

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2013] NZEmpC 165
ARC 23/12**

IN THE MATTER OF proceedings removed
AND IN THE MATTER of applications for orders for discovery
BETWEEN JOHN MATSUOKA
 Plaintiff
AND LSG SKY CHEFS NEW ZEALAND LTD
 Defendant

Hearing: 9 July 2013
 By submissions filed on 12 and 15 July 2013

Appearances: Mr A Drake and Mr B Nicholson, counsel for the plaintiff
 Mr G Pollak and Ms A Borchardt, counsel for the defendant

Judgment: 4 September 2013

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] This judgment considers applications for disclosure of documents by each of the parties against the other and against non-parties. The matters in issue have come before the Court on an interlocutory basis by virtue of the following:

- (a) The defendant's notice requiring disclosure by the plaintiff dated 11 February 2013;
- (b) The plaintiff's notice of objection to such disclosure dated 15 February 2013;

- (c) The defendant's on notice interlocutory application for particular discovery against a non-party: Pacific Flight Catering Limited ("PFC");
- (d) The defendant's on notice interlocutory application for particular discovery against a non-party: PRI Flight Catering Limited ("PRI").

[2] The plaintiff and the non-parties against whom the particular discovery is sought are connected in that the plaintiff was, prior to the circumstances giving rise to these proceedings, an employee of either PFC, PRI or both. In respect of the present applications they have similar interests. However, the plaintiff is separately represented from PFC and PRI. There is a history as to the relationships between the parties to these particular proceedings (that is the plaintiff Mr Matsuoka, PFC, PRI and the defendant ("LSG")).

[3] That history has been the subject of numerous pieces of litigation and judgments both of this Court and the High Court. It is not necessary to go into all of that litigation other than in passing and by way of background. It provides some explanation for the fact that what should be relatively easily resolved issues of discovery and disclosure of documents in these particular proceedings are proving to be difficult.

[4] While they participated through counsel at a preliminary directions conference, the non-parties PFC and PRI were not represented at the hearing of the applications affecting them. The applications were set down for argument. PFC and PRI were given the opportunity, if they wished, to present their positions on the non-party disclosure applications by way of filing affidavits. Mr J K Goodall, counsel for the non-parties, filed a memorandum prior to the hearing on 9 July 2013 indicating that the non-parties would not be filing any affidavits nor appearing at the hearing and would abide the decision of the Court. Mr Goodall submitted, however, in a memorandum dated 5 July 2013, that:

- (a) Any non-party discovery orders be strictly confined to the issues in the proceeding and specify the particular documents to be discovered; and
- (b) any non-party discovery orders should include the standard order that the parties seeking discovery pay the non-parties' reasonable costs of complying with the orders.

Factual outline

[5] These proceedings are before the Court having been removed to the Court by the Employment Relations Authority (the Authority) on 14 March 2012.¹ At that time there were questions of law proposed, which had not previously been before the Authority or the Court. These related primarily to issues arising under pt 6A of the Employment Relations Act (the Act). Urgency was granted for a hearing.

[6] Mr Matsuoka was formerly an employee of PRI. That company traded under the name of Pacific Flight Catering (Pacific). PFC is a subsidiary of PRI and was incorporated simply for the purposes of protecting the Pacific Flight Catering brand name and does not otherwise trade. Over the time that these entities have been trading, in legal terms, there has been a somewhat murky relationship between them so far as employment issues are concerned. There have been previous decisions making findings on this and, to summarise the position, the name of the employer tended to be interchanged and often simply referred to as Pacific Flight Catering, the non-legal entity.

[7] PRI as a separate legal entity and trading under the name Pacific Flight Catering formerly held catering contracts with Singapore Airlines. These contracts were to provide catering services for flights from New Zealand. Singapore Airlines put the contract up for tender. The successful tenderer as a result of this process was LSG and that company took over the catering services on 23 February 2011. The contract held by PRI ended the previous day on 22 February 2011.

¹ [2012] NZERA Auckland 95.

[8] As there were employees (whether of PRI, Pacific or PFC) who were providing food catering services, they were covered by sch 1A of the Act and therefore pt 6A of the Act applied to them. This required continuity of their employment so that they were, with their consent, required to be employed by LSG. Mr Matsuoka, at the time of the transfer of PRI, Pacific or PFC employees to LSG, claimed eligibility to transfer under pt 6A of the Act. LSG declined this, hence the urgency of the proceedings before Judge B S Travis under ARC 19/11.

[9] As a result of a decision of Judge Travis dated 18 May 2011,² Mr Matsuoka's position under pt 6A of the Act and therefore his entitlement to require employment with LSG was resolved in his favour. At the time Judge Travis also answered several legal questions posed following the transfer of the proceedings to this Court from the Authority. Having answered those questions and made a finding that Mr Matsuoka was in fact an employee covered by pt 6A of the Act, in a later judgment dated 21 December 2012,³ Judge Travis considered and resolved issues of compensation and penalties, which had been earlier reserved.

[10] In the present proceedings the factual position, in summary, is that following the Employment Court's judgments under ARC 19/11, LSG, having to accept Mr Matsuoka as an employee, commenced a disciplinary process against him. He was dismissed from such employment. While Mr Matsuoka apparently endeavoured to report for work, he never actually commenced work with LSG. This was despite the company having to deal with him as an employee transferring by virtue of the catering work, which LSG was required to perform under the contract with Singapore Airlines. He now claims to have been unjustifiably dismissed.

Other litigation and decisions

[11] As I have indicated, there is a long history of proceedings arising from LSG's acquisition of the contract with Singapore Airlines. Just prior to transfer of employees from PRI, Pacific or PFC in February 2011, the management of the PRI group, whichever of them was the employer, enhanced the terms and conditions of

² [2011] ERNZ 56.

