty under the Act is not the same as a conviction for a criminal offence. I agree so far as that goes but whilst a person may not be required to self-incriminate when charged with a criminal offence, that does not apply necessarily and equally to the risk of imposition of a civil penalty.

[37] Next, Mr Churchman submitted that s 63 of the Evidence Act, in dealing with civil proceedings, has abrogated the privilege against self-incrimination except where that may put a party in jeopardy of a criminal conviction. Counsel for the plaintiff submitted that it would be illogical to apply privilege in lower courts, authorities and tribunals, when it has been abrogated in other courts. That is so for civil proceedings covered by the Evidence Act (excluding those in the Authority and the Court) but also begs the question whether proceedings for a penalty under the Act is included in that abrogation. I deal with this submission at [65]-[66] of this judgment.

[38] Mr Churchman then submitted that civil penalties under other legislation, and dealt with generally in other courts, are more significant than are penalties in the employment institutions. That may be so when one compares the maximum amounts of such penalties but I conclude it is not necessarily so when the reality of employment relationships in practice is examined. The penalties regime under the Act applies irrespective of the size, nature, or other circumstances of an employer. A sole trader may employ a single employee (and, in some circumstances, be little better off economically than that employee). However, because he or she is an employer, that employer is nevertheless liable to the same maximum penalties as the largest and wealthiest employing corporation. That is very unlikely to be the circumstances of a party potentially liable to a civil penalty under the Commerce Act

or any one of the eight or so other pieces of legislation relied on by the Commission in its assessments of the position.

[39] Counsel next submitted that s 27 of the NZBORA (entitlement to natural justice) does not extend to procedural issues in civil proceedings; and therefore s 27 has no relevance to the matter before the Court. I have noted at [21] that it is arguable whether an entitlement to assert privilege in a self-incriminatory document in civil proceedings is a principle of "natural justice", but consider it unnecessary to decide whether the privilege is a matter of natural justice in proceedings such as these. That is best left to another case in which the question is argued comprehensively.

[40] Counsel for the plaintiff submitted that this Court's judgment in *Matsuoka v LSG Sky Chefs New Zealand Ltd* was both decided correctly and should determine the outcome in this case.[17] In particular, the plaintiff says that reg 39(2) only applies to documents that tend to incriminate the objector in respect of criminal conduct; that disclosure of such documents is not prohibited but rather is not obtained by the application of regs 40-52 although may be required by other means. I address these arguments at [68]-[72] of this judgment.

[41] Not dealt with elsewhere in this judgment, the plaintiff makes the following further submissions. First, Mr Churchman contended that if the Executive had intended the Authority and the Court to be subject to the same regulatory regime, it (and, as this is reflected in the Act, Parliament) would have provided a common or identical set of rules on questions of disclosure of documents and privilege. I accept that this may be so, but the effect of the Court's interpretation of reg 39(2) in the *Matsuoka* judgment, with which I agree, is that this is the consequence in practice.

[42] Next, the plaintiff submitted that the parts of the *Aarts* judgment upon which the defendants rely were observations (obiter dicta) and made without the benefit of legal argument or submissions although the plaintiff appears to agree with these. Again, that may be so, but I do not resile from them as statements of the law.

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[17] *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165, [2013] ERNZ 605.

[43] Next, Mr Churchman submitted that s 160(2) of the Act reveals the parliamentary intention that the Authority would be able to admit evidence that might be inadmissible in other jurisdictions and/or proceedings. I return to this argument subsequently.

[44] Penultimately, counsel submitted that by including in s 160 the words "in equity and good conscience", Parliament intended that a party that did not have 'clean hands' could not avail itself of the privilege against self-incrimination. Even if that is so (and I do not so find), there is no evidence (at least yet) suggesting that the defendants may have acted in bad faith or otherwise as equity would condemn.

