

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**[2015] NZEmpC 85  
CRC 18/14**

IN THE MATTER OF a referral of a question of law from the  
Authority  
AND IN THE MATTER of a challenge to objection to disclosure  
BETWEEN AGUS RIYANTO AND 43 OTHERS  
Plaintiff  
AND DONG NAM COMPANY LIMITED  
Defendant

Hearing: (on the papers dated 13 February, 24, 29 April and 4, 13, 20 and  
21 May 2015)

Counsel: P Dawson, counsel for the plaintiffs  
K Reid and J Inns, counsel for the defendant

Judgment: 9 June 2015

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**INTERLOCUTORY JUDGMENT NO 2 OF JUDGE B A CORKILL**

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**Introduction**

[1] This judgment determines a disputed disclosure issue.

[2] For convenience I repeat the description of the background to the proceeding as set out in my first interlocutory judgment in this matter:<sup>1</sup>

[2] 87 crew members from three South Korean flagged fishing vessels (*Sur Este 700*, *Sur Este 707* and *Sur Este 709*) owned by the defendant filed claims in the Employment Relations Authority (the Authority) alleging that wages were due. If the three actions had proceeded before the Authority they would have been consolidated. However, in a determination of 1 July 2014, the matter was removed to the Employment Court without the Authority investigating them.

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<sup>1</sup> *Agus Riyanto & 43 others v Dong Nam Co Ltd* [2015] NZEmpC 67 (footnote omitted).

[3] In this Court, the plaintiffs in respect of each vessel filed separate statements of claim. I am currently concerned with a claim brought by 44 crew members who it is alleged worked on *Sur Este 707*, that vessel being registered to fish in New Zealand fisheries waters pursuant to s 103(4) of the Fisheries Act 1996; it is also alleged that this Court has jurisdiction in relation to the employment relationship between the plaintiffs and the defendant by virtue of s 103(5)(g) of the same Act. The plaintiffs currently allege that:

- a) The defendant breached the obligations it owed to them under their employment agreements by failing to pay the plaintiffs their full wage entitlements.
- b) The defendant breached s 6 of the Minimum Wage Act 1983 by failing to pay the plaintiffs their full wages entitlements. This cause of action will involve a consideration of the findings made in *Idea Services Limited v Dickson* to support a contention that the plaintiffs be paid the minimum wage 24 hours per day and seven days per week for the period they were on call at sea.<sup>2</sup>
- c) The defendant breached s 12A of the Wages Protection Act 1983 by seeking and receiving premiums in respect of employment for some or all of the plaintiffs.

[4] In respect of the claim that the plaintiffs be paid for each hour that they were at sea, quantum is not yet pleaded. Alternatively, the plaintiffs seek orders that the defendant pays each of them for unpaid wages and for wrongfully retained sums in specific amounts. The claims arise between April 2007 and January 2013. The initial estimate of unpaid hours for the 44 plaintiffs is \$3,235,008.19, and for wages alleged to have been retained wrongfully by the defendant's agent, \$1,233,836, in all a total of \$4,468,844.19.

[5] For its part, the defendant denies each of the plaintiffs' claims, pleading in effect that all wages have been properly paid.

[3] On 13 February 2015, the plaintiffs served on the defendant a notice requiring disclosure under reg 42 of the Employment Court Regulations 2000 (the Regulations). Disclosure of 19 categories of documents were requested. Only six of those categories are now in issue, the earlier categories having been dealt with by way of a verification order. The outstanding categories were described in this way:

#### **The charter agreement**

14. All agreements, contracts, charter parties and documents between the defendant and [South East Resources (2001) Limited SERL] evidencing the provision of the vessel and the crew to SERL, together with;

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<sup>2</sup> *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522.

15. All invoices for charter fees;
16. All receipts for charter fees;
17. All (original) bank transfers, money order or any financial instrument made for the payment of charter fees;
18. Spreadsheets supporting the calculation of hire, with reference to the payment of crew;
19. Documents containing details of calculations of all charter fees from SERL to the defendant during the claim period.