³ [2012] NZEmpC 220.

most of the transferring employees so that their wage and leave entitlements were increased. This then imposed an unexpected liability on LSG, which was forced to take on those employees by virtue of the operation of pt 6A of the Act. Some employees, most notably those who had a history of involvement with their union, were not given such enhanced conditions of employment. Litigation in this Court has resulted from the actions of PRI, Pacific or PFC. In addition, there was a decision of Woolford J in the High Court at Auckland, imposing liability on the PRI Group, whether it is PRI or PFC, for their actions.⁴ The High Court judgment was appealed to the Court of Appeal. A decision has now been issued. The appeal by PFC and PRI was successful.

The present applications relating to discovery of documents and general disclosure

[12] In respect of the defendant's notice against Mr Matsuoka for discovery, his arguments in objecting are twofold. First, he claims that as a penalty is being sought by him against LSG he is not required by virtue of reg 39(2) of the Employment Court Regulations 2000 (the 2000 Regulations) to make disclosure. This is on the basis that if reg 39(2) applies, the scheme of disclosure contained in regs 40-52 cannot then apply to him. Secondly, even if he is required to disclose documents, the breadth and range of the documentation sought is too wide and ought to be narrowed to only documents relevant to the issues in the litigation. As the proceedings have progressed the defendant has, in any event, narrowed the ambit of the discovery sought so that now only the true wage, time and leave records of Mr Matsuoka are required.

[13] In respect of the first point relating to the plaintiff's claim for a penalty, the pleading in the first amended statement of claim appears to be defective in that it alleges that the defendant has breached its obligations under s 4(1A) of the Act. The entitlement to a penalty for breaches of duty of good faith under the Act is prescribed by s 4A. That in turn requires proof of failure to comply with s 4(1). Section 4(1)(a), sets out the requirement that each party must deal with each other in good faith whereas s 4(1A) simply defines the scope of the duty of good faith. It is not a

⁴ *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2012] NZHC 2810.

major point, however, and at some stage the plaintiff will need to give consideration to amending the pleadings if the penalty is to be pursued.

[14] Mr Drake for the plaintiff has maintained what is effectively an argument on the literal wording of subordinate legislation contained in the 2000 Regulations. Regulation 39, upon which he relied, reads as follows:

39 Applicability

- (1) Subject to subclause (2), regulations 40 to 52 apply to all proceedings in the court.
- (2) Nothing in regulations 40 to 52 applies to any action for the recovery of a penalty.

[15] Regulations 40-52 then set out general regulations as to duties, obligations and procedures for the assistance of litigants and the Court insofar as mutual disclosure and inspection of documents is concerned. They are stated as applying only to parties to the proceedings. However, by virtue of cl 13 of sch 3 of the Act they extend to non-party disclosure insofar as applicable.

[16] Regulation 39, with a notable exception, reflects the wording of reg 47 in the Employment Court Regulations 1991 (the 1991 Regulations) made pursuant to the Employment Contracts Act 1991. That reads as follows:

47 Applicability

- (1) Subject to subclause (2) of this regulation, regulations 48 to 59 of these regulations shall apply to all proceedings in the Court.
- (2) Nothing in regulations 48 to 59 of these regulations applies to any action for the recovery of a penalty or to any appeal.

[17] Mr Drake for the plaintiff, put forward the following issues that he maintained need to be determined as pre-trial matters on the issue of disclosure:

- (a) whether the wording of reg 39(2) of the 2000 Regulations means that the party seeking a penalty does not have to disclose documents;
- (b) whether the defendant can obtain disclosure against the plaintiff whilst relying on reg 39(2) as a shield;

- (c) whether it is possible to separate out the causes of action pleaded in the personal grievance procedures from the penalty action for the purposes of disclosure of documents;
- (d) whether disclosure should be granted to the defendant in any event. (The submission here is that the documents sought do not relate in time to the decision made to dismiss Mr Matsuoka.);
- (e) the definition of the words “immediately before” in the context of the transfer of employees under pt 6A of the Act. (While this issue has been raised in this interlocutory application, Mr Drake has conceded that this is really a matter to be determined at the substantive hearing.)

[18] Mr Pollak, for the defendant, disputed the plaintiff’s argument under the legislation. The defendant wishes to have the correct wage, time and leave records for Mr Matsuoka when he was employed by PRI, PFC, or both. He submitted that these documents have relevance to both overall liability and the measure of compensation, and if a penalty is awarded, which is opposed, liability for or the amount of such penalty. Initially in a filed memorandum, Mr Pollak indicated that the defendant did not seek to rely on reg 39(2) to oppose having to make disclosure to the plaintiff. He indicated that, in fact, the defendants had progressed considerably with the preparatory work required to make full disclosure to the plaintiff. In his submissions to the Court, Mr Pollak has indicated that the defendant has now changed its mind in this respect. The position taken is that if the plaintiff is entitled to rely on reg 39(2) to deny discovery and disclosure to the defendant; then it similarly would rely upon the same regulation and not make disclosure or discovery to the plaintiff.

[19] During the course of the hearing of argument, I suggested to Mr Drake that he did not have standing as counsel for Mr Matsuoka to argue against the defendant’s application for non-party disclosure. As I have indicated, the non-parties are represented separately by Mr Goodall who prior to the hearing filed a memorandum advising that they would abide by the decision of the Court.

[20] Following the close of the hearing, Mr Drake filed a further memorandum of submissions on that point and then submitted that in fact he did, as Mr Matsuoka's counsel, have standing to oppose the application for disclosure against non-parties. In opposing the non-party discovery application he relied in particular on r 8.2(1) of the High Court Rules to submit that because the same standards apply to a non-party as to a party, the express prohibition in reg 39(2) on the application of regs 40-52 of the 2000 Regulations applies to also preclude the defendant from obtaining disclosure against the non-parties. Mr Drake submitted that the High Court Rules and the District Court Rules 2009 were incorporated by cl 13 of sch 3 of the Act. That is not correct. While cl 13 of sch 3 incorporates ss 56A and 56B of the District Courts Act 1947, any application under those sections is to be dealt with in accordance with the 2000 Regulations.

[21] In addition, Mr Drake relied upon the decision of *Taylor Preston Ltd v Ministry of Business, Innovation and Employment*,⁵ to submit that the application for disclosure against non-parties was premature in any event because resolution of disclosure as between the parties to the litigation has not been completed. That is a somewhat facetious submission in view of the fact that the plaintiff is relying upon reg 39(2) to delay or avoid disclosure altogether.

