IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 86
EMPC 265/2015

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER	of an application for an order for disclosure of documents
BETWEEN	RADIUS RESIDENTIAL CARE LIMITED Plaintiff
AND	THE NEW ZEALAND NURSES ORGANISATION INC First Defendant
AND	E TU INC (FORMERLY THE SERVICE & FOOD WORKERS UNION NGA RINGA TOTA INC) Second Defendant
AND	THE EMPLOYEES LISTED IN SCHEDULE A OF THE STATEMENT OF CLAIM Third Defendants

Hearing:	27 June 2016 (Heard at Auckland)
Appearances:	P Kiely and S Worthy, counsel for plaintiff J Lawrie, counsel for first defendant and third defendants who are members of the first defendant P Cranney and A-M McInally, counsel for second defendant and third defendants who are members of the second defendant
Judgment:	6 July 2016

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

Nature of case.

[1] This case highlights, not for the first time, the application in practice of a problematic statutory provision, reg 39(2) of the Employment Court Regulations 2000 (the Regulations). It makes statutory document disclosure procedures under regs 40-52 inapplicable to cases in which penalties are sought. Regulations 40-52 deal with the powers and machinery of inter-parties document disclosure.

[2] This issue has arisen again in proceedings where a combination of remedies (including declarations, damages and penalties for breaches of the Act and of a collective agreement) are claimed. The plaintiff employer has sought to have the defendants disclose documents under the statutory procedure for doing so provided for in regs 40-52. The defendants claim that they are not required to disclose any documents at all to the plaintiff because of the application to the proceedings of reg 39(2). This provides: "Nothing in regulations 40 to 52 applies to any action for the recovery of a penalty."

[3] Similar issues are said to have arisen in at least three cases dealt with previously by this Court and to which I will return in my analysis of the law on disclosure/discovery.

[4] As always, a little background information is necessary to understand the issue for decision.

[5] It is clear, even from admissions and denials in the pleadings, that employees of Radius Residential Care Ltd (Radius) who were members of either the New Zealand Nurses Organisation Inc (the NZNO) or of what is the union now called E Tu Inc (E Tu) formed picket lines outside workplaces and the company's head office during their working hours. They did so after their unions told Radius that they would then be engaged in paid stop-work meetings about matters of union business and, inferentially at least, collective bargaining that was then going on.

[6] Paid stop-work meetings of limited duration are permitted under both the Employment Relations Act 2000 (the Act)[1] and the relevant collective agreement applicable to the employees at the time. Although the employees were paid for the periods that they were absent from work, as they would have been had their absences been at traditional stop-work meetings, Radius now says that the unions and the employees engaged in unlawful strike action, rather than conducting true stop-work meetings.

[7] The plaintiff says that the strikes were unlawful, if only because statutory notice of them was not given to it. It claims damages for losses it says it incurred (including to recover the wages which it paid to the employees for those periods); declarations of breach of the parties' bargaining process agreements in their collective negotiations; breach of good faith (both under the Act and under the collective agreement); and, significantly for the purposes of this case, penalties for those breaches. Although the plaintiff has not, as it is entitled to do, nominated a figure which it says should represent any particular penalty payable by any particular party, the maximum penalties available, multiplied by the numbers of breaches and parties, exceed $1.3 million. The plaintiff concedes that it has no prospect of obtaining such a substantial sum in penalties, and says, in fact, that the 'going rate' for penalties imposed on individual employees generally is about $500 per breach. I would note that a crude averaging approach alone takes no account of the individual or collective financial and other relevant circumstances, so is not particularly helpful, especially to a case of modestly-paid employees taking collective action in conjunction with their unions. However, the defendants say that these claims will be counter-productive to creating and maintaining constructive ongoing employment relationships; and that they are entitled to exercise what they say are their statutory rights not to assist the plaintiff in its prosecution of those claims for penalties against them.