[45] Finally, Mr Churchman submitted that recourse to the Regulations cannot fetter the Authority's statutory discretion provided for in s 160 of the Act. Again, while it is correct that a regulation cannot contradict a relevant statute, the interpretation and application of a provision worded as broadly as s 160 may be informed by a relevant regulation, just as it may be by another statute such as the Evidence Act.

[46] The plaintiff's submissions on the Law Commission paper[18] generally dismiss, or at least minimise, the significance of the Law Commission's assessments of the current position at law. Mr Churchman nevertheless relied on, and adopted, the Commission's assessment that:[19]

> There is a strong argument that the Evidence Act 2006 abrogated the privilege, as it was not provided for in the new statute. At best, there is considerable lack of clarity as to whether it still exists.

[47] This position necessarily assumes that there was, as the Commission considers, a common law privilege against self-incrimination in proceedings for civil penalties before the enactment of the Evidence Act.

[48] Having acknowledged the Law Commission's assessment of the position generally as regards civil penalties, counsel nevertheless submitted that the

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[18] Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133, 2014), subsequently tabled in Parliament and which has now been responded to by Government. http://www.lawcom.govt.nz/our-projects/law-relating-civil-penalties.
[19] At 9.2.

Commission's rationale for a civil penalty privilege are inapplicable to the penalties regime under the Act. Those rationale were expressed by the Law Commission as being:

(a) that there is a potential for significant penalties to be imposed;

(b) that there is an imbalance of power between the State and individuals in penalty investigations and proceedings; and

(c) that there are concerns about the reliability of evidence obtained in those potentially coercive circumstances.

[49] Comparing the employment regime to what he described as "the paradigm cases of pecuniary penalties (such as under the Commerce Act)", Mr Churchman submitted that one significant difference is that penalties are often sought by other parties to employment relationships and not, or not only, by the state. In these circumstances, counsel submitted that the problems of imbalance of power identified by the Commission are substantially reduced.

[50] Next, Mr Churchman submitted that the ability of enforcement bodies to access information, which may otherwise be the subject of privilege, is essential to the overall effectiveness of the employment regime. Counsel submitted that this, and the impossibility of an enforcement agency to monitor compliance effectively or to identify and establish unlawful conduct, are present in the employment regime. Mr Churchman submitted that it is very difficult to establish breaches of the Act that expose a party to penalty liability, in this matter for breach of s 20 of the Act, given that he said that "[t]he most probative information will often be what was said or directed by directors to managers regarding the issue before the Authority".

[51] I do not accept that assertion, either in this case or generally in employment cases. Here, the Union alleges essentially two types of breach by the first defendant for which it said the company should be penalised as well as being subject to compliance orders. Those breaches are, first, of s 20 of the Act by unlawfully refusing union officials access to meat processing plants and, second, by unlawful

conduct in collective bargaining. All of those breaches would seem to be provable by viva voce and other relevant and admissible documentary evidence given by persons present, either on the occasions when entry to the plants has been prohibited or made more difficult by the first defendant, or present in collective negotiations when the alleged illegalities have manifested themselves. Non-privileged documents may also assist in the decision-making task of the Authority. Questions of the first defendant's motives are not relevant to the proof of those penalty actions, although they may possibly affect the level of any penalty or penalties to be imposed once the breach or breaches have been established.

[52] In the case of the second defendant, the plaintiff's objective seems to be to sheet home individual liability to an officer or agent of the first defendant for its breaches by establishing that Mr Talley was a party to them in the sense that he aided or abetted or counselled them. Those allegations against Mr Talley personally may be difficult to prove without obtaining documents for which the privilege is claimed. However, it is the first defendant that was and is the employer of the plaintiff's members and which will have primary responsibility for the breaches which will be required to be proved before there is any question of secondary or party breach by Mr Talley.

[53] Compliance, being the primary remedy or breach of the Act, will, if granted, require SPML to remedy those breaches irrespective of whether the claims against Mr Talley for a penalty are effective. Penalties for non-compliance with compliance orders are available in the Court. They include monetary penalties, sequestration of assets and imprisonment of individual (human) non-compliers.