[22] Finally, Mr Drake relied upon sch 2 of the 2000 Regulations relating to the issuing of an information to commence a prosecution for an offence. He submitted that this might have some relevance to the issue of disclosure in respect of an application for penalties. He submitted that the provisions in sch 2 impose specific disclosure obligations upon Labour Inspectors in the course of prosecutions advanced under the Act. The fact that similar obligations are not specifically legislated for in respect of penalties, he submitted, means no such obligation exists in actions for penalties as it does for prosecutions.

[23] I am not sure I fully understand Mr Drake's argument in respect of sch 2. The use of the word "information" in that schedule is referring to the document required to be filed to initiate the prosecution. While there are requirements as to the particulars to be contained in the information, I can find no provisions in sch 2

⁵ [2013] NZHC 937.

referring to the prosecutor's obligations as to pre-trial information required to be provided to the defence. Such obligations may now be covered in the case of such a prosecution by the Criminal Disclosure Act 2008. The position would also be covered by the normal principles of disclosure required of a prosecutor. However, later in this judgment I discuss the distinction made in the Act and predecessor legislation between fines for offences and actions for penalties. It is also hard to accept Mr Drake's opposition to non-party disclosure on the grounds of reg 39(2) when the non-parties themselves have not taken the point.

[24] Mr Drake also referred to the relationship between reg 39(2), relating to penalties, and reg 44, relating to the general right of objection to disclosure. Regulation 44(3) states:

...

- (3) The only grounds upon which objections may be based are that the document or class of documents—
 - (a) is or are subject to legal professional privilege; or
 - (b) if disclosed, would tend to incriminate the objector; or
 - (c) if disclosed, would be injurious to the public interest.

[25] Regulation 44(3) would only apply, of course, if reg 39(2) did not and therefore upon Mr Drake's argument, only if a penalty was not being sought. Mr Drake made the submission that the purpose of reg 39(2) must be wider than mere protection against self-incrimination. He pointed to reg 44(3)(b) as fortification for his argument that as the regulation already provides for protection in respect of self-incrimination, Parliament would not include two separate provisions to achieve the same effect.

[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.

[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.

[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. He indicated that the defendant now only requires disclosure of the true wage, time and leave records for Mr Matsuoka. He further submitted that the 2000 Regulations do not apply to non-parties because it is specifically stated that they relate only to inter-party discovery and disclosure. That, however, overlooks the effect of cl 13 of sch 3 of the Act and incorporation of ss 56A and 56B of the District Courts Act then to be dealt with in accordance with the 2000 Regulations as I have already discussed.

Principles to be considered

Predecessor legislation

[29] In order to consider this particular dispute, historical legislation pertaining to industrial and employment law in New Zealand has some relevance and, together with legal authorities on the point, informs the interpretation and application of reg 39(2). These enactments are the original Industrial Conciliation and Arbitration Act 1894 and its subsequent amendments leading to the consolidated Act in 1954, the Industrial Relations Act 1973, the Labour Relations Act 1987 and the Employment Contracts Act 1991. In all of that legislation there has been provision for the imposition of both penalties and fines. The methods of enforcement of fines under the legislation have changed in that under the older enactments going back to 1908, fines enforcement was by way of summary proceedings initially under the Justices of the Peace Act 1908 and subsequently the Summary Proceedings Act 1957; therefore squarely within a quasi-criminal regime. Since the Labour Relations Act 1987, the conviction for, and imposition of, a fine has been conducted by the Court through its civil enforcement procedures, as well as those originally applying in the former Magistrates Court and currently in the District Court. Even so, sch 2 of the 2000 Regulations setting out procedures for the prosecution of offences has a distinct quasi-criminal flavour. By contrast, the enforcement of penalties appears to have always been by the use of civil procedures rather than such quasi-criminal mechanisms.

[30] Where a fine was sought to be recovered by way of a quasi-criminal procedure, particularly under the Summary Proceedings Act, the person or authority

prosecuting the fine would have been required to make full disclosure so that the person against whom the fine was sought would be fully informed of the nature of the case against them. On the basis that that person would not be required to assist the prosecutor, no disclosure of documents against the person defending the prosecution could be procured. In addition, the person being prosecuted would certainly not have been required to disclose any information which might lead to self incrimination.

[31] The same principles have been discussed from time to time in respect of proceedings or actions for penalties. It has been suggested that reg 39(2) of the 2000 Regulations and its predecessor, reg 47(2) of the 1991 Regulations were enacted by Order in Council for the same purposes of protecting the party defending the penalty claim.⁶ They are of course, regulations contained in subordinate legislation.

Comparing regs 39(2) and 47(2)

[32] As I have already indicated, there is a difference between reg 47(2) of the 1991 Regulations enacted under the Employment Contracts Act and reg 39(2) of the 2000 Regulations enacted under the Employment Relations Act. Whilst reg 39(2) of the 2000 Regulations only deals with the waiver of obligations to disclosure of documents where a penalty is sought, the former regulation also included a similar waiver in respect of appeals. Under the Employment Contracts Act, review of decisions of the lower tribunal, in that case the Employment Tribunal was by way of appeal, whereas the present procedures involve references to the Court by way of de novo or non-de novo challenges to determinations of the Authority. Appeals under the Employment Contracts Act would be by way of rehearing, perhaps with less scope for the presentation of new evidence (including documents) and only with leave. It may, therefore, have been the intention of the regulation to ensure that admission of such new evidence was firmly under control of the Court under its powers contained in that Act rather than discovery being left to the parties by rules under regulations.

⁶ See Kevin Leary (ed) *Brookers Employment Law* (online looseleaf ed, Brookers) at [EC39.01].