[4] During discussion with counsel on 17 April 2015 at a directions conference which dealt with a range of interlocutory issues, it was agreed that if the defendant wished to contest the disclosure which was sought, then a formal objection to disclosure needed to be served. Then the plaintiffs would have a right to challenge that objection thereafter.

[5] Accordingly, on 22 April 2015, the defendant filed an objection to disclosure in respect of the disputed categories stating that the documents in question were not relevant to any matter in dispute between the parties in terms of reg 31(1), (category 14) and that the balance of the documents arose from that category and therefore were also not relevant to any matter in dispute between the parties (categories 15 to 19).

[6] This was followed by the filing of a challenge to objection to disclosure on 24 April 2015. The objection to disclosure states that the plaintiffs' challenge is based on these grounds:

3. The documents described at categories 14 – 19 of the plaintiffs' notice requiring disclosure are relevant documents in the resolution of these proceedings and so far as they may directly or indirectly:
  - a) support the plaintiffs' case;
  - b) prove or disprove disputed facts in the proceedings.
4. The plaintiffs assert in their Statement of Problem that they did not receive their full minimum wage entitlements and pled breaches of the Minimum Wage Act 1983 at paragraph (sic) 50 of the amended statement of claim. The amended statement of defence at paragraph 50 denies the plaintiffs' claims.

[7] Submissions were made in support of the objection to the effect that it was likely the charter agreements would disclose details of sums allocated for the payment of crew wages, as to the manner in which crew wages were calculated and paid, and as to the amount paid by SERL as charterer to the defendant for wages. It was also submitted that the charter agreements may set out the contractual obligations between SERL as charterer and the defendant as owner of the vessel.

[8] Reliance was also placed on a High Court decision where the Court had considered a particular charter agreement which it was contended had been relevant to the manner of payment of crew wages.<sup>3</sup>

[9] Pursuant to directions which the Court then issued to resolve the challenge, the defendant filed an affidavit of documents in form G37 of Sch 1 of the High Court Rules. Annexed to the affidavit were schedules describing the documents which were in the defendant's possession, custody or control; those which were no longer in its possession, custody or control; and those which were never in its possession, custody or control.

[10] That affidavit was filed and served on the plaintiffs' lawyers. Counsel for the defendant proposed that the disputed documents should be placed before the Court for inspection by a Judge. Counsel for the defendant agreed to this process. Both parties also agreed that although I shall be the trial Judge, I should inspect the documents and resolve the present challenge.

[11] Accordingly, charter agreements for each of the years 2006 to 2012 were placed before the Court. Also filed was an affidavit prepared by an accounts administrator employed by SERL, Ms R J Chandler. In that affidavit, she described the manner in which charter fees were invoiced across the period, together with an example of such invoicing which followed the landing of fish on 4 December 2012. Ms Chandler said that the documentation demonstrated the process of calculating and rendering a charter invoice under the charter agreement. All this evidence was to assist in the resolution of the question as to whether the documents in categories 14 to 19 would be relevant.

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<sup>3</sup> *UFL Charters Ltd v The Ship "No 203 Melilla"* [2015] NZHC 794.

[12] The defendant also filed submissions in support of its objection. The definition of relevance as contained in reg 38 was emphasised. By reference to decided cases regarding that regulation it was submitted that the plaintiffs' challenge to the objection disclosed only the possibility that documents would be relevant. Counsel submitted that the plaintiffs did not assert and they could not assert that the disputed documents would actually be relevant. It was also submitted that there was no credible link between the charter agreement and the particular provisions of the pleading relied on by the plaintiffs. Finally, counsel stated that the charter agreements do not contain an allotted allowance for wages and other operational expenses, and that the remaining categories of documentation relating to the calculation of a charter fee bear no relevance to the issues as to unpaid wages as alleged in the pleadings.