[54] Next, Mr Churchman argued that s 160 of the Act, properly interpreted, has limited the scope of privilege even if it existed, as is envisaged by the Law Commission at 9.10 of its report where it states: "Our recommendations make it clear that, like the privilege against self-incrimination, individual statutes should be able to exclude the application of the penalty privilege either expressly or by necessary implication."

[55] I do not agree that s 160 or other relevant provisions of the Act deal either expressly or by necessary implication with the question of self-incrimination privilege in penalty proceedings, at least in the same way that other legislation, including civil penalty regimes, do so. It may be argued that the Regulations address questions of self-incrimination and privilege in relation to proceedings before the Court. However, a different regime for document disclosure and production is in place for the Authority, and the same position may not apply to the Authority as for the Court. If Parliament had intended removing what is generally recognised as pre-2006 self-incrimination privilege in penalty proceedings, it would have been expected that this would have been addressed expressly in the legislation given the importance of the privilege.

[56] Finally, Mr Churchman submitted that the Law Commission's assessment and proposals cannot be said to represent the current state of the relevant law in New Zealand or that the report supports the privilege currently being in existence. For reasons set out elsewhere in this judgment in relation to the abrogation of the pre-2006 privilege by the Evidence Act, and the non-application of that legislation to proceedings in the Authority (and the Court), I consider that a privilege against self-incrimination in statutory civil penalty proceedings under the Act does continue to be available.

Discussion

[57] The question concerns the entitlement of SPML and Mr Talley to resist disclosure of documents in their possession which are relevant to the Union's claims, on the grounds that these documents are privileged. The privilege asserted is said to be one that enables a party to litigation including claims to penalties under the Act, to refuse to disclose self-incriminatory documents. Although self-incrimination (otherwise undefined) is a statutory ground by which disclosure of documents can be resisted in proceedings in the Employment Court,[20] no such express statutory ground exists in relation to proceedings in the Authority as these are. Assuming that there is a residual privilege at common law against "self-incrimination", the second question

[20] Employment Court Regulations 2000, r 44(3)(b).

at issue is the nature of the proceedings in which the documents may incriminate the party holding them.

[58] In addition to the question whether SPML and Mr Talley are entitled in law to resist disclosing those documents to the Authority and/or to the Union, this judgment also touches on how disclosure of the documents can (but not should) be made if there is a claim to privilege in them that is challenged. However, those are matters for the Authority and the Court cannot tell or advise it how to go about its investigations within the law.[21] This judgment therefore identifies what the Authority *can* do in law but not *how* it *should* act within those constraints, either generally or in a particular case.

[59] Although SPML and Mr Talley object to disclosing any documents which may incriminate them in the proceedings brought by the Union, these claims are not only for penalties but also for compliance orders and declarations. The Union claims penalties against SPML as employer and Mr Talley as an inciter, instigator, aider or abettor of the company's statutory breaches, as well as declarations and compliance orders. I should make it clear that any vestigial privilege against self-incrimination can only be invoked where penalties are claimed.

[60] I do not agree with Mr Churchman's broad contention that the enactment of the Evidence Act 2006 abrogated entirely the previous privilege (including in employment litigation). I conclude that if it did so, it could only have done so in respect of those matters covered by the Evidence Act. Proceedings before the Authority and the Employment Court are not subject to the Evidence Act. It follows, in my conclusion, that although the previous privilege may have been reduced in the scope of its application, it continues to apply to proceedings in the Authority and the Court in relation to penalties because it could not have been abrogated by legislation that is inapplicable in these jurisdictions.

[61] Having concluded that the Evidence Act 2006, which deals (at least in part) with this question, is not applicable to proceedings in the Authority (or in the Court), I turn to s 160(2) of the Act. Here the Authority "may take into account such

[21] Employment Relations Act 2000, s 188(4).

evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not". The associated Authority powers under s 160(1)(a), (b), (c), (d) and (f) to "call for evidence and information from the parties or from any other person"; to "require the parties or any other person to attend an investigation meeting to give evidence"; to "interview any of the parties or any person at any time before, during, or after an investigation meeting"; to "fully examine any witness"; and to "follow whatever procedure the Authority considers appropriate"; are informed by the broad evidential discretions allowed it in s 160(2) and, in turn, inform the interpretation and application of s 160.