[33] The wording of regs 47(2) of the 1991 Regulations and 39(2) of the 2000 Regulations have, on their face, a wide ambit and have given Mr Matsuoka, the plaintiff in this case, encouragement to place before the Court the argument that he has. For reasons, upon which I shall shortly elaborate, such an argument could not be tenable in principle and is contrary to the stated objects and purposes of the Act, including those relating specifically to pt 10 of the Act, which incorporates proceedings before the Court. In addition, it would appear to run counter to the overriding flavour of good faith dealings. While there may be an argument that the specific requirement as to good faith may not be capable of being used to enforce a position against either of the parties to the present dispute in view of the fact their employment relationship has ended (and I make no concluded finding in that regard, particularly in view of s 4(5) of the Act), nevertheless, those principles strongly underlying the legislation can again be used to inform on issues in the present applications.

Previous decisions considering the matter

[34] The arguments raised in the current case, have been the subject of decisions by the Employment Court under both the 1991 and 2000 Regulations.

[35] Regulation 47(2) was first considered by this Court in *Lakeland Health Ltd v Teviotdale*.⁷ This was in the the context of an appeal. Of relevance was the extent to which the regulation could be ameliorated by the Court's equity and good conscience jurisdiction under what was then s 104(3) of the Employment Contracts Act. With respect to this, the Court observed that:⁸

Regulation 47(2) of the Employment Court Regulations 1991 provides that the codified disclosure procedures contained in regs 48-59 of the regulations 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 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): s 104(3).

⁷ AEC 74A/96, 3 December 1996.

⁸ At 3.

[36] Regulation 47(2) was considered again in the context of appeals in the case of *Perroplas One Ltd v Woodfield*.⁹ There the Court applied *Lakeland Health* and decided that the codification of reg 47(2) was a hindrance to the operation of the Court's equitable jurisdiction.

[37] The scope of reg 39(2) has only been considered comprehensively once by this Court, in *New Zealand Air Line Pilots Association Inc v Jetconnect Ltd (No 2)*.¹⁰ There, the plaintiff sought a series of penalties and injunctions against the plaintiff. The defendant refused disclosure on account of reg 39(2). Challenging this, the plaintiff argued that reg 39(2) was to only have application where a penalty was the *only* form of relief being sought and, therefore, had no application in the present instance.

[38] Considering the plaintiff's argument, the Court observed that:

[14] 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 imposed by [the plaintiff] would defeat that intention in practice as most proceedings in which penalties are sought include claims for other remedies too.

[39] Drawing a distinction between the use of the word "proceedings" in reg 39(1) (which referred broadly to the plaintiff's case as encompassed within its statement of claim) and an "action" in reg 39(2) the Court held that:

[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.

[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.

⁹ AEC 93/96, 18 December 1996.

¹⁰ [2009] ERNZ 207.

[40] The only option for the plaintiff in such a predicament, the Court concluded, was to re-plead or postpone those parts of the hearing that seek remedies other than penalties. It was clear however, that the Court, by its reasoning for the applicability of the regulation considered that the benefit only applied to the defendant against whom the penalty was sought. The Court suggested legislative intervention might be necessary.

[41] The scope of reg 39(2) was also considered briefly in the case of *Aarts v Barnados New Zealand*,¹¹ albeit in the context of Authority proceedings. There, the Authority determined the lack of an equivalent of reg 39(2) in the Employment Relations Authority Regulations 2000 to be a legislative oversight, and that the privilege in respect of recovery of a penalty also applied in the course of Authority proceedings. While the difference in the two sets of regulations seems incongruous, having regard to the apparent purpose of reg 39(2), Chief Judge Colgan cast doubt on the Authority's conclusion, stressing the difference in disclosure regimes between the Court and the Authority:

[100] So, while in the Employment Court, no party may be required to give another party seeking a penalty against it any document which may assist that other party to institute and prosecute its penalty proceedings, the position may arguably be different in the Authority. It will be the Authority itself which determines whether and, if so, how documents supplied to it are to be used including in penalty proceedings. The difference lies in the Authority's control of the process in that forum as opposed to the parties' control of it in the Employment Court.

The Penalty Privilege at Common Law

[42] The scope of penalty privilege has not been considered in great detail by the New Zealand Courts of general jurisdiction. Where it has, considerable reliance has been placed upon Australian jurisprudence. In *Taylor v New Zealand Poultry Board*,¹² Cooke P, when considering the scope of the broader privilege against self-incrimination cited with approval the Australian case of *Pyneboard Pty Ltd v Trade Practices Commission*.¹³ That decision dealt with the narrower scope of the penalty privilege at common law.

¹¹ [2013] NZEmpC 85.

¹² [1984] 1 NZLR 394 (CA).

¹³ (1983) 45 ALR 609.

[43] In *Wallis Brothers Ltd v Canterbury Bye Products Ltd*,¹⁴ at issue was the appellant's liability for "hanging fees" under s 23 of the Meat Act 1964.¹⁵ The appellant refused to answer interrogatories ordered by the High Court and in the Court of Appeal argued that the "hanging fees" were, in substance, a penalty and therefore subject to the common law privilege. The Court of Appeal briefly observed that proceedings for penalties were uncommon outside of the then-extant Industrial Relations Act 1973. It went on, however, to "assume such a privilege is available to a corporation in New Zealand."¹⁶ The Court in that case resolved the matter by dismissing the contention that the fees were penalties in any event.

[44] In *Port Nelson Ltd v Commerce Commission*,¹⁷ the Court of Appeal considered the scope of the civil penalty privilege in the context of pecuniary penalty proceedings under s 80 of the Commerce Act 1986. Cooke P, as he did in *Taylor*, cited with approval the Australian case of *Pyneboard* and stated: "that there is a common law privilege against answering questions in such a way as to expose one to a penalty is clear enough."¹⁸ It has to be added that by virtue of s 79B of the Commerce Act there is a close relationship between pecuniary penalties and criminal liability. Further, the penalty regime in that Act applies to serious breaches for which maximum penalties of \$500,000 and \$1 million are prescribed.¹⁹

[45] The only other reported case in which the penalty privilege has been considered by the New Zealand Courts (in a non-employment context) appears to be by the District Court in *Fairmont Motors Ltd v NZ Customs Service (No 2)*.²⁰ In finding for the existence of a privilege against self-incrimination in civil cases, it was held that seizure provisions under the Customs and Excise Act 1996 amounted to a penalty. Particular reliance was placed upon the High Court of Australia decision of *R v Associated Northern Collieries*²¹ where it was observed that:²²

¹⁴ (1985) 5 PRNZ 590 (CA).