The document disclosure orders sought

[8] Acknowledging that, in a strict sense, the wording of reg 39(2) means that it cannot compel inter-parties document disclosure in respect of its penalty causes of

[1] Employment Relations Act 2000, s 26.

action, the plaintiff nevertheless proposes that the Court impose on the defendants one of two alternative ways of disclosing relevant documents to it. It does so accepting that the three statutory categories of objection to disclosure generally may still affect the extent of such disclosure.[2]

[9] The first of the alternatives proposed by the plaintiff is that, pursuant to a combination of its powers contained in ss 189(1) and 221(d) of the Act, the Court should direct the defendants to disclose the nature but not the contents of relevant documents to the Court and to Radius. Counsel for the plaintiff say that this was the course followed, in effect, by Judge Perkins in *Matsuoka v LSG Sky Chefs New Zealand Ltd*.[3] *Matsuoka* is, however, partially distinguishable, as I note in more detail later, if only because that was a case in which a plaintiff seeking penalties against a defendant refused to disclose the plaintiff's documents to the defendant. Here, the position is the reverse; it is the defendants against whom penalties are claimed who are opposed to disclosing their documents to the prosecutor because they say they should not have to incriminate themselves.

[10] The plaintiff's second proposed course of action is that the Court should direct disclosure by the defendants of documents relevant to Radius's claims against them for declarations, damages and costs. While I accept that reg 39(2) does not, of course, exempt the defendants from disclosing documents in these circumstances, the proposed course of action begs the question of the position of the remaining causes of action and claims for penalties.

[11] The plaintiff is not presently prepared to forego these penalties claims, even although any penalties ordered by the Court are, prima facie, payable to the Crown. It would have to make out a case for payment of them, or any proportion of them, to the plaintiff itself, especially if it had obtained damages for its losses and costs.

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[2] Employment Court Regulations 2000, reg 44(3).
[3] *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165, [2013] ERNZ 605.

Cases on reg 39(2)

[12] The first case decided in time was *New Zealand Air Line Pilots Association Inc v Jetconnect Ltd (No 2).*[4] The claims in that case included for breach of the good faith provisions of the Act (s 4). Remedies sought included a declaration of breach and penalties for those breaches pursuant to ss 4A and 134(2) of the Act. Other remedies against the same parties for the alleged breaches included injunctions.

[13] The plaintiff's case in *Jetconnect* was that reg 39(2) only applies where a claim is solely for penalties. Addressing that argument, interpreting the phrase in reg 39(2), "any action for the recovery of a penalty", the Court concluded:[5]

> The purpose of the regulation is to ensure that a party at risk of the imposition of a penalty should not have to provide evidence against himself, herself or itself. It is a form of statutory avoidance of self-incrimination. The interpretation proposed by Mr Harrison [counsel for the plaintiff] would defeat that intention in practice as most proceedings in which penalties are sought include claims for other remedies too.

[14] The Court also noted what was then the commentary on the regulation in *Brooker's Employment Law* at EC39.04:[6]

> The exclusion of penalty proceedings from the ambit of the disclosure requirements reflects the quasi-criminal character of such proceedings, and the principle that disclosure of documents ought not to be required if that would tend to incriminate the party who possesses them.

[15] In *Jetconnect* the Court was reinforced in its conclusion by reference to an earlier case decided by the Employment Court on appeal from the Employment Tribunal under the Employment Contracts Act 1991, which contained a materially identical provision.[7] In that case, *Lakeland Health Ltd v Teviotdale,* the Court held that the regulation: [8]

> . . . provides that the codified disclosure procedures contained in regs 48-59 . . . do not apply to appeals as this is. It would be to defeat the intention of the Executive Council for this Court, in a general direction, to effectively

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[4] *New Zealand Air Line Pilots Association Inc v Jetconnect Ltd (No 2)* [2009] ERNZ 207.
[5] At [14].
[6] At [15], citing *Brooker's Employment Law*, Wellington, Brookers, 2000.
[7] Employment Court Regulations 1991, reg 47(2).
[8] *Lakeland Health Ltd v Teviotdale* AEC74A/96, 3 December 1996 at 3.

