**IN THE EMPLOYMENT COURT**
**WELLINGTON**

**WC 11/08**
**WRC 41/07**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | MCCAIN FOODS (NZ) LIMITED<br>Plaintiff |
| AND | SERVICE & FOOD WORKERS UNION NGA RINGA TOTA INCORPORATED<br>Defendant |

Hearing: 28 April 2008
(Heard at Auckland)

Court: Chief Judge G L Colgan
Judge B S Travis
Judge A A Couch

Appearances: RL Towner, Counsel for Plaintiff
Peter Cranney and Tim Oldfield, Counsel for Defendant

Judgment: 23 June 2008

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**JUDGMENT OF THE FULL COURT**

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[1] The question for decision at the heart of this case is whether employees of a competitor company can be union representatives entitled to entry onto the plaintiff's premises pursuant to statutory powers allowing and governing such entry. McCain Foods (NZ) Limited ("McCain") has elected to challenge by hearing de novo the determination of the Employment Relations Authority, finding that such persons can be union representatives entitled to entry.

## The facts

[2] The Service & Food Workers Union ("SFWU") has members who perform similar functions in both McCain's and Heinz Wattie's Limited's ("Heinz Wattie's")

food processing plants at or near Hastings. At each plant, union members have elected delegates. SFWU also has one full time and one part time organiser in the Hawke's Bay region who, in conjunction with workplace delegates, carry out its functions dealing with relevant employers including McCain. SFWU's full time organiser in Hawke's Bay is Thomas O'Neill. Two of its delegates employed at the Heinz Wattie's plant are Tai Wharepapa and June Brander.

[3] In the third quarter of 2007 the parties' negotiations for a collective agreement for union members at McCain's Hastings plant reached a stalemate. One of the union's responses to this was to attempt to recruit more members employed by McCain at Hastings by visiting the plant and speaking with relevant employees before or after work or in their breaks in the cafeteria.

[4] Although in the past what are known informally as union "member organisers", employed by Heinz Wattie's and other competing companies in the area, have entered McCain's plant under statutory union access entitlements without difficulty, a recent re-organisation of the company's management structure was probably behind its new strategy to prohibit this. Within the last couple of years the Hastings plant has ceased to be managed locally and its operations are now directed from Australia as an integrated part of a production operation that includes at least one large McCain factory in that country against which New Zealand operations are compared. There is, in a sense, a competitive relationship between those two plants so that the Australian plant's performance details are publicised to employees at the Hastings plant, who are encouraged to emulate and better these. McCain finds the best way to publish this comparative information is on staff notice boards in cafeterias.

[5] So among notices and other material displayed at the company and staff cafeteria at the McCain plant is what the company describes as "*commercially sensitive*" information. It does not wish either its competitors or employees of its competitors to see this information.

[6] The confidential information that McCain shares with staff and which is posted on notice boards in the plant cafeteria includes:

- minutes of management team and health and safety team meetings, including information that it would not want disclosed to its competitor: this information includes details of capital expenditure, quality and customer issues, and crop plantings;

- internal job advertisements;

- comparisons between the McCain New Zealand and Australian sites;

- what are described as *"enablers"*, cost items where savings are targeted;

- the company's international business strategy and growth plan known as *"Growing Together"*;

- overhead and maintenance comparisons between the McCain Australian and New Zealand sites;

- information about the cleanliness of production lines known as *"Sanitation Swabs"*.

[7] McCain is agreeable to full time union officials exercising access to its plant and, in particular, Mr O'Neill. McCain's opposition is to access by people who are employed by its competitor and, in particular, Ms Wharepapa and Ms Brander who are experienced SFWU delegates at the Heinz Wattie's Hastings site whom it says have responsibility to look after the best interests of the union's members employed by Heinz Wattie's.

[8] McCain engages a number of casual or temporary staff including people employed by labour hire companies who come and go freely in the factory and the staff cafeteria during the periods of their engagement. Other contractors and their staff do likewise. McCain has a recording system for persons on the site that is now usual in many workplaces. It requires visitors to sign in and sign out and to wear appropriate identification on their clothing during the period of a visit. That is unexceptional and no objection is taken to it by the union for its representatives.

[9] The company says it expects its employees to be loyal to it and that if Heinz Wattie's has the same expectation of its employees, their entry onto the McCain plant would create a conflict of interest and might cause Heinz Wattie's employees to misuse confidential information to the advantage of their employer.

[10] The SFWU describes itself as *"an organising union"*, one that involves its members in its affairs as much as possible. Its paid employees include the national secretary and regional secretaries who report, respectively, to the national and regional executives of the union, its governing bodies composed of elected members, usually delegates. Delegates and other *"activists"* play an important role in the union's affairs and, in practice, not only at their own work sites. Delegates represent the union in matters involving other than their own employers. This is reflected in a number of collective agreements that the union has entered into with employers, including Heinz Wattie's, although not McCain. So, in the case of the delegates at Heinz Wattie's in Hastings, their collective agreement allows expressly their release without loss of earnings *"for off-site Union business."* Union delegates appointed as member organisers are authorised by the national or relevant regional secretary of the union to represent it. There is no formality to the process of the appointment of a member organiser although, if that person is to be paid by the union, the authorisation of the national secretary is required.