[62] Although not applicable to the Authority, the Evidence Act is nevertheless instructive in interpreting and applying s 160 of the Employment Relations Act. Section 160 is not an entitlement to the Authority to allow in any evidence in an undiscriminating or open slather manner. The power is subject to limits and safeguards prescribed in case law to ensure adherence to the legislation's objects and procedural fairness generally. It has never been suggested that s 160 would allow evidence of communications between lawyer and client that are privileged in other contexts, to be admissible completely and automatically; and that approach should apply, in principle, no less to privilege against self-incrimination. The Evidence Act is an important, albeit sometimes not the sole, source of reference in making such decisions on admissibility.

[63] Section 60 of the Evidence Act addresses "privilege against self-incrimination". However, it relates to "… information [which] would, if so provided, be likely to incriminate the person under New Zealand law for an offence punishable by a fine or imprisonment". I note, also, that under s 62(2) of the Evidence Act, "a person who claims a privilege against self-incrimination in a court proceeding must offer sufficient evidence to enable a judge to assess whether self-incrimination is reasonably likely if the person provides the required information". Because of s 63,with which I will deal now, s 60 relates to self-incrimination in what might be called criminal proceedings. That is not the situation in this case.

[64] Again by analogy, s 63 of the Evidence Act is particularly pertinent because it deals with privilege against self-incrimination in civil proceedings. Proceedings in

the employment jurisdictions are civil in nature rather than criminal. The point of difficulty is at the boundary between those two categories, where penalties are claimed as here. Pursuant to subs (1), it might be argued that s 63 would apply by analogy to Authority proceedings where a person is required by an order of a court for the purposes of a civil proceeding to disclose information or to admit documents or things to be inspected, recorded, copied or removed. Section 63(2) provides that in these circumstances, the person does not have the privilege provided for under s 60 and must comply with the terms of the order. Subsection (3) then provides:

> No evidence of any information that has directly or indirectly been obtained as a result of the person's compliance with the order may be used against the person in any criminal proceeding, except in a criminal proceeding that concerns the falsity of the information.

[65] Even if the Authority were to apply, by analogy, the Evidence Act's provisions in relation to privilege against self-incrimination in exercising its discretion under s 160(2) of the Act, that begs the question whether penalty proceedings under the Act are "criminal proceedings" for "an offence punishable by a fine or imprisonment" or, alternatively, "civil proceedings". I conclude that proceedings for a penalty under the Act are not criminal proceedings as defined and as governed by s 60 of the Evidence Act. But the question remains, are they thereby simply "civil proceedings" if they include claims for penalties?

[66] As already alluded to in [26], the question of self-incrimination in proceedings (in the Employment Court) for a penalty under the Act was dealt with by Judge Perkins in *Matsuoka*.[22] That case concerned disclosure of documents in Employment Court proceedings, unlike this question which affects the Authority. The position in the Court is, nevertheless, analogous to, and informs, the answer to the question now affecting the Authority.

[67] Regulation 39(2) of the Regulations qualifies regs 40-52 which provide generally for the disclosure of documents in proceedings before the Court and set out the grounds on which disclosure can be resisted lawfully. These include that disclosure and provision of a document may incriminate the affected party.

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[22] *Matsuoka*, above n 17.

Regulation 39(2), however, excludes the application of regs 40-52 in respect of "any action for the recovery of a penalty".