> order disclosure of a document solely for the purpose of an appeal. That would be to run counter to the scheme and intent of the regulations. The Court's equity and good conscience jurisdiction cannot defeat the provisions of the Act (including its Regulations): see s 104(3).

[16] However, at [18] of *Jetconnect* the Court noted:

> Because I did not hear argument on the question of the application of s 189(1) to Regulations made pursuant to s 237, I simply note that the statement above from the *Lakeland Health* case may no longer be good law because of the change in the Interpretation Act 1999 to distinguish Acts and Regulations so that the latter are no longer to be regarded as a part of the former.

[17] As the Court also noted in *Jetconnect*, reg 37, which sets out the objectives of regs 40-52 covering document disclosure, qualifies the obligation that "… each party to proceedings in the court has access to the relevant documents of the other parties to those proceedings, it being recognised that, while such access is usually necessary for the fair and effective resolution of differences between parties to employment relationships, there are circumstances in which such access is unnecessary or undesirable or both".[9] The important qualifying words are "where appropriate".

[18] In *Jetconnect* the Court concluded:

> [23] The interpretation of reg 39(2) is not affected by the more recent Evidence Act 2006. That Act is not necessarily applicable to proceedings in the Employment Court. In *Taylor v NZ Poultry Board* [1984] 1 NZLR 394 (CA), 399, the Court of Appeal (Cooke J) noted that privilege against exposure to civil penalties was separate to the privilege against self-incrimination. Although acknowledging that the Act is a code, it is arguable that "privilege" dealt with under the Evidence Act 2006 relates to exposure to criminal liability and the common law of privilege affecting claims to civil penalties may have been left untouched by Parliament.
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> [24] The answer to the conundrum lies in the deliberate distinction drawn by Parliament between "proceedings" under reg 39(1) and "action" under reg 39(2). A party's proceeding is the party's case encompassed within a statement of claim or defence. The narrower category of "*action*" refers to what lawyers term a cause of action, a discrete subset of the proceeding that can and often does exist in a proceeding alongside other causes of action.
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> [25] So it follows that where a cause of action ("*action*") is for the recovery of a penalty, disclosure is not available. In a proceeding, statutory disclosure is nevertheless available for causes of action which are not for the recovery of a penalty.

[9] Employment Court Regulations 1991, reg 37.

> [26] The difficulty inherent in practice in the distinction between "*proceedings*" under reg 39(1) and "*action*" under reg 39(2) is that it is the different remedies claimed for the plaintiffs' two causes of action that are the distinctive and vital elements rather than the causes of action themselves. So, to take the example of the plaintiffs' cause of action for breach of collective agreement, the remedies claimed are both penalties and injunctions. In this sense, even the remedy of injunction is caught by reg 39(2) because this action (or cause of action) is for the remedy of penalty as well as injunction.
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> [27] Although awkward, the only way in which the intent of the Regulations may be preserved is for the plaintiffs to separate in their pleadings causes of action that seek the remedy of injunction alone for breach of collective agreement (which would be amenable to statutory disclosure) and, as a separate cause of action, for penalty for breach of collective agreement for which disclosure would not be available under reg 39(2).
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> [28] Even then, this separation of common causes of action by reference to relief, will not be sufficient without management by the parties or the Court of the process by which the proceeding is managed to a hearing and then heard.
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> [29] In view of my conclusion on this preliminary point advanced by Mr Skelton on behalf of the second and third defendants but which is logically applicable to the position also between the first defendant and the plaintiffs, I must decline to make any other orders or directions as the plaintiffs' case is now pleaded.
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> [30] A consequence of this conclusion may be an attempt by the plaintiffs to replead their proceedings and perhaps also to seek postponement of the hearing of those parts of them that seek remedies other than penalties. Although inelegant, even clumsy, that is the consequence of reg 39(2) unless and until the Executive considers revisiting this procedural regulation. It may, therefore, assist the parties to know what my decision would have been on the substantive chronological limitation question which brought this issue to a hearing.