[11] The SFWU uses member organisers to recruit at work sites that have either no union membership or a low level of union membership. Member organisers have an understanding of their particular industry and can relate well to other employees engaged in it, whether employed by the same employer or by other employers in the industry. This use of member organisers takes the pressure off the union's paid officials who cannot be present at all work sites at all times, especially for union membership recruitment purposes.

[12] Apart from Mr O'Neill, the only other paid union official in the Hawke's Bay region is a part timer with his own busy workload and sites for which he is responsible. The union has serious concerns that it would be unable to recruit members at the McCain site if only Mr O'Neill or the other part time paid union official were allowed access to the site.

[13] The union makes the point that its recruiting at the McCain site is conducted in the staff cafeteria because McCain employees are not working when there and that, from both the union's and the company's point of view, this is preferable to approaching them on the job.

## The determination challenged

[14] Having set out the relevant facts, the Authority found against McCain's position for the following reasons. It said that the statutory rights of entry conferred on unions by ss20 and 21 of the Employment Relations Act 2000 ("the Act") did not expressly exclude employees of competitors and that it was wrong to read the Act down by construing it in a manner which precluded them from exercising those rights on behalf of a union. The Authority found that a representative was someone chosen or appointed to act or speak for another or others and, the SFWU having chosen or appointed members to organise on its behalf and on behalf of its other members, they were entitled to have access to the McCain plant at Hastings, subject to other statutory constraints.

[15] The Authority also concluded that the role of member organisers as representatives was provided for both explicitly in the statute, and implicitly in the SFWU's rules. It concluded that the company's interests were safeguarded by both the express statutory provisions giving right of access and the legislation's requirements for all involved to act in good faith. The Authority found it would be an abuse of those requirements, for example, for a delegate to enter the McCain plant for the purposes of industrial espionage or to pass on to his or her employer or a third party commercially sensitive information obtained as a result of that access. It would also be a breach of the legislative good faith requirements for the employer of those persons to require or pressure them to pass on commercially sensitive information in these circumstances.

## The case for the plaintiff

[16] McCain advances three grounds for saying that the Authority's determination was wrong and that it is entitled to exclude from access to its Hastings plant the two member organiser employees of Heinz Wattie's, Tai Wharepapa and June Brander.

[17] The first argument is that neither Ms Wharepapa nor Ms Brander is properly authorised by the union as its representative under s21 because the union has no power to appoint them to that role. In particular, McCain says that the purported authorisation given by the union's national secretary does not comply with the union's rules and is therefore of no legal effect.

[18] The second argument advanced by the company is that it is *"justified"* in denying access to the employees of its major competitor because of potential damage to its business from loss of valuable commercial information.

[19] Finally, McCain says the union is not acting *"reasonably"* and therefore not in compliance with s21(2) of the Act in insisting that access to the company's site be granted to Heinz Wattie's employees.

## Case for the defendant

[20] As to the plaintiff's argument that the member organisers are not representatives of the union appointed pursuant to its rules, Mr Cranney submitted that unions have a general right to organise their own affairs including their choices of representatives. That is said to be reflected at a fundamental level by International Labour Organisation Convention 87 Article 3, clause 1 of which provides that:

> *Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*

[21] Dealing with employer objections to union representatives in New Zealand, the defendant relies on the statement of principle in *Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corporation (NZ) Ltd* [1993] 2 ERNZ 513, 522:

> *The employees' right to decide to be represented and their right to decide who their representative should be are absolute rights concerning which their employer has no say, except in the rare cases caught by s 11* [of the Employment Contracts Act 1991 that has no application in this case].

## The legislative code

[22] Entry onto work premises by union representatives that would otherwise be unlawful if objected to by employers, is governed by ss19 to 25 (inclusive) of the Act. Sections relevant for decision of the issues in this case include:

- Section 20 refers to *"A representative of a union"* and sets out the purposes of entry by such a person to a workplace as including for purposes relating to the employment of the union's members or related to its business or both. Subsections (2) and (3) further define the purposes related to the employment of union members and to a union's business.