[68] In *Matsuoka* these questions affected both parties and non-parties. In the present case, only parties are affected but there is no difference in principle for non-parties. In *Matsuoka*, the Court held that reg 39(2) applies only to actions for penalties, that reg 44(3)(b) applies more broadly to general disclosure in any proceedings and that it relates to incrimination of the objector in respect of criminal liability.[23] The Court held that such behaviour for which a penalty under the Act might be sought is not, or is not in the nature of, criminal behaviour. I have already reached the same conclusion and agree with Judge Perkins's conclusion. His Honour did not, however, have to go on and determine the question raised by this case about penalty proceedings in the Authority.

[69] The judgment in *Matsuoka* held that reg 39(2) does not obviate any requirement to disclose documents in penalty actions under the Act. Rather, it negates the application of procedural regs 40-52 in such actions.[24] This means, in practical terms, that a party seeking the imposition of a penalty cannot require, as of right, any disclosure of documents from another party in accordance with the Regulations. Any compulsion to disclose documents must emanate from an order of the Court, exercising its statutory jurisdiction under ss 189. This enables the Court to consider claims to privilege of documents, including to self-incrimination avoidance privilege, as well as on other grounds for resisting disclosure..

[70] Such a construction of reg 39(2) enables the Court in penalty actions to balance the probative and prejudicial factors associated with the disclosure of particular documents and in the overall interests of justice. In the Court, this will probably be determined in a pre-trial process which will follow once it is clear from the initiating proceedings that a penalty is sought, and that privilege in respect of the disclosure of a particular document or documents is claimed. In these circumstances, reg 39(2) would make regs 40-52 inapplicable, but does not affect the Court's powers under the Act to regulate the conduct of proceedings from filing of

[23] At [26].
[24] At [66].

pleadings to the conclusion of the trial. That includes by determining whether a document or documents may be privileged on the ground that to disclose it or them in the case would be self-incriminatory. So the question of whether there is a remnant common law privilege against self-incrimination in statutory penalty proceedings is as much a question for the Court as it is for the Authority.

[71] The Court's judgment in *Matsuoka* went on to suggest some factors that will influence the exercise of the Court's discretion in these circumstances. These will be useful indicators also to the Authority. They will include the history of the legislation, previously decided cases, including about whether civil penalty privilege, if it remains, should apply in the particular case having regard to all the circumstances.[25]

[72] I agree with these statements of the applicable law in *Matsuoka* and will apply them, and others, in deciding whether the privilege asserted in this case can be sustained.

[73] I would add that whilst questions of privilege in self-incriminatory documents are dealt with expressly in the Court by the Regulations, it will be desirable, if possible, to ensure that there is a consistency of approach to this question in both institutions, the Court and the Authority. That is because, although most cases must begin life in the Authority, some are removed to the Court under s 178 for hearing at first instance. There is also a class of proceeding that entitles an applicant to file at first instance in either the Authority or the Court.[26] Even for those cases that may be concluded in the Authority, a party's entitlement to a de novo challenge to its determination under s 179 of the Act, also makes it highly desirable that there is a consistency of approach. That is so that one rule for privilege applicable in the Authority and another in the Court are, as far as possible, not inconsistent. The judgment in *Matsuoka* in relation to the Court, allows such a consistency of approach between the two institutions following this judgment about the position in the Authority.

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[25] At [67].
[26] See, for example, s 6(5) (declaration of employment status) cases.

Self-incrimination privilege for corporate and human persons?

[74] The existence in principle of a privilege against self-incrimination in penalty proceedings raises a further question as to whether, in addition to applying to human persons, the privilege extends also to corporations. In this case one of the defendants falls into each class. Potentially, whilst the privilege may be available to Mr Talley as an individual human person, it may arguably not be available to the first defendant as a company. In some of the cases, that distinction has been made.

[75] If there is this distinction in law, it may raise some practical problems, including if the company is required to provide documents that tend to incriminate it in the Union's claim against it for penalties, those documents may potentially include incriminating evidence against Mr Talley who will be entitled to assert his privilege in the same documents. If that is the law, then the Authority may have to direct itself not to use incriminating documents disclosed by the first defendant in its consideration of whether the plaintiff has made out its claim against the second defendant.