[19] Next and significantly, is the judgment in *Matsuoka*.[10] That, too, was a case in which there was a claim of breach of statutory good faith obligations under s 4 of the Act, that is for penalties for breaches of statutory good faith obligations. The judgment contains a comprehensive analysis of reg 39(2) and its consequences in cases such as this.

[20] Judge Perkins concluded, in relation to a submission that reg 44(3)(b) must mean that reg 39(2) does not simply protect a party against whom a penalty is sought from self-incrimination:

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[10] *Matsuoka v LSG Sky Chefs*, above n 3.

> [26] Mr Drake's submission is partly correct in that reg 39(2) has a purpose beyond mere protection of the privilege against self-incrimination. Nevertheless, it also includes that purpose. While Mr Drake's submission proceeded on the basis that if reg 39(2) applies then there is no obligation at all on either party to then make disclosure, that submission is not correct for reasons discussed later in this judgment. Mr Drake's analysis of the relationship between reg 39(2) and reg 44(3)(b) is, however, flawed for another reason. Regulation 39(2) applies only to actions for penalties. Regulation 44(3)(b) applies to general disclosure in any proceedings and provides any party (and a non-party for reasons stated in this judgment) with the ability to object to disclosure of a "document or class of documents", which would tend to incriminate the objector in respect of criminal behaviour. That could not include behaviour for which a penalty might be sought under the Act. An example of its operation might be where a document, while relevant to the employment relations proceeding, nevertheless discloses a fraud by the party (or non-party) objecting. Mr Drake's argument is therefore contradictory. If reg 39(2) applies in the way he has argued then the privilege confirmed under reg 44(3)(b) could never be available in a penalty action.
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> [27] For these reasons I do not accept Mr Drake's analysis that the existence of reg 44(3)(b) means that reg 39(2), relating solely to penalties, does not have as its intent protection against self-incrimination in respect of such actions. The submission he makes, of course, is that if there is a wider rationale for reg 39(2) then its exclusionary effect upon disclosure extends equally to the plaintiff, as the seeker of the penalty, as to the defendant. I am of the view that reg 39(2), when it applies, does have the effect of removing the obligation of compliance with regs 40-52 by both parties and for that matter, non-parties, but for reasons totally different to those submitted by Mr Drake and with a different consequence than simply leaving a vacuum as he maintains.
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> [28] Mr Pollak's argument on behalf of the defendant was that for the purpose of protection against self-incrimination, reg 39(2) only applies for the benefit of the defendant on the receiving end of an application for a penalty. He submitted that reg 39(2) cannot possibly be interpreted to mean that the simple application of a penalty removes disclosure obligations on all parties, including the applicant. If that were the position then it would become the norm to apply for a penalty in all proceedings before the Court so that any party wishing to do so could avoid the obligation of disclosure. That would result in substantial impediments to the Court's orderly management of pre-trial procedures. Mr Pollak submitted that in any event, if that is the position in a penalty action then in this particular case the other causes of action could be isolated out so that disclosure can be enforced for those parts of the proceedings

[21] It is necessary also to consider the Employment Court's recent judgment in *NZ Meat Workers' Union Inc* v *South Pacific Meats Ltd & Talley*.[11] This is the third relevant case. This judgment concerned, among other things, questions of disclosure of documents by a party to the Employment Relations Authority in the course of

[11] [2015] EmpC 138

proceedings in that forum where there was or might be a risk of self-incrimination. The proceeding was then before the Authority, so that neither reg 39(2) nor any other applicable statutory provision in respect of the Authority was in force. The defendants relied, to validate their resistance to produce documents to the Authority, upon a common law right to privilege in civil proceedings where disclosure of a document might give rise to liability for a civil penalty.