- Section 21 places conditions on access to workplaces by union representatives. Subsection (2) confines such entry to *"reasonable times during any period when any employee is employed to work in the workplace"* and requires that such entry be done *"in a reasonable way, having regard to normal business operations in the workplace …"*. Significantly, under s21(2)(c)(ii) a representative *"must comply with any existing reasonable procedures and requirements applying in respect of the workplace that relate to … security."*

- Section 21(3) requires that if, and at the time of initial entry, called upon by an employer, a representative of a union must give the purpose of the entry and produce evidence of his or her identity and *"evidence of his or her authority to represent the union concerned"*: s21(3)(b)(ii)

- Section 22 provides expressly when access to workplaces may be denied to *"A representative of a union"*. Circumstances include if entry to the premises or any part of them might prejudice the security or defence of New Zealand or the investigation or detection of offences.

- Sections 23 and 24 deal with the denial of access to workplaces on religious grounds.

- Finally, s25 provides for penalties to be imposed for refusal to allow union representatives to enter a workplace or for the obstruction of representatives of unions in doing so.

[23] What is a *"representative of a union"* is not defined in the legislation.

## The SFWU's rules

[24] These are the Rules of the Service and Food Workers Union Nga Ringa Tota Incorporated 2006. Particular rules relevant to the question whether the union is entitled to authorise "member organisers" to represent it for the purposes of workplace entry include the following.

[25] Under r3 (*"KAUPAPA OF THE UNION"*), the union describes itself as *"an organising union"* being *"a collective of workers who improve the lives of workers and work for a fair and just society by organising for strength and unity on the job, in our industries, our communities and society as a whole."*

[26] Further objects under r3 include:

> *3.1 To organise those workers who are covered by the membership rule of this union throughout New Zealand for the purpose of protecting and furthering in any lawful way the interests of members employed in the industry in relation to their conditions of employment.*
>
> …
>
> *3.6 Such other objects which are not inconsistent with the above kaupapa.*

[27] Rule 4 deals with *"POWERS OF THE UNION"* and includes, for the purposes of pursuing its objectives:

*4.1.3 Exercise all legal rights and powers of the Union provided for under the Incorporated Societies Act 1908 or under the Employment Relations Act 2000 and successor legislation and their amendments.*

…

*4.1.13 Employ staff on such terms and conditions as the National Executive of the Union considers appropriate, to carry out the Objects of the Union.*

…

*4.1.15 Institute and maintain an active program of recruitment of new members.*

…

*4.1.17 Do any other thing that is necessary or incidental to the exercise of any of these Powers.*

[28] Part III ("*NATIONAL STRUCTURES & MANAGEMENT*") provides, under the subheading "*MANAGEMENT OF THE UNION*" at r20.1:

> *The business of the Union and all its affairs shall be controlled and managed by officials, executive members and delegates democratically elected by the members of the Union in accordance with these Rules.*

[29] Dealing with the role and powers of the regional secretary of the union (John Ryall) who purported to authorise in writing Ms Wharepapa and Ms Brander to be member organiser representatives of the union for purposes of entry to the McCain Hastings site, the rules provide as follows:

> *32.9 The Regional Secretary shall be in general supervision of industrial disputes within the region and shall supervise and control all staff employed by the region.*
>
> *32.10 The Regional Secretary shall be responsible for any correspondence regarding union matters within the region so as to ensure the smooth running of the union consistent with the union's objectives, policies, the decisions of the National Executive, Regional Executive, special and general meetings.*

[30] "*DELEGATES*" are dealt with in r38. Rule 38.1 emphasises the election of union delegates within workplaces and by members in them. Organisers are to maintain regular contact with delegates to ensure adequate resourcing and advice. Rule 38.2 recognises "*that delegates have a vital role in the workplace in protecting and advancing the interests of members [and] also are important in developing the democratic participation of members in the affairs of the Union.*" Rule 38.4 records the encouragement by the union of delegate participation in policy development and "*campaigns promoted by the Union.*"

[31] Rule 38.5 provides:

> *It shall be the responsibility of the job delegate to represent the interests of the members in their particular place of work to the Union and to the employer. The delegate shall act in a manner, which is consistent with the Rules and Policy of the Union.*

[32] Part VII (*"OTHER MATTERS"*) includes at r60 (*"REPRESENTATION"*):

> *60.1 The union may be represented before any Court or Tribunal by such person or persons as the National Executive may appoint.*

[33] Rule 62 deals with *"UNION STAFF"* and provides:

> *62.1 Appointed staff shall be paid officials of the Union.*
>
> *62.2 The National or Regional Executive, as appropriate, may appoint such staff as may be required from time to time to carry out such duties as the National or Regional Executive may require. Such staff shall carry out their duties under the direction of the National or Regional Secretary or Assistant Secretary as appropriate, and shall report as required to meetings of the National or Regional Executive. …*
>
> *62.3 Organisers shall report to the appropriate National or Regional Secretary or Assistant Secretary. Organisers shall carry out the policy of the union and their duties shall from time to time be laid down by the National or Regional Executive where delegated that function by the National Executive. …*

## Construing the SFWU's rules

[34] Mr Towner for McCain relied on statements in New Zealand judgments that mandate a strict and literal approach to interpreting union rules. These New Zealand judgments no doubt followed English counterparts to like effect. However, the following examination of the judgments relied on by Mr Towner and of other subsequent judgments shows a change of approach over more recent years in both jurisdictions.