¹⁵ These were fees prescribed by a controlling authority in respect of meat sold for consumption within an abattoir district and derived from stock slaughtered in another abattoir or in any export slaughter house.

¹⁶ At 594.

¹⁷ [1994] 3 NZLR 435 (CA).

¹⁸ At 437.

¹⁹ Section 80(2B).

²⁰ [1997] DCR 858 (DC).

²¹ (1910) 11 CLR 738.

²² At 742-743.

There is an inherent distinction between a civil action to prevent or redress a civil injury on the one hand, and a civil action to recover a penalty on the other. In the latter case the whole and avowed object of the proceedings is the infliction of a penalty, and the discovery sought of the documents relevant to the claim can therefore have no other intended consequence. It does not require in such a case the oath of the defendant to establish the fact that the production of the documents would tend to penalize him. The Court can see the effect of discovery from the nature of the proceeding. In the former case there is no such necessary consequence, and whether the objectionable tendency exists or not has to be otherwise ascertained, and claiming immunity upon oath in the course of making discovery is the most usual, but not the only other means of establishing it.

[46] The above quote is notable for the fact that it highlights as did *Jetconnect* the unsuitability of the ‘penalty privilege’ in proceedings under the Act which are generally of the same ‘hybrid’ nature, for example, where relief in the form of damages and penalties can be, and usually are, sought out of the same set of proceedings. It is also to be noted that in *Fairmont Motors* the penalty in question was a particularly punitive seizure and that in *Associated Northern Collieries* the penalty was to be imposed for “offences” and therefore had a strong quasi-criminal context.

[47] The continued existence of the common law privilege is now uncertain in light of the enactment of the Evidence Act 2006. Section 60 of that Act provides that a privilege against self-incrimination is available, but only in respect of criminal and not, by exclusion, civil proceedings. The Evidence Act does not explicitly apply to the Employment Court but is to be applied by this Court by analogy and where consistent with the wide powers of the Court as to evidence under s 189(2) of the Act.²³

[48] Whether there still exists a residual privilege under the common law is uncertain. Although the Evidence Act was originally envisaged as a code, the combined effect of ss 10 and 12 appear to suggest that the courts may have regard to common law principles where consistent with the provisions, purpose, and principles of the Act. With respect to this, Chief Judge Colgan in *Jetconnect* made the following observation:²⁴

²³ See *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 at [14].

²⁴ At [23].

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.

[49] However, for its part, the Law Commission in its recently published Issues Paper on Civil Penalties²⁵ suggests that privilege in respect of civil penalties has not been retained (while remaining open to the suggestion that the privilege might be re-established):²⁶

... We have considered whether there is scope for a court to determine that the combined effect of the provisions set out above [ss 10, 11 and 12 of the Evidence Act] makes room for the continuation of the common law penalty privilege in New Zealand. We think that this would be unlikely: any court doing so would be acting in the face of the Law Commission’s express view that the privilege should not be retained. However, judges have shown some willingness to place greater emphasis on a broad reading of the interpretation aids in the Act than on the Commission’s recommendation that the Act should be a code. Where civil pecuniary penalty statutes are silent on the matter, then, there may presently be some uncertainty as to the position for those resisting civil pecuniary penalty investigations and proceedings.

Scope of Equity and Good Conscience Jurisdiction – ss 189 and 221(d) of the Act

[50] The wide nature of the Court’s equity and good conscience jurisdiction under s 189, as well as its broad discretionary power to make directions it thinks fit under s 221(d), need to be considered in this matter, particularly in the context of what a literal interpretation of reg 39(2) really involves. These sections read as follows:

189 Equity and good conscience

- (1) In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.
- (2) The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

...

²⁵ Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012).

²⁶ At [6.67].

221 Joinder, waiver, and extension of time

In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—

...

- (d) generally give such directions as are necessary or expedient in the circumstances.

[51] In the decisions of *Lakeland Health* and *Perroplas* the Court held that its equitable jurisdiction could not override the will of the Executive in drafting the Regulations. However, in *Jetconnect*, Chief Judge Colgan remained open to a reconsideration of his earlier view in *Lakeland Health*:

[18] 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 part of the former.

[52] The equity and good conscience jurisdiction has also, in the past, been exercised to prevent a party from misusing or abusing a privilege, albeit in a different context from the present. At issue in *Woolf v Kelston Girls' High School Board of Trustees*,²⁷ was whether a party could selectively waive or rely upon the privilege afforded to it by the without prejudice rule:²⁸

I accept, generally, the proposition advanced for the respondent that [the applicant], as the holder of the privilege, should not be able to abuse it by using it to create an inaccurate perception of the protected communication. [The applicant] should not, in equity and good conscience, be entitled to have [the witness] excused from giving evidence of matters that may be unfavourable to her case, but waive that privilege for closely associated passages that are perceived to favour her position. Any excusing of the requirement to give evidence must be exercised in a principled way so that the Court does not have a distorted picture ...

The relationship with subordinate legislation

²⁷ AC 28B/00, 24 July 2000.

²⁸ At 7.

[53] Whilst s 189(1) makes clear that the equity and good conscience jurisdiction cannot be used in a manner inconsistent with the Act, any other statute, or employment agreement, it is silent as to its relationship with subordinate legislation. The *Lakeland Health* and *Perroplas* decisions do not mean, however, that where there may be an inconsistency between the Act and the Regulations, including with the stated objects and principles underpinning the Act, the equity and good conscience jurisdiction is to be maintained as subservient. The Court has, on a number of occasions, made clear that the statutory provisions of the Act (or, for that matter, any other statute) cannot be read down or fettered by the 2000 Regulations.