[22] In *South Pacific Meats* the Employment Court noted that the question appeared to have been explored first in the employment jurisdiction in New Zealand by a full Court in *New Zealand Baking Trades Employees Union (Inc) v Foodtown Supermarkets Ltd*.[12] Although the Court in that case concluded that a party, required by the then Employment Tribunal to produce documents to it, was entitled to statutory confidentiality protections, albeit very different ones to those which currently apply, the Court wrote generally:[13]

> 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.

[23] In *South Pacific Meats* the Court also noted the statements of the Court of Appeal in *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* under a heading "*The rule against self-incrimination"*:[14]

> 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

[12] *New Zealand Baking Trades Employees Union (Inc) v Foodtown Supermarkets Ltd* [1992] 3 ERNZ 305.
[13] At 316.
[14] *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191 at 193.

> the peril and possibility of being convicted as a criminal': per Field J in *Lamb v Munster* 10 QBD 110, 111" (403).
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> See also *Blunt v Park Lane 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).

[24] As to whether that common law rule has been modified statutorily and under a heading "Ousting of the rule by statute", McMullin J, delivering the judgment of the Court of Appeal, wrote:[15]

> 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 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.

[25] Albeit strictly as an observation (obiter dicta), the Court in *South Pacific Meats* dealt with reg 39(2) at [66] and following. It distinguished the principles espoused by Judge Perkins in *Matsuoka*, which was a case affecting express statutory provisions in the Employment Court, although the Court in *South Pacific Meats* conceded that the questions were analogous, and informed the answers, to those affecting self-incrimination and disclosure in the Authority.

[26] The Court in *South Pacific Meats* agreed with the conclusion of Judge Perkins in *Matsuoka* that the conduct for which a penalty under the Act might be sought is not, or is not in the nature of, criminal offending.

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[15] At 193.

[27] The judgment in *South Pacific Meats* summarised the *Matsuoka* judgment as follows:

> [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. 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 (sic) 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.
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> [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 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.

[28] Regulation 39(2) does not mean that if any proceedings include a claim for a penalty, the respondent to the claim is relieved from disclosing all documents that the respondent may have. It is equally clear that a claimant for a penalty, whether as the sole relief or combined with other forms of remedy, cannot invoke reg 39(2) to absolve that party of the obligation of prosecutorial disclosure. Where claims to penalties arise, it will be for the Court to determine whether disclosure of documents will infringe the common law privilege against self-incrimination in civil proceedings identified by the Court in *South Pacific Meats*.

[29] In light of the decision in *South Pacific Meats*, therefore, I would add to the statements of principle in the *Matsuoka* case the finding that the Court will have similar regard to the protections of the grounds of privilege specified in reg 44 (and, in particular, the privilege against self-incrimination). This is in view of the

continuation of the common law privilege against self-incrimination in relation to proceedings for civil penalties, as the Court concluded in *South Pacific Meats*.

The effect of reg 39(2)

[30] I agree with the reasoning of the judgment in *Matsuoka* that reg 39(2) does not prohibit document disclosure per se in cases where penalties are sought and, more particularly, in proceedings where other remedies are claimed in addition to penalties. Regulation 39(2) creates an exception in such proceedings to the inter-parties disclosure process under the following regulations. In most cases, penalties are claimed as part of a range of remedies for a number of causes of action apart from breach of statutory provisions and/or breach of employment agreements. Regulation 39(2) cannot be interpreted and applied to preclude altogether inter-parties disclosure procedures in those other causes of action simply because they are accompanied by claims to penalties for breach in the same proceedings.

[31] This interpretation of reg 39(2) allows the Court to ensure that there is no self-incrimination in penalty proceedings at the same time as permitting appropriate disclosure of relevant documents in causes of action where other remedies are sought, and even in the same proceeding. So, if there is truly a risk of self-incrimination in respect of the penalty proceedings, the Court can confirm assertions of this privilege to which a party is entitled, irrespective of whether that is in penalty proceedings or in others in which there may be a risk of criminal self-incrimination That is because reg 44(3)(b) confirms a party's entitlement to assert a privilege against self-incrimination in criminal proceedings (but including self-incrimination in penalty proceedings) in any case before the Court in which document disclosure is sought.