[76] As already indicated for the reasons set out in [16]-[17] and [21], I have concluded that the same privilege that may be invoked by a human person is also available to a corporation. Both Mr Talley and SPML are entitled to invoke the privilege against self-incrimination in this case.

Is a penalty under the Act a "pecuniary penalty"?

[77] This is a relevant question because that (pecuniary penalty) is the description of the outcome of proceedings under other legislation and in other courts, which have been drawn on in deciding this. Penalties have long existed in employment legislation in New Zealand. They are, and have been, able to be claimed not only by governmental enforcement agencies, but also by other parties to employment relationships: unions, individual employees, or employers. A further notable feature of such penalties is that the Authority or the Court may direct that they, or parts of them, be paid not to the Crown but to another party in the proceedings, usually the

applicant. Such payments are not in the nature of compensation or to defray costs (although they may, in practice, be perceived as such) but allow a payment that would otherwise be made to the Crown to reflect an "offence" committed against the community by breach of (predominantly) employee-protection legislation.

[78] I conclude that penalties that may be imposed under the Act are what the law now knows as "pecuniary penalties" under other legislative regimes. They are not criminal sanctions for criminal conduct. Rather, they are civil penalties for statutory breaches. It follows that if there remains in New Zealand law a privilege against self-incrimination in document disclosure under the Act, that is the same privilege as exists in pecuniary penalty proceedings under other regulatory statutory regimes.

The Authority's question reformulated

[79] The Authority's question set out earlier in this judgment does not focus completely or accurately upon the real issue in the case. I have, therefore, reformulated the question with a view to giving the Authority better guidance.

[80] The reformulated question may be stated as follows:

> Is there a privilege against self-incrimination available to a party to proceedings under the Act for a penalty or penalties, which may be invoked in response to an order or direction requiring the production to the Authority of relevant documents or other information?
>
> If so, is this privilege available to bodies corporate as well as to human persons?

Decision

[81] I conclude that there remain two relatively narrow self-incrimination privileges that the defendants may be entitled to assert in justification for not disclosing relevant self-incriminatory documents in the proceedings before the Authority, including the plaintiff's claims for penalties. They are as follows.

[82] First, if a document or documents held by the defendants, for which disclosure to the Authority and the plaintiff are sought, may incriminate the defendants in the sense of assisting the prosecutor in proving, or prejudicing their defences to, a prosecution for crimes or summary offences or other proceedings of a criminal nature, a privilege against self-incrimination is available to them.

[83] The other residual privilege against self-incrimination relates to proceedings under the Act in which a penalty or penalties are claimed against the party seeking to invoke the privilege. This is the privilege contended for by the defendants that is engaged in this case. It is available to the defendants in respect of what are said to be the self-incriminatory documents held by them.

[84] To the Authority's question, reframed at [80] as two separate questions:

> Is there a privilege against self-incrimination available to a party to proceedings under the Act for a penalty or penalties which may be invoked in response to an order or direction requiring the production to the Authority of relevant documents or other information?
>
> If so, is this privilege available to bodies corporate as well as to human persons?

the answers are as follows:

> The Authority is empowered, pursuant to s 160(1)(a) and (2) of the Act, to direct disclosure by a party of relevant documents or information including in a proceeding in which a statutory penalty or penalties are sought. A party so directed may assert privilege in, and may thereby not be required to disclose, documents or information if such disclosure may tend to incriminate that party by compromising that party's entitlement to defend any prosecution against that party for a crime or other criminal offence. The privilege against self-incrimination is also available to a party if the documents or information are relevant to proceedings which are for, or include, a claim to a penalty for breach of the Act.

The decision as to whether a document is privileged rests with counsel for the party seeking to assert that privilege. In the exceptional event that there is a challenge to that assertion (and thereby to counsel's assessment), the Authority may inspect the document to determine whether it is indeed privileged.

The privilege is available to both defendants as corporate and human persons.

[85] I reserve costs on this application.

GL Colgan
Chief Judge

Judgment signed at 4 pm on Friday 7 August 2015