[35] In *British Actors' Equity Association v Goring* [1977] ICR 393, Lord Denning MR in the English Court of Appeal stated:

> *So when it comes to construing the rules, it seems to me that they should be construed, not literally according to the very letter, but according to the spirit, the purpose, the intendment, which lies behind them, so as to ensure –*

> *especially in a matter affecting the constitution – that they should be interpreted fairly, having regard to the many interests which its constitutional code is designed to serve. … it seems to me that the courts, when called upon to construe the rules, must do all they can to construe them reasonably, fairly, broadly and liberally in the interests of all concerned in the association.*

[36] Roskill LJ at pp401-402 of the same case discussed the evolution of associations and how their rules may not cover every eventuality, meaning that it was important not to interpret them too legalistically.

[37] The *Goring* case was further considered by the House of Lords on appeal in *British Actors' Equity Association v Goring* [1978] ICR 791. Viscount Dilhorne held at pp794-795:

> *While it cannot be said that the rules are a fine example of legal drafting, I do not think that, because they are the rules of a union, different canons of construction should be applied to them than are applied to any written documents. Our task is to construe them so as to give them a reasonable interpretation which accords with what in our opinion must have been intended.*

[38] The next relevant decision is *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15 where, at pp100-101, the House of Lords stated:

> *… trade union rule books are not drafted by parliamentary draftsmen. Courts of law must resist the temptation to construe them as if they were; for that is not how they would be understood by the members who are the parties to the agreement of which the terms, or some of them, are set out in the rule book, nor how they would be, and in fact were, understood by the experienced members of the court. Furthermore, it is not to be assumed, as in the case of a commercial contract which has been reduced into writing, that all the terms of the agreement are to be found in the rule book alone: particularly as respects the discretion conferred by the members upon committees or officials of the union as to the way in which they may act on the union's behalf.*

[39] This was followed by the Court of Appeal in New Zealand in *NZ (with exceptions) Food Processing, Chemical IUOW v NZ Meat Processors, Packers, Preservers, Freezing Works IUOW* [1986] ACJ 885. That was a demarcation case turning on the interpretation of union rules and whether the word *"meat"* should be construed in accordance with the Meat Act. The Court of Appeal held:

> … *the only safe course is to have regard to the exigencies of drafting and give the particular provision under consideration its ordinary and natural meaning having regard to the context in which it appears and so to its function in the Rule and also to recognise that membership clauses like objects clauses are ordinarily intended to be facilitative, not restrictive.*

[40] This was followed by the judgment of the Labour Court in New Zealand in *NZ Air Line Pilots Assn IUOW v The Registrar of Unions* [1989] 2 NZILR 194 where, at p215, the Chief Judge, in dealing generally with the interpretation of union rules, stated:

> *There are many other dicta in the cases warning against unduly legalistic constructions, if they lead to a meaning which is contrary to that in which the parties, the union and its members, would reasonably have understood the rules. All this is entirely consistent with what this Court's approach should be, and is, to the construction of union rules.*

[41] Next, in *Barron v Canterbury Frozen Meat Company Ltd* [1989] 3 NZILR 305, the Labour Court adopted the approach of the High Court of Australia in *R v Holmes: Ex parte Public Service Association (NSW)* (1978) 140 CLR 63 which, when speaking of the rules of a trade union, said:

> *I would add that rules of this kind should not be subjected to the same meticulous scrutiny as a deed carefully prepared by lawyers, and should not be restrictively construed.*

[42] The High Court referred also to the following passage in *R v Aird: Ex parte Australian Workers' Union* (1973) 129 CLR 654:

> *As with all construction, the nature of the instrument in which the words appear and the purposes the instrument is evidently intended to serve or effect must be kept in mind. In this respect, it is proper, in my opinion, in the present case to acknowledge that the eligibility clause will have been drawn, more likely than not, by union officials more familiar with the practical affairs of industry than with the niceties or subtle nuances of language. But, granted this generosity of approach, the question of the meaning of the words used remains a legal question.*

[43] The Court in *Barron* noted that while a rule had to be interpreted according to its plain words, established custom and practice can appropriately be brought into account consistently with that fundamental approach.