### **Legal principles**

[13] Even though issues of relevance are not among the grounds of objection referred to in reg 44(3) which describes the process for filing objections to disclosure, it has been accepted by this Court in *Snowdon v Radio New Zealand* that the recipient of a disclosure list may serve a notice of objection on the grounds of relevance.<sup>4</sup> There it was held that where there is potentially a wide breadth and extent of documentation which is being sought, a party is "entitled to object to the relevance of the documents listed whether by description or by class before moving on to identify issues such as privilege or the like."<sup>5</sup>

[14] In this case, it is clear that the extent of documentation is potentially significant. Although there are only seven charter agreements, the evidence is that the remaining categories of invoices and supporting documentation sought for disclosure could amount to some 10,000 pages. The procedure which has been adopted in the present case was accordingly appropriate, since it facilitated a timely and efficient means of dealing with the preliminary issue of relevance.

[15] Regulation 38 defines the term "relevance" as follows:

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<sup>4</sup> *Snowdon v Radio New Zealand* [2005] ERNZ 905 (EmpC); leave to appeal against that decision was refused in *Snowdon v Radio New Zealand Ltd* CA 28/06, 23 June 2006.

<sup>5</sup> *Snowdon v Radio New Zealand* (EmpC), above n 4 at [60].

- (1) For the purposes of regulation 37 and regulations 40 to 52, a document is relevant, in the resolution of any proceedings, if it directly or indirectly—
  - (a) supports, or may support, the case of the party who possesses it; or
  - (b) supports, or may support, the case of a party opposed to the case of the party who possesses it; or
  - (c) may prove or disprove any disputed fact in the proceedings; or
  - (d) is referred to in any other relevant document and is itself relevant.

[16] A convenient summary of the relevant principles is contained in *Fox v Hereford School Trust Board* where Chief Judge Colgan stated:<sup>6</sup>

[40] The pleadings define primarily the ambit of the proceedings and therefore the issues to which questions of relevance must relate. The Court must determine more than that there is a possibility of relevance: it must determine the actual existence of relevance (as defined in the Regulations). Authority for this proposition is the judgment in *Air New Zealand Ltd v Kerr*. I agree with the statements of principle also articulated in *Kerr* that a party cannot seek disclosure of a document in order to find out whether it may be relevant and that the Court is entitled to take into account, as a matter of proportionality, the extent to which disclosure may become oppressive and to ensure that the disclosure process is not misused oppressively. Nor should the disclosure process be used to determine whether documents may reveal a new head of claim or cause of action. Finally, I accept also the commonsense that the Court should not order disclosure of documents which do not exist or would be required to be created in order to exist and be disclosed. There may be other litigation strategies that will reach that result, but document disclosure is not one of them.

[41] Even if documents are relevant (as defined), the Court retains a discretion to refuse unnecessary or undesirable disclosure and whether this would be oppressive as a consideration to be taken into account. In determining this balancing exercise, a relevant consideration is also the likely probative value of the documents sought.

## **Analysis**

[17] The amended statement of claim refers to a range of documents and provisions which create the legal framework within which the plaintiffs were employed by the defendant. These include:

- the charter agreements entered into between the defendant and SERL;

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<sup>6</sup> *Fox v Hereford School Trust Board* [2014] NZEmpC 154, (footnotes omitted).

- the Approvals in Principle (AIP) to recruit foreign crew which were issued to SERL and were renewed annually;
- a Code of Practice for the employment of crew aboard foreign chartered vessels;
- a guarantee executed by SERL, it being asserted that SERL thereby guaranteed the performance of the defendant's obligation to remunerate the plaintiffs, and
- the fact that SERL as charterer was the authorised agent of the defendant for the purposes of s 103 of the Fisheries Act 1996.