[54] In *Andrew v Commissioner of Police*,²⁹ the relationship between s 32 of the Police Complaints Authority Act 1988 (which prevented disclosure of documents produced as part of a PCA investigation in any Court) and reg 44(3) of the 2000 Regulations (which only prohibited disclosure on three narrower grounds) was considered:

[13] Unless it can be said that to breach an express statutory requirement of secrecy or privilege is caught by the public interest exception, the rules, read literally, are deficient. It cannot have been intended that an express statutory prohibition upon disclosure contained in an Act could nevertheless be trumped by subordinate legislation contained in a regulation. Where the two are in conflict, the superior enactment must prevail. It follows that an express statutory prohibition on disclosure or a statutory privilege provides an additional ground for a party to resist disclosure and inspection. ...

[55] *Chief Executive of the Department of Corrections v Tawhiwhirangi*,³⁰ concerned, in part, an argument that the Court's broad discretion to award costs under cl 19, sch 3 of the Act was fettered by reg 68 of the 2000 Regulations, which states that in making an order as to costs the Court may have regard to an offer to settle:

[24] Read in isolation, the inclusion of one express factor of timeliness in regulation 68 could be seen as fettering the wide discretion to award costs conferred by the Act. That is not in accordance with the principle that subordinate legislation cannot modify or fetter an express statutory provision. While regulations may be a guide to the meaning of an Act, this is only so where the meaning is ambiguous. In the case of costs, the Employment Relations Act 2000 is unambiguous.

²⁹ [2003] 2 ERNZ 514.

³⁰ [2008] ERNZ 73.

[56] In *Heritage Expeditions v Fraser*,³¹ it was argued that the broad power of the Authority to reopen an investigation under cl 4, sch 2 of the Act was to be read down in accordance with the stipulated procedure for an application to reopen an investigation as contained in reg 10 of the Employment Relations Authority Regulations 2000. This was rejected by the Court, which observed that:

[29] Another fundamental difficulty with the argument advanced by [counsel for the plaintiffs] is that it relies on regulations impliedly limiting the scope of a statutory provision. As I observed in *Vice-Chancellor of Lincoln University v Stewart (No 1)*:

The Employment Court Regulations 2000 are a form of delegated legislation made pursuant to the power conferred under s 237 of the Employment Relations Act 2000. Unless the empowering statute so provides, delegated legislation cannot override or otherwise be inconsistent with a statute, particularly the statute under which it was made.

[30] That principle extends to discretions conferred by statute. The exercise of a statutory discretion cannot be constrained by regulations, rules or other delegated legislation unless the statute provides for that effect.

[57] Most recently, in *Aarts v Barnados New Zealand* the Court agreed with a submission from the plaintiff that the broad discretion of the Authority under s 160(2) of the Act to admit such evidence as it thinks fit (not dissimilar to the Court's own power to do so under s 189(2)) could not be read down by the contents of the Evidence Regulations 2007:

[89] [The advocate for the plaintiff] is right in his fundamental argument that the breadth of the Authority's power to call for evidence, which is contained in primary legislation, trumps the narrower statutory prohibitions on the use of such videotapes provided in subordinate legislation. I would add to that broad conclusion that it is especially so where the subordinate legislation (a regulation) is made pursuant to an Act of Parliament (the Evidence Act 2006) which is not applicable to the Employment Relations Authority (or the Employment Court).

[58] The matter has also been considered by the higher courts. In *Combined State Unions v State Services Co-ordinating Committee*,³² the Court of Appeal was asked to consider the validity of the Wage Freeze Regulations 1982 in light of many of its

³¹ [2010] ERNZ 85.

³² [1982] 1 NZLR 742 (CA).

contents overriding provisions of the State Services Conditions of Employment Act 1977. Of relevance to the present case, the Court observed:³³

It is an important constitutional principle that subordinate legislation cannot repeal or interfere with the operation of a statute except with the antecedent authority of Parliament itself. It is a constitutional principle because it gives effect to the primacy of Parliament in the whole field of legislation. And as a corollary a rule of construction springs from it that the Courts will not accept that Parliament has intended its own enactments to be subject to suspension, amendment or repeal by any kind of subordinate legislation at the hand of the Executive unless direct and unambiguous authority has been expressly spelled out to that effect, or is to be found as a matter of necessary intendment, in the parent statute.

[59] This principle in *Combined State Unions* was more recently applied by the Supreme Court in *Zaoui v Attorney-General*.³⁴

Conclusions

[60] As observed by Chief Judge Colgan in *Jetconnect*, the language of reg 39(2) is capable of applying in respect of all proceedings for a penalty, irrespective of whether or not other remedies have been sought. The prospect, as was argued by the plaintiff, that the regulation is sufficiently wide so as to provide a reverse privilege benefitting the applicant for a penalty was not contemplated in that case.

[61] It is open to the Court, as was also suggested in *Jetconnect* and *Woolf*, for it to exercise its equity and good conscience jurisdiction to prevent the application of the privilege where such application may be inequitable. Upon the basis of the above discussion it is now commonly accepted in this Court that a statutory discretion under the Act cannot be fettered or curtailed by a regulation under the 2000 Regulations (or, for that matter, any other regulation). This extends to the Court's equity and good conscience jurisdiction under s 189 of the Act.

[62] Another issue to be considered is that if a penalty action is equated with a quasi-criminal procedure such as an action to recover a fine, then it may have an impact as to the standard of the onus of proof resting on the party claiming the

³³ At 745.

³⁴ [2005] 1 NZLR 577 (SC).

penalty. Whilst it is true that the circumstances required to be proved under the Act to recover a penalty are quite onerous, it would seem incongruous and somewhat counter-productive to the deterrent aspects behind penalties in the Act if the claimant was required to reach the standard of proof applying in criminal or quasi-criminal proceedings. Even so, there would be greater incongruity if the plaintiff's argument in the present proceeding is accepted that reg 39(2) also enables the party seeking the penalty to claim an entitlement not to disclose any documentary information to the party against whom the penalty is sought. That would thereby deprive that party of knowing what it is they have to answer. That cannot possibly be the position when one has regard to the principles underpinning the Act or general equitable principles.