[44] A similar question was addressed by the Court of Appeal in *Walker v Mount Victoria Residents Association Inc* [1991] 2 NZLR 520. The case concerned

whether the Association had status to appear before the Planning Tribunal, and it was argued that it had not resolved properly to bring an appeal in accordance with its rules. At p524 Hardie Boys J held:

> *The rules of an incorporated society, which by definition does not exist for profit, but normally for purposes of mutual interest and concern of its members, and so is likely to function informally rather than formally, must in my view be construed sensibly and realistically so as to give them practical and workaday effect.*

[45] Finally, and most recently, the proper approach to interpreting the rules of an incorporated society was addressed by the High Court in *Antunovich v Dalmatinsko Kulturno Drustvo Inc (Dalmatian Cultural Society)*, HC Auckland, CP398-SW00, 15 November 2000, where Rodney Hansen J commented:

> *I think it is inappropriate to impose on the democratic processes of a voluntary society an unduly high degree of formalism and technicality. Some flexibility and pragmatism is called for provided the ultimate goal is not frustrated.*

## Union powers and "ultra vires"

[46] Dealing with the plaintiff's related ultra vires argument, there are a number of relevant authorities. In *Automobile Association (Wellington) Inc v Daysh* [1955] NZLR 520 the Court of Appeal dealt with a challenge to a commercial arrangement made by an incorporated society that was said to have involved it acting beyond its legal powers. The Court of Appeal noted:

> *The objects of such a body are to be construed in a fair and reasonable way. Unless expressed with objectionable and meticulous redundancy, they will necessarily be expressed in somewhat vague and general terms, and considerable reliance will be placed on the well-established rule that objects are to be read as including what is reasonably necessary for their attainment.* (p532)

[47] The Court of Appeal cited with approval the historic statement by the House of Lords in *Attorney General v Great Eastern Railway Co.* 5 App. Cas. 473, 478 per Lord Selborne that:

> *… this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought*

> *not (unless expressly prohibited) to be held, by judicial construction, to be* ultra vires.

[48] In *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159, 178 the Court of Appeal noted:

> *The law or practice relating to limited liability companies is not necessarily a helpful analogy in approaching these cases. The doctrine of ultra vires in company law was evolved mainly to protect investors and creditors. The same considerations are not easily transportable to cases where the raison d'etre of an organisation is not to make profits but to promote a certain activity.*

[49] The authors of Mazengarb's Employment Law (NZ) in the chapter on trade unions and representatives – "*Powers"* [2210] note:

> *The law relating to ultra vires activities by incorporated societies seems to be in a state of flux at present. … In* Walker v Mt Victoria Residents Association *[1991] 2 NZLR 520 (CA), Richardson J suggested that the provisions of the Incorporated Societies Act "may require or allow a broader approach historically and in the wider public interest" (at 523), a view previously suggested by Cooke J in* Finnigan v NZ Rugby Football Union Inc *[1985] 2 NZLR 159, at 178 (CA).*

[50] The Mazengarb text is also pertinent when considering implied powers of unions. At [2217] the author[1] states:

> *Since the rule book is a contract, the general principles of the law of contract prima facie apply to it. One of these principles is that under certain circumstances the Courts may imply terms into the contract in order to give it practical efficacy. In* Bourne v Colodense Ltd *[1985] IRLR 339, it was stated that it should not be assumed that "all terms of the agreement between the members and the union are to be found in the rule book". So far there has been little judicial discussion of the manner in which the Courts should imply supplementary rules into union rule books, or eke out inadequate rules by implication, and none in relation to unions in New Zealand. In summary, the Courts have so far adopted a cautious approach.*

[51] Dealing with the position in the United Kingdom, Mazengarb opines:

> *… the Courts in the United Kingdom have been reluctant to imply terms which would extend the duties of the members as against the union. It will no doubt be easier to induce a Court to imply something of a procedural character into a union's rule book than something touching on a topic not dealt with at all by the rules. If, for example, a rule provided that "notices of remits must be despatched to members before the Annual Conference", a*

[1] Gordon Anderson, now Professor of Law at Victoria University, Wellington.

> *Court would almost certainly imply the words "by the secretary, so as to reach members before they leave to attend the Conference". ...*
>
> *A different issue is posed by practices, contrary to union rules, that may develop within a union. Such a practice, however well established, cannot abrogate a rule, and no one relying on a rule can be met by an estoppel founded on his or her acquiescence in a contrary practice* (Gould v Wellington Watersiders Workers IUW *[1924] NZLR 1025;* Bielski v Oliver *(1958) 1 FLR 258*). *Nor can the rules be informally varied by the members* (Barrett v Opitz *(1945) 70 CLR 141*). *In all cases, amendments must pass through the specified procedure.*

[52] Drawing these threads together in the context of union rules in 21st century New Zealand, we conclude that provisions of union rules conferring powers should be interpreted facilitatively and liberally to give effect to the union's lawful objectives. The emphasis is no longer upon literal and restrictive interpretations of such provisions and consequential exclusion of implied powers.

## What is a "representative" of a union for the purposes of statutory access?

[53] In the absence of a statutory definition, Mr Towner argued that the Court should adopt the definition from the 6th edition of the Concise Oxford Dictionary that a representative is a *"person's or firm's agent"*. We agree with that starting point.