[18] Section 103 provides for the registration of fishing vessels in New Zealand fisheries' waters, and in respect of employment of crew it relevantly states:

**103 Fishing vessels must be registered**

...

- (5) If the chief executive consents under subsection (4) to the registration of any vessel, or if a vessel is owned or operated by an overseas person who has obtained consent under the overseas investment fishing provisions or is exempt from the requirement for that consent, the following provisions apply while the vessel is in New Zealand fisheries waters:
- (a) for the purposes of the Minimum Wage Act 1983, the Wages Protection Act 1983, and such provisions of any other enactments as are necessary to give full effect to those Acts, a person engaged or employed to do work on the vessel who holds a temporary entry class visa with conditions that allow the person to work under the Immigration Act 2009 shall be deemed to be an employee:
  - (b) for the purposes of the Minimum Wage Act 1983, the Wages Protection Act 1983, and such provisions of any other enactments as are necessary to give full effect to those Acts, the employer of a person referred to in paragraph (a) shall be deemed to be,—
    - (i) if the operator of the vessel is the employer or contractor of those persons, the operator:
    - (ii) in any other case, the person from whom the operator has, by virtue of a lease, a sublease, a charter, a subcharter, or otherwise, for the time being obtained possession and control of the vessel:
  - (c) for the purpose of determining whether the payment to any person engaged or employed to do work on any such vessel

meets the requirements of the Minimum Wage Act 1983, the hours of work of, the payments received by, and the entitlements to payment of that person shall be assessed in relation to the whole of each period of such engagement or employment in New Zealand fisheries waters:

- (d) Labour Inspectors within the meaning of the Employment Relations Act 2000 may exercise their powers under that Act and under the enactments referred to in paragraph (a) within New Zealand fisheries waters in respect of any person deemed to be an employee or employer by virtue of paragraph (a) or paragraph (b):
- (e) if the operator of any vessel is not the employer by virtue of paragraph (b), then, notwithstanding any responsibility that may rest with the employer, the authorised agent referred to in subsection (2)(c) shall be responsible under the enactments referred to in paragraph (a) for providing any information and records to any Labour Inspector exercising powers under those Acts:
- (f) the authorised agent referred to in subsection (2)(c) may be served with any documents requiring service under any of the enactments referred to in paragraph (a), and such service shall be deemed to be service on the employer:
- (g) the Employment Relations Authority and the Employment Court may exercise jurisdiction in respect of any employment relationship that arises by virtue of paragraph (a) or paragraph (b) as if it were a lawful employment relationship subject to New Zealand law.

...

[19] The effect of the various legal documents and provisions to which the amended statement of claim refers is that there is a framework which is not on the face of it straightforward.

[20] It is also pleaded by the plaintiffs that the crew were to be paid by the defendant for each hour worked at the wage rate prescribed by the Minimum Wage Act 1983 (MW Act) plus \$2NZD per hour, subject to authorised deductions.

[21] For its part, the defendant admits that SERL was the New Zealand charterer of the vessel, admits that AIPs to recruit foreign crew were issued to SERL so that it could recruit overseas workers on behalf of the defendant, and admits it was a condition of the AIPs that SERL should execute a Deed of Guarantee of Financial Obligations in respect of Foreign Crew. It denies that SERL was the authorised agent of the defendant for the purposes of s 103 of the Fisheries Act 1996, but says



that the director of that company was. The defendant accepts it was the employer of the plaintiffs who worked on the vessel, and that the MW Act applied to the parties.

[22] There is no admission as to how the plaintiffs' wage entitlements were to be calculated.

[23] The focus of the challenge is on those documents relating to the allegation that the plaintiffs did not receive their full minimum wage entitlements, and that there were breaches of the MW Act, each of which are separate causes of action. The defendant denies liability for each of those claims.

[24] Against the background of the pleadings, I turn to consider the disputed categories of documents, having had the advantage of considering the documents placed before the Court by the defendant.