[63] Absent reg 39(2), the scheme of the Act as to discovery and disclosure of documents and their admissibility in the Employment Court is prescribed by a combination of ss 187, 189, 221(d) and cl 13 of sch 3 to the Act, and regs 40-52 of the 2000 Regulations. Similar provisions do not apply in the Authority. Interestingly cl 13 of sch 3 gives the Court power to make the same order that a District Court may make under s 56A of the District Courts Act 1947 (which relates to discovery before commencement of proceedings) not only in respect of proceedings yet to be commenced before it, but also proceedings yet to be commenced before the Authority. The Court has power (by virtue of analogy with s 56B of the District Courts Act) to order non-party discovery. Clause 13(2) requires that every application for an order under ss 56A or 56B of the District Courts Act is to be dealt with in accordance with the 2000 Regulations. This simply specifies the procedures contained in regs 40-52, where applicable, to bring a non-party discovery application before the Court. It has been noted that the non-parties in this case do not oppose the application for discovery against them. Regulations 40-52 set the rules and procedures to be adopted to ensure and enforce orderly disclosure of documents to the other party. Subsections (1) and (2) of ss 189 and 221(d) of the Act when read in combination give the Court wide powers as to admissibility of evidence and control of the proceedings before it. Logically, that extends to discovery and disclosure of documents prior to trial, consistent with the principles and purposes underpinning the Act, to ensure good faith dealings between the parties. In addition, the power of the Court to regulate and govern its procedures (including disclosure of

documents) is what is in effect encapsulated in s 221(d), which is broadly stated both as to its terms and purpose.

[64] I have already indicated that I am of the view that reg 39(2) means that where a penalty is sought the requirements of the provisions contained in regs 40-52 do not apply to either party. That does not mean, however, as Mr Drake appears to be submitting, that disclosure in the proceedings is brought to an abrupt end and that the matter then remains in a vacuum. That would be to allow the subordinate regulation to override the provisions of the statute. Upon a proper assessment of its effect, reg 39(2) in combination with ss 189 and 221(d) has the distinct purpose of ensuring that where penalties are sought, the Court retains control of the issue of disclosure of documents between the parties. One of the reasons for that might well be to protect the civil penalty privilege if it appropriately applied.

[65] The Regulations cannot confer jurisdiction upon the Court. Jurisdiction instead comes from the Act. Equally, as subordinate legislation made under the Act, the 2000 Regulations cannot constrain the exercise of jurisdiction conferred by the Act. The role of the Regulations is procedural, that is, to direct the manner in which the jurisdiction of the Court conferred by the statute is to be accessed by parties to litigation.

[66] On a literal interpretation, reg 39(2) does not purport to forbid disclosure of documents in actions for a penalty. Rather, it simply negates the application of regs 40-52 to such actions. What that means in practical terms is that the party seeking the imposition of a penalty cannot require disclosure in accordance with the 2000 Regulations as of right, but rather, any compulsion to disclose documents must come from an order of the Court, exercising its statutory jurisdiction under ss 189 and 221(d). This construction, rather than that submitted for by both parties at the hearing, would enable the Court in a penalty action to equitably balance the probative and prejudicial factors associated with the disclosure of particular documents and in the overall interests of justice.

[67] As to how the Court should exercise that discretion would be informed by a number of factors. The Court would obviously take into account the history of the

legislation and authorities to which I have referred in this judgment to decide whether the civil penalty privilege, if it remains, should apply in the particular case having regard to all of the circumstances. It may well be that the Court will decide that in a particular case the privilege should apply because it is appropriate to do so, looking at the matter from both the point of view of the person seeking the penalty and the person vulnerable to the penalty, and having regard to all of the principles underlying the Act. On the other hand it may decide that the circumstances mean that the privilege should not apply. The extent of the prejudice, which might be occasioned to the person vulnerable to the penalty, would be a matter to be assessed and taken into account. The Court would also look at exactly what it is that the parties are seeking privilege for.

[68] For instance, the plaintiff in this case could not possibly seek privilege for any document, because no penalty is being sought against him and he is not vulnerable in any way. The defendant has indicated that it too seeks to rely upon the privilege. However, no basis for requiring the privilege to apply to it has been put forward. The defendant's claim to privilege seems simply to be a reaction to the fact that the plaintiff has sought privilege; accordingly, it will do so also. In addition, in this action, another matter which the Court should take into account is the need to have disclosure of documents for the purposes of entitling the parties and the Court to advance the proceedings for other remedies. Such a consideration would go a long way towards dealing with the difficulties expressed in the *Jetconnect* case.

[69] It is not the prerogative of this Court to declare the final demise of the civil penalty privilege. However, within the context of the Act, governing as it does the special employment relationship replete with requirements as to good faith dealings, maintenance of the privilege may no longer always be appropriate. The matter remains to be decided having regard to the circumstances applying in each case.

[70] A penalty is now simply part of the armoury of remedies available for a breach of the employment relationship. This is particularly corroborated by the fact that the Court has been granted discretion (as with the Authority) to award part or the entire penalty to the applicant. Along with other remedies invariably claimed, the parties to a penalty action should usually be required in an orderly fashion to make

full disclosure of the documentary evidence in their possession relevant to the consideration of the issues the Court is required to make. It would seem illogical if the Court could not require such disclosure pre-trial, and yet may require production of such documents at trial by exercising its wide discretion under ss 189 and 221(d). Nevertheless, as I have indicated there may be occasions where it is appropriate to extend the penalty privilege to the party subject to the penalty action. That would be a matter to be decided by the Court in the pre-trial process, which would follow once a penalty was sought in the initiating proceedings and the privilege in respect of a particular document or documents was claimed. Regulation 39(2) would in that case, therefore, abrogate regs 40-52, and require the Court to exercise its powers under the Act to regulate the conduct of the proceedings from that point on to trial. Of course when such privilege was not sought it would be expected that the parties would be capable of dealing with disclosure on a voluntary basis and without the need for the Court to intervene.