[54] Next, counsel submitted that an authority to represent the union must be a valid and lawful authority. A union must act under its registered rules so that its authorisation of a representative must be one that it is able to give pursuant to them. Unions are incorporated societies and their powers as such are limited to those expressly or impliedly permitted by the rules: Laws of New Zealand, Incorporated Societies and Other Associations (2000) at para 5. So, *"… if a body with limited powers makes a decision which it has no power to make, the decision is void and of no legal effect"*: *Crédit Suisse v Allerdale Borough Council* [1996] 4 All ER 129. We agree also with these fundamental propositions of law.

[55] Mr Towner submitted that the Authority erred in its approach to the decision by concluding that the employees of Heinz Wattie's could enter as representatives of the union because there was nothing in the union's rules preventing the appointment of member organisers with authority to represent the union. Mr Towner argued that

it cannot be correct that the union is entitled to do anything that its rules do not prevent. Rather, he submitted that the position is antithetical to that. We accept that general proposition also. If the Authority decided the issue by concluding the union could do anything its rules did not prevent it expressly from doing (because it is obvious that there is no express power in the rules), then it erred in law. But that is not the end of the matter. At the heart of the case is whether the union's rules implicitly authorise members, designated informally as member organisers, to be representatives of the union for the purpose of statutory entry to workplaces other than their own.

[56] Relying upon the judgment of the Court of Appeal in *Wellington Amalgamated Watersiders' Industrial Union of Workers and Others v Wall* [1962] NZLR 777, Mr Towner submitted that there is comparatively little scope for the implication of powers to a union: see also Mathieson, Industrial Law in New Zealand (1970) 218-220. However, analysis of more recent judgments, both in New Zealand and elsewhere as earlier set out in this judgment, reveals that this proposition is now suspect. When construing unions' rules to determine the extent of implied powers, the emphasis should be on reasonable facilitation rather than on constraint.

[57] Mr Towner also relied on the judgment of the High Court in *Winstanley v The National Union of Railwaymens IUOW* A283/80, 17 November 1982. That was a case about a union's power to resolve to debar a member from holding office for a term of 5 years. The rules contained express powers to remove a union employee from office for incompetence or insubordination and, separately, to suspend an officer of the union on the same and other broader grounds. The High Court determined that the express rules did not cover what the union had purported to do. Nor was the position saved by another rule that allowed the union's National Council *"to interpret doubtful rules and [to] determine anything in connection with the business of the union on which the rules are silent."* The power purportedly exercised did not fall into the category of power so described and the debarring from office was held to have been ultra vires the union.

[58] Mr Towner submitted that these cases establish that the union's rules regulate its affairs and empower it to act as provided for expressly or impliedly. Counsel

submitted that the union can only do what is permitted by its rules or as additionally authorised by the legislation, for example to represent its members under s18 of the Act, to initiate bargaining under ss40 to 42, and the like. Again we agree with this as a broad proposition of the law.

[59] Counsel submitted that the Court's task is to determine whether the rules, expressly or by necessary implication, permit the union to authorise *"member organisers"* to exercise access to work sites. Counsel pointed out that there are a number of rules providing for membership, national and regional management, delegates (r38), and union staff including organisers (r62). In particular, *"organisers"* are paid officials of the union pursuant to r62.3.

[60] As we have already noted, and against which Mr Cranney did not argue for the union, its rules do not authorise expressly a member of the union to act as a representative in exercising access to a workplace. Mr Towner submitted that such a power cannot be justified as a reasonable implication from the rules and, in particular, r4.1.17 does not assist the union. Counsel submitted that the reference to the word *"workplace"* in r38 dealing with *"delegates"* is a reference to the workplace in which such delegates have been elected by their fellow employees to represent their interests. Counsel submitted that this should not be construed as authorising impliedly delegates to act as representatives of the union in relation to access in other workplaces. That is said to be emphasised by r38.5 clarifying the responsibility of job delegates and stating:

> *It shall be the responsibility of the job delegate to represent the interests of the members in their particular place of work to the Union and to the employer.*

[61] Mr Towner submitted that, like members, delegates are neither expressly nor impliedly authorised under the union's rules to act as its representatives in relation to workplace access.

[62] Counsel submitted that organisers are appointed and are paid officials of the union. Their role is to carry out union policy including in relation to rights of exercising access. Counsel submitted that this delegation of powers from the national or regional executive authorises organisers to act as the union's

representatives in relation to access. Organisers are in an employment relationship with the union rather than a membership relationship. It is the plaintiff's case that simply because the union does not have the human resources authorised by its rules to represent it in Hawke's Bay, it cannot thereby lawfully use others, and in particular members from other workplaces operated by competing employers, to do so.

**Is a "member organiser" able to be a representative of the SFWU?**

[63] We find that it is necessarily implicit in the union's rules that representatives or agents can be appointed to exercise the statutory powers of entry to workplaces. The absence of an express power is not fatal to the desirability, if not necessity, in practice for the union to make such appointments.