[25] The annual charter agreements describe the charter relationship between the defendant and SERL. In summary, the terms of each agreement confirm:

- that SERL held catch entitlements or quota which gave it the right to catch quantities of fish species in defined areas within the 200-mile exclusive economic zone of New Zealand but outside the 12-mile limit;
- that the defendant owned and operated fishing vessels suitable for catching the fish specified in the quota held by SERL;
- that the parties had agreed the defendant would use its vessels to catch fish as agent for and on behalf of the charterer subject to the terms of the charter agreement, and
- that SERL would employ foreign and/or New Zealand crew to man the vessels in accordance with all applicable New Zealand laws.

[26] Each agreement was subject to a number of conditions, including a condition that the parties had obtained the registration of the vessel and a certificate of registry under, inter alia, s 103(4) of the Fisheries Act 1996. SERL agreed to organise and procure a third party to be the authorised agent in New Zealand for the purposes of

s 103(2)(c) of that Act. The defendant would provide the authorised agent with all employment information and records of crews so that the agent could discharge his duties under s 103(5)(e) and (f) of that Act, should the need arise. The charter agreement states that the owner acknowledges and agrees that:

... Notwithstanding its position as agent of the charterer, it is the employer of the crew for the purposes of s 332 of the Fisheries Act 1996, the Resource Management Act 1991, the Minimum Wages Act 1983 and the Wage Protection Act 1983 and undertakes to pay its crew the minimum wage specified from time to time.

[27] There are other provisions relating to the employment of crew, including as to the obtaining of work permits for officers and crew for a minimum of 12 months, and as to husbandry services during each port visit throughout the term of the charter.

[28] Each agreement provides that SERL was to pay a charter fee to the defendant, calculated at rates specified in an annexed schedule, less certain costs. The charter fee was to be calculated and invoiced to SERL on the occasion of the landing of fish. In no instance do any of the charter agreements provide that the charter fee was to be calculated by reference to wages paid to the crew of the vessel, or hours worked by them.<sup>7</sup>

[29] The content of the charter agreements in this proceeding appear to be different from those which were before the High Court decision relied on for the plaintiffs.<sup>8</sup>

[30] My perusal of the example of the invoicing records provided to the Court confirms that the calculation of charter fees was not made with reference to the payments of wages to crew, or hours worked by them.

[31] However, that is not the end of any issue as to relevance for the purpose of the plaintiffs' action as pleaded. The grounds of objection to disclosure relate not only to the question of whether the requirements of s 6 of the MW Act have been

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<sup>7</sup> The content of the charter agreements in this proceeding appear to be different from those which were before the Court in *UFL Charters Ltd v The Ship "No 203 Melilla"*, above n 3.

<sup>8</sup> *UFL Charters Ltd v The Ship "No 203 Melilla"*, above, n 3.

met – which will focus on a consideration of hours worked, the application of relevant Minimum Wage Orders<sup>9</sup> and the payments which were actually made – but also and separately whether they have received their wage entitlements under their employment agreements. A proper understanding of the terms of those agreements and the context in which the work was performed will be relevant. That raises an issue as to the scope of documents that are potentially relevant to that context.

[32] Rule 8.14 of the High Court Rules, which may be applied by this Court under reg 6 of the Regulations, is of assistance. In describing what would constitute a reasonable search of documents within the scope of a discovery order – that is, the extent of disclosure – the Rule emphasises that this is an issue which depends on the circumstances.<sup>10</sup> Those circumstances may be wide-ranging since they include the following factors:<sup>11</sup>

- a) The nature and complexity of the proceeding;
- b) The number of documents involved;
- c) The ease and cost of retrieving a document;
- d) The significance of any document likely to be found; and
- e) The need for discovery to be proportionate to the subject matter of the proceeding.