[71] If the civil penalty privilege applies, it could only extend to the party at risk of having the penalty awarded against them. The consequence of accepting Mr Drake's argument for the plaintiff in this matter would result in absurd consequences. Those consequences are of the kind Mr Pollak mentioned in his submissions, that the parties would be encouraged when claiming or defending general remedies to seek or cross-apply for a penalty simply to avoid having to make disclosure. The effect of such behaviour on the Court in the orderly management of proceedings before it would be totally unacceptable. That cannot possibly have been intended by reg 39(2) of the 2000 Regulations if an interpretation of this particular enactment in the light of its literal meaning and its purpose is adopted. Even allowing the privilege to extend to the party defending the penalty action gives rise to the type of difficulties referred to in the *Jetconnect* case.

[72] However, as I have indicated, the meaning and intent of reg 39(2) is clear. It is part of the procedure specified in the 2000 Regulations, for the management of discovery and disclosure of documents leading to trial. Clearly, different considerations apply when a penalty is sought. A penalty is different in nature from the other remedies prescribed in the Act for breach of an employment relationship. The penalty is a remedy, which primarily is to be awarded to the Crown, but,

alternatively, either in whole or in part to a litigant. It is obviously present in the Act for the purposes of deterring those involved in employment relationships from acting in contravention of the requirement of good faith and fair dealings so clearly enunciated in the objects and the introductory sections of the Act.

[73] Insofar as the present proceedings are concerned, a penalty is claimed by the plaintiff and the privilege is sought. Therefore, the Court needs to revert to its powers under the Act, rather than allowing the parties to rely upon regs 40-52 to resolve issues relating to documents. Nevertheless, I am not persuaded that this is a case where it is necessary to give consideration to the civil penalty privilege. In saying that I have regard to the authorities relating to the history and previous application of the privilege referred to earlier in this judgment. Certainly the privilege cannot apply in respect of the plaintiff who, as I have indicated, is not vulnerable to a penalty at all. Insofar as the defendant is concerned, Mr Pollak indicated in his submissions, and in earlier memoranda to the Court, that the defendant was prepared to make full disclosure to the plaintiff and in fact was in the course of preparing to do so. There has been nothing presented to the Court by the defendant in its reasoning to show that there may be a document or documents to which the privilege should attach.

Comment

[74] Generally it needs to be said in respect of the present applications that it is difficult to understand the stance taken by the plaintiff on these issues of discovery and disclosure. Even if reg 39(2) applies, Mr Matsuoka was never vulnerable to a penalty. Nor were the non-parties for whom Mr Drake has now made submissions and taken a stance. The only possible explanation is that these parties are pursuing these arguments solely on principle or simply to be obstructive. At trial the documents sought now by the defendant will be equally necessary in the interests of the plaintiff as they will be to the defendant. They are relevant. It is curious, therefore, as to why their disclosure is so vehemently opposed such that these nebulous arguments have been raised and pursued to this extent.

[75] In an earlier decision involving PRI or PFC's refusal to provide wages and leave records to several former employees and their union, I referred to the overwhelming animosity and antagonism of the PRI Group and its management towards LSG as a commercial competitor. That animosity and antagonism appears to have unfortunately spilled over into the present proceedings where it is not in dispute that PRI and PFC are funding Mr Matsuoka's litigation against LSG. In Judge Travis's judgment of 18 May 2011³⁵ factual findings were made as to Mr Matsuoka's continuing close connection with PRI, its related companies and its shareholders and directors. Indeed, Mr Matsuoka himself held, or holds, shares in one or more of the companies.

Disposition

[76] For the reasons set out in this judgment, the plaintiff's notice of objection to the defendant's notice requiring disclosure is invalid and ill-founded. The defendant has not formally applied for declarations and directions but in view of the way this matter has been argued I direct that the documents sought now be disclosed. It is to be hoped that any further application by the defendant would not be necessary.

[77] I now turn to disposition of the defendant's application against non-parties. In respect of these matters I have had regard to the submissions of counsel presented at the hearing and also each of their supplementary submissions. I also have regard to Mr Goodall's submissions, even though he indicated that his clients, the non-parties, would abide the decision of the Court. Even if Mr Drake, as counsel for Mr Matsuoka, has standing to support opposition to disclosure issues against the non-parties, I do not accept his submission that any order against the non-party should await the completion of disclosure by the plaintiff. Mr Matsuoka's and the non-parties' positions in the proceeding are different even though I am informed that the non-parties are funding this litigation. As Mr Matsuoka's former employer, the non-parties are likely to have a wider range of documents relevant to these proceedings than Mr Matsuoka. The issue of relevance is the crucial point. Mr Pollak persuaded me that the documents he now seeks as specified in paragraph 39 of his submission are relevant to the proceedings, not only as to a substantive defence, but also in

³⁵ [2011] ERNZ 56.

respect of remedies to be considered by the Court if it gets to that point. The Court has power under cl 13(1) of sch 3 of the Act by incorporation of s 56B of the District Courts Act to make orders against non-parties. Accordingly, the defendant's on notice interlocutory applications against Pacific Flight Catering Limited and PRI Flight Catering Limited are granted.

[78] As sought by Mr Goodall, the defendant is required to meet the *reasonable costs* of PRI and PFC in complying with this order. I emphasise the words reasonable costs. Compliance should not be onerous because, as former employers of Mr Matsuoka, they are required as a matter of law to have up-to-date wage, time and leave records for him. Again, I would hope there would be cooperation between the parties in ensuring that there is compliance. Similarly, in view of the findings on principle in this judgment, I would hope that the defendant would now make full disclosure of relevant documents to Mr Matsuoka. I realise that initially the defendant was in the process of making such full disclosure but took the point under reg 39(2) in view of the plaintiff's stance in the matter. There is no basis presented for that to continue.

[79] Finally, the issue of costs arises. As this is an interlocutory matter and in view of the nature of the issues still to be resolved, it is not appropriate that there should be an order for costs in any event at this stage. That will, however, need to be revisited, when the outcome of the proceedings on their merits is determined. In the interim costs are reserved.

M E Perkins
Judge

Judgment signed at 11.30 am on 4 September 2013