Decision

[32] I have concluded that the plaintiff's first proposal for obtaining disclosure of the defendants' relevant documents while ensuring that their rights not to self-incriminate are preserved, is the most just manner of proceeding in all the circumstances. Although this is for the reasons that persuaded the Court in *Matsuoka*

to do so, it is also because the Court has subsequently determined that there is a common law privilege against disclosure of self-incriminatory documents in proceedings for civil penalties as are sought in this case. This procedure will mean that a single trial on all causes of action will be able to continue to take place as scheduled, as opposed to what I would have concluded was the only other alternative, namely a preliminary trial on causes of action for which penalties were sought, followed by the usual document disclosure rights and obligations in civil litigation and then a trial of those causes of action for declarations and damages. The following orders are made pursuant to the Court's powers to regulate its proceedings under ss 189 and 221(d) of the Act.

[33] I direct that:

(a) The first and second defendants (the unions) are to file an affidavit or affidavits including or annexing lists of their documents relevant to the proceedings. This is to be done within the next 14 days.

(b) Each document or group of documents must contain a reference to its general nature, the date of its creation, by and to whom it was sent and, if privilege against self-incrimination or any of the other two recognised classes of privilege are asserted, a brief description of the grounds for which such privilege is asserted.

(c) If, after having done so (which I reiterate must take place within 14 days of the date of this interlocutory judgment), there remains a dispute about whether any of the documents so disclosed are privileged, copies of all such disputed documents should be provided by the defendants to the Registrar of the Employment Court at Auckland for the purpose of a Judge determining each assertion of privilege.

(d) All documents so submitted shall be kept on a separate file that will not be available for inspection by, or disclosure to, any other person.

(e) Such documents as may be determined by the Court to be privileged will be returned to the defendants.

(f) Relevant documents which are not privileged will be made available for inspection and copying by the plaintiff.

[34] Leave is reserved for any party to apply for any further orders or directions on short notice.

[35] The costs on this application are reserved until costs are dealt with finally at the conclusion of the proceedings.

Managing the scope of the hearing

[36] In the course of argument on behalf of the defendants, Mr Cranney pointed out correctly that in addition to the first and second defendant union parties, there are 64 or so third defendants. At relevant times they were employees of the plaintiff and I expect the vast majority of them still are. As Mr Cranney submits, claims (including for penalties) are against each of those third defendants personally and, as such, they are entitled to defend themselves in the proceeding which is set down for hearing over five days. Counsel for the defendants has intimated that each of the third defendants may wish to attend the trial as parties and potentially as witnesses and otherwise to participate as individual sued parties are entitled to do.

[37] Without more, this will clearly provide significant logistical difficulties. It will be difficult to find a courtroom large enough to accommodate all of the third defendants. If each puts forward a defence, as he or she is entitled to do, considerably more than the five days allocated for the hearing will be required. I imagine, also, that the third defendants are a not insignificant proportion of Radius's workforce on which it will rely to be available for work and whose absence from work, because it has chosen to sue them, will provide difficulties for the plaintiff company and the residents of the homes it runs.

[38] I invite counsel to confer between themselves initially as to how these issues may be managed sensibly and justly and, if agreement can be reached, to put proposals to the Court with a view to giving directions. If no consensus can be reached, I think it is incumbent on the plaintiff to seek directions, even if only to maintain the current fixture and for the defendants to have an opportunity to respond to any directions sought by the plaintiff. Again, the timetable for doing so should not be open-ended. I will allow the same 14 days from today's date for the parties to either confer and agree or, alternatively if they cannot, for the plaintiff to apply formally for directions.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Wednesday 6 July 2016