[33] There are several of those factors which require consideration in this case. The present claim is one brought on behalf of 44 plaintiffs. The sums claimed are potentially very significant. The Court has ruled that the claims in respect of 10 plaintiffs only should proceed at a fixture which is set down for five weeks, commencing in October 2015.<sup>12</sup> The findings made by the Court when dealing with the claims of the 10 plaintiffs could potentially affect the claims of the remaining plaintiffs in this proceeding, and the claims of numerous other plaintiffs in the allied

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<sup>9</sup> See for example *Law v Board of Trustees of Woodford House and others* [2014] NZEmpC 25, at [46]-[49].

<sup>10</sup> High Court Rules, r 8.14(2).

<sup>11</sup> Rule 8.14(2).

<sup>12</sup> *Agus Riyanto and 43 others v Dom Nang Co Ltd* [2015] NZEmpC 67.

proceedings relating to *Sur Este 700* and *Sur Este 709*. These factors suggest that a more comprehensible approach to disclosure is justified, and a wider range of documents will potentially be relevant in dealing with the plaintiffs' pleaded claims.

[34] In my view the terms of each charter agreement and information as to how the charter fee invoicing was undertaken are relevant to context, particularly for the purposes of the claim that there have been breaches of the plaintiffs' employment agreements for which the defendant and SERL are allegedly liable.<sup>13</sup> The Court is likely to be assisted by the provision of such evidence in considering the details of the work history of many plaintiffs over several years.

[35] Given the significance and scale of the proceeding, the plaintiffs' advisers should be able to consider the disputed documents so as to obtain an accurate appreciation of the relevant framework, so that the plaintiffs' claims proceed on the basis of an accurate understanding of those arrangements; if that does not occur it is likely there will be speculative assertions which could perhaps lead to a misunderstanding of the actual arrangements and the needless utilisation of hearing time when endeavouring to clarify them.

[36] As well as submitting that the disputed documents are not relevant under reg 38, the defendant raises an issue as to confidentiality. No particulars to support that claim are given, but it may be presumed that the defendant will contend that details relating to the calculation of the charter fee are commercially sensitive.

[37] The defendant, via its Operating Manager, Mr Chang Yeol Lee, proposes in his affidavit that the confidentiality concern could be addressed by restricting inspection of the subject documents to the plaintiffs' legal representatives, and to any analyst engaged to consider the documents for evidential purposes, particularly the plaintiffs' advisor, Mr Nigel Field, as well as any other analyst for whom access is requested by the plaintiffs which the defendant approves. It is reasonable for an interim order to be made which will protect the confidentiality concerns, although I

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<sup>13</sup> An allegation that SERL is liable is made notwithstanding the fact it is not named as a party. The plaintiffs' rights to proceed against any third party are expressly reserved in the amended statement of claim.

will require further evidence on this topic at the hearing before considering whether it is appropriate to make a permanent order.

## **Conclusion**

[38] The challenge succeeds. I consider that the charter agreements and Ms Chandler's affidavit which annexes a particular example of charter invoicing should be disclosed by way of provision of copies to the plaintiffs' counsel by 2.00 pm on 11 June 2015, which means counsel will have had a brief opportunity to consider the documents prior to a telephone directions conference on disclosure issues which is scheduled for 12 June 2015.

[39] I make an interim order as to the extent of the disclosure so as to address the defendant's concerns as to confidentiality. The documents are to be provided only to the plaintiffs' legal representatives, and they may provide them to Mr Field. They may also be disclosed to such other persons as the Court may approve; any application in that regard is to be made on two days' notice, with a right of response two days thereafter. The documents may not be disclosed by those persons to any other person without leave of the Court. If one or more of the documents are produced in evidence, the parties should attempt to agree whether non-publication orders as to some or all of the documents are necessary, and if need be seek leave of the Court for appropriate directions.

[40] Costs with regard to the plaintiffs' challenge are reserved and will be dealt with following the substantive hearing.

B A Corkill  
Judge

Judgment signed at 2.45 pm on 9 June 2015