[64] The next question is whether such appointees can be so-called member organisers, a class not referred to expressly in the union's rules and therefore not invested expressly with powers or able to have powers delegated to them. Consistent with the principle discussed earlier, the rules are to be interpreted and applied to facilitate their express objectives. This includes, where necessary and appropriate, the implication of powers. The express objectives of the rules include being *"an organising union"* (r3), *"a collective of workers who…[organise] for strength and unity…in our industries"* (r3) *" for the purpose of … furthering in any lawful way the interests of members employed in the industry in relation to their conditions of employment."* (r3.1). Other objects include to "*Institute and maintain an active program of recruitment of new members*"(r4.1.15) and to "*Do any other thing that is necessary or incidental to the exercise of any of these Powers*." (r4.1.17). Rule 38.4 encourages delegates to be involved in union campaigns that include recruitment, precisely what is happening in this case. If not express authorisation, this is certainly a strong indicator of an implied power.

[65] We conclude that there are implied powers in the union's rules to create the position of member organiser and to authorise persons holding that position to exercise the union's statutory right of entry to workplaces. As the Authority found and we endorse, so long as persons purporting to enter are authorised representatives

of the union, the employer is not permitted to prevent their entry simply because it does not approve of them. So it follows in our conclusion that McCain cannot exclude member organisers, including Ms Brander and Ms Wharepapa, from its Hastings plant on grounds that they are not in law representatives of the union. This first ground of challenge fails.

## "Unreasonableness" as a ground of challenge

[66] Although posed as a second ground of challenge, we do not think that "unreasonableness" alone can operate to preclude the member organisers from accessing the McCain site as union representatives. Indeed, Mr Towner did not so argue in substance. Rather, unreasonableness formed a part of McCain's remaining ground of challenge. We agree that unreasonableness without reference to a statutory test cannot determine a case that depends on statutory interpretation and application to particular facts. Put another way, whether or not we may think that the entry of Heinz Wattie's employees onto McCain's premises purporting to represent the union is unreasonable cannot be determinative of the issues in the case. So we say no more about reasonableness per se, although, in deciding the remaining ground of challenge, we will invoke the concept in terms of the manner of entry and in compliance with security procedures.

## Is entry by Heinz Wattie's employees compliant with s21(2)?

[67] We turn now to the plaintiff's third broad ground of challenge. That is that entry onto the McCain site by employees of Heinz Wattie's does not meet the statutory requirement that such entry be made in a reasonable way having regard to normal business operations in the workplace. McCain says also that it does not comply with the requirement that entry be in conformity with existing reasonable procedures and requirements applying in respect of workplace security.

[68] Mr Towner relies on the judgment of the Court of Appeal in *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ 239. At paragraph [25] the Court of Appeal agreed with the Employment Court's approach at first instance to union rights of entry onto private employer property that these should be

*"strictly construed if there is doubt."* Mr Towner relied particularly on paragraphs [43] and [44] of the Court of Appeal's judgment in which it postulated circumstances in which an employer could refuse access. These were said to include situations in which access could cause potential damage to the employer's business, where there was a serious risk to health or safety or *"loss of valuable commercial information"*. Mr Towner went on to submit that the evidence discloses that there will be potential damage to the company's business by the risk of the loss of *"valuable commercial information"* if access is exercised by employees of a commercial opponent.

[69] Mr Towner submitted that Heinz Wattie's employees *"have a fundamental obligation to act in the best interests of that company"* and, so far as the member organisers are concerned, the responsibility to look after the best interests of union members employed at Heinz Wattie's. Mr Towner invited us to find that anything that may be to the detriment of McCain or to the advantage of Heinz Wattie's could potentially benefit union members employed by the latter company.

[70] Counsel submitted that a potentially greater risk than deliberate industrial espionage will be inadvertent passing on of information by a Heinz Wattie's employee failing to appreciate its commercial value. Mr Towner submitted that even to require a Heinz Wattie's employee to sign a confidentiality undertaking (as has been suggested by the union) will not be sufficient protection for McCain.

[71] Mr Towner emphasised the genuineness of the company's concern by reference to the fact that it does not oppose union access per se, that this has not been an issue at other sites, and that it has always acknowledged that the union's Hawke's Bay organiser, Mr O'Neill, is entitled to exercise access on the conditions set out in the statute.

[72] For the defendant, Mr Cranney says if there is an existing reasonable security requirement prohibiting the taking of photographs then this could reasonably extend to a prohibition upon the reading of confidential material on notice boards. Disobedience of this requirement could result in heavy fines imposed under s25(c) of the Act and, potentially, liability in tort against a union representative acting in breach.

[73] Alternatively, Mr Cranney submitted that the confidential nature of documents on display at McCain's Hastings site may be a basis for a requirement that such documents not be read by representatives but not for denying access to the site. Counsel pointed out that many workplaces contain documents that are sensitive or confidential but are necessarily on display. These would include banks, insurance companies, hospitals, Government departments, prisons, factories and so on. Mr Cranney submitted that most of the information that might be on the notice board is scarcely sensitive or confidential at all. To the extent that such documents or some of them might not be read, this can easily be complied with by obscuring them. Counsel submitted that the plaintiff has sought to exaggerate the confidentiality and risk so as to deny access and says that if such documents were truly confidential they would not be on a notice board in an area such as a cafeteria in any event.

[74] We do not wish to discourage McCain from sharing information with its workforce and accept that some of this at least, and for a limited time, will be confidential in the sense that McCain wishes legitimately to ensure that competitors are not aware of it. Although, by agreeing to disclose such information to a large workforce, McCain must accept the possibility of some inadvertent disclosure even by its own loyal employees, that should not be an argument for compromising confidentiality in other ways. Rather, the answer seems to us to be that practical means can and should be taken by McCain and the union to preserve current levels of confidentiality of this information. This can be done at the same time as allowing the union to exercise its statutory rights including, if it wishes to do so, by union representatives who are employed by a competitor business.

[75] In the detailed legal analysis of such concepts as express or implied authorisation, ultra vires and the reasonableness of entry by competitors' employees, it is easy to overlook essentially practical and reasonable ways of resolving this dispute. There are at least two that are obvious. First, the employer could ask to have reasonable, albeit short, notice of the union's intended visit so that confidential information on a notice board in a room where a meeting is going to be held could either be removed temporarily or obscured simply by another sheet of paper being pinned on top of it. That would eliminate the risk about which McCain is concerned that employees of its competitor will, even inadvertently, learn of McCain's

strategies or other confidential information. That would seem to us to be both a low-tech and easily implemented solution to the employer's concerns.

[76] The other answer may be for the parties to agree that the meetings that the union wishes to hold will be held elsewhere than in the work cafeteria where such notices are exhibited. There is evidence that there is more than one cafeteria in the plant and it is likely that there would be other suitable places for a meeting to be held in which confidential information would not be displayed.

[77] The statutory obligations of "good faith" also affect this aspect of the dispute. Although the company's arguments do not avoid this aspect of the case, we nevertheless consider that they do not do it justice. Union representatives owe McCain a statutory duty of good faith: s4(2)(b). That includes, but is not limited to, not misleading or deceiving McCain. We consider that the duty extends to not disclosing McCain's confidential information if that comes to the knowledge of those union representatives including if they are employed by competitors.

[78] As well, the statutory obligations of good faith that member organisers may owe their own employer do not extend to any obligation to convey to it confidential information belonging to its competitor into possession of which the union representatives may have come by virtue of that role. In evidence, McCain's human resources manager at its Hastings site confirmed that his advice to McCain would be to reject and not rely upon any confidential information of a competitor that one of McCain's employees may have come across. He said he expected that his counterpart's advice at Heinz Wattie's would be the same. Those are proper and responsible expectations that the Court would likewise expect Heinz Wattie's and its relevant employees to respect.

[79] We do not agree with Mr Towner's proposition that employees of Heinz Wattie's will feel compelled to do what they can to advance their employer's interests at the expense of McCain. The employees concerned are food processing workers employed on modest wages to perform manual work. Although not to demean them or their work, they are not fiduciaries or even managers involved in

strategy. If anything, their loyalty in this task as member organisers may be to their union rather than to their own employer.

[80] So, put shortly, statutory obligations of good faith mean that even if confidential information were to be gleaned, advertently or inadvertently, it cannot be disclosed to a competitor or otherwise acted upon.

[81] We conclude that the union will exercise reasonable access to the McCain plant at Hastings, if it does so by member organisers employed by a competitor, by giving McCain reasonable notice of its intention to do so. The period of this notice should be related to McCain's ability to protect its confidential information on display by either removing it, or covering it temporarily. We imagine that no more than a few minutes at most will be required to do so. Specifically, under s21(2)(b), the "reasonable way" for union entry to take account of McCain's reasonable security procedures and requirements will be either for the union representatives to wait until confidential information has been removed or obscured, or for those representatives to give the company advance notice of their arrival at the plant to enable this to be done. We note that this was in essence the union's suggestion to the company but which, for reasons that are not apparent to us, it declined to consider.

## Outcome of challenge

[82] Although on some different grounds from those used by the Authority, for the reasons given McCain's challenge is dismissed. We reserve questions of costs to be determined by a single Judge. If costs cannot be settled between the parties, any applications should be filed and served within 30 days of this judgment with the respondent to such application having a like period within which to reply by memorandum.

GL Colgan
Chief Judge
for full Court

Judgment signed at 2.45 pm on Monday 23 June 2008