



Employment Court of New Zealand

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Mataura Valley Milk Limited v Scott [2020] NZEmpC 140 (2 September 2020)

Last Updated: 7 September 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2020\] NZEmpC 140](#)

EMPC 221/2020

IN THE MATTER OF	an application for an urgent search order without notice
AND IN THE MATTER	of an application to vary search order
AND IN THE MATTER	of an application to join a party or to intervene
BETWEEN	MATAURA VALLEY MILK LIMITED Applicant
AND	GRAHAM SCOTT Respondent

Hearing: 20 August 2020

(Heard at Christchurch and via AVL)

Appearances: J Smith QC and B Locke, counsel for applicant G
Drewitt and E Wilson, counsel for respondent
L Scampion, counsel for Happy Valley Nutrition
Ltd S Campbell, independent counsel

Judgment: 2 September 2020

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

(Application to vary search order, leave to join a party or to intervene)

[1] On 30 July 2020 a search order was made without notice authorising the search for, inspection and removal of, certain electronic storage devices and hard copies of documents thought to contain confidential information belonging to Mataura Valley Milk Ltd held by Graham Scott.¹

¹ *Mataura Valley Milk Ltd v Scott* [\[2020\] NZEmpC 112](#).

MATAURA VALLEY MILK LIMITED v GRAHAM SCOTT [\[2020\] NZEmpC 140](#) [2 September 2020]

[2] That order was reviewed on 10 August 2020. At that time further orders were made:²

- (a) continuing the search order relating to the items seized, copied and in the custody of the independent solicitor, Mr Campbell, pending further order of the Court;
- (b) varying the search order so that the independent computer expert, Mr McKenzie, was permitted to search for and download information from a Yahoo account held by Mr Scott;
- (c) extending the time for the report of the independent computer expert to be filed, requiring that step to be taken by 12 August 2020; and
- (d) providing for further applications to be made, if required.

[3] Against that background there are two further applications. First, Mataura Valley has applied to further vary the search

order to enable inspection of the documents obtained during the search. Second, Happy Valley Nutrition Ltd has applied to be joined as a third party or, as an alternative, to be granted leave to intervene.

[4] Happy Valley's application was opposed by Mataura Valley. During argument it emerged that Mataura Valley is less concerned about Happy Valley being heard about the proposed variation to the search order, affecting that company's laptop that was seized, than about it becoming a party.

The application to join as a party or to intervene

[5] Happy Valley's application needs to be addressed first. The application was made because Happy Valley wishes to be heard about the inspection of documents seized under the search order, and is concerned about the potential to disclose its confidential information to Mataura Valley when its laptop is inspected.

2 *Mataura Valley Milk Ltd v Scott* [2020] NZEmpC 120.

[6] To explain the application to be joined, Happy Valley's Chief Executive, Greg Wood, described the company's plan to construct a premium milk product plant that will compete with Mataura Valley. He explained that Mr Scott was engaged by his company as an independent contractor between 23 March and 23 September 2020. He said that the laptop used by Mr Scott had on it a significant amount of Happy Valley's confidential information, including the "basis-of-design" of its proposed plant and "design metrics" many of which were developed before Mr Scott was engaged by Happy Valley.

[7] While Happy Valley is yet to build a plant, much of the information Mr Wood was concerned about was described as being advantageous to a competitor. That was because some of the documents thought to be on the laptop provided a picture of the company's business strategy, which he considered to be unique in New Zealand.

[8] Mataura Valley opposed Happy Valley being joined as a third party because:

- (a) the proceeding is an employment dispute and Happy Valley has no substantive interest in its outcome;
- (b) Happy Valley's legal rights or liabilities will not be affected either directly or indirectly;
- (c) Happy Valley's commercial or financial interests are limited to the secure handling of material and information seized pursuant to the search order;
- (d) those Happy Valley interests are procedural in nature only and are insufficient as a basis to join it as a party; and
- (e) adequate arrangements may be made to secure Happy Valley's interests short of it becoming a party.

[9] As expressed in the notice of opposition, Mataura Valley opposed Happy Valley being allowed to intervene because:

- (a) it could not legitimately require an audience any more than it had a legitimate interest to become a party;
- (b) the arrangements it was proposing would provide adequate security for Happy Valley's information;
- (c) if, and to the extent, Happy Valley ought to be heard then the only respect in which that should happen was as to the adequacy of the arrangements proposed to be made to ensure Mataura Valley did not have access to its confidential information; and
- (d) Happy Valley has no legitimate interest in the proceeding absent any further matter arising in respect of the search and seizure orders.

[10] At the conclusion of counsel's submissions, I indicated that the application to be joined as a third party was unsuccessful but leave would be granted to Happy Valley to intervene. That intervention would be for the limited purpose of being able to be heard about the conditions (if any) to be imposed if the application to vary the search order succeeded. My reasons follow.

[11] Ms Scampion, for Happy Valley, submitted that the company has a proper interest in the proceeding, and is directly impacted by the search order and its possible variation. She relied on *Moody v Chamberlain*, where Chief Judge Inglis summarised the nature of the Court's broad discretion to allow intervention and observed that the section is not obviously restricted to applications involving parties who are plaintiffs and/or defendants.³

[12] Mr Smith QC, for Mataura Valley, pointed out that what is usually involved in considering joining a party to the litigation is if that person ought to have been joined or where that person's presence before the Court may be necessary to adjudicate on and settle all questions involved in the proceeding.⁴ His submission was that there

3 *Moody v Chamberlain* [2019] NZEmpC 43.

4. See for example *Zara's Turkish Ltd v Kocatürk* [2019] NZEmpC 139; *Lorigan v Infinity Automotive Ltd* [2018] NZEmpC 88 at [31]–[36]; *McCook v Chief Executive of the Inland Revenue Department* [2019] NZEmpC 189 at [17]; *High Court Rules 2016*, r 4.56(1)(a) and (1)(b)(i)–(ii); and relying on *Capital + Merchant Finance Ltd (in rec and in liq) v Perpetual Trust Ltd* [2014] NZHC 3205, [2015] NZAR 228.

was no connection between Happy Valley and the subject matter of the proceeding compounded in this case because the request was to be joined as a third party. Third parties are usually joined where the defendant is entitled to some sort of relief from that party,

connected with the subject matter of the proceeding.⁵ Mr Smith pointed out that, as well as Happy Valley having no interest in the subject matter of the proceeding, Mr Scott is unlikely to seek any relief from it if Mataura Valley's claim against him succeeds.

[13] The power to add or strike out a party from a proceeding is conferred by [s 221](#) of the [Employment Relations Act 2000](#) (the Act). The power is reasonably broad. The section reads:

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,—

(a) direct parties to be joined or struck out; and

...

[14] The application to be joined as a third party does not satisfy [s 221](#). This proceeding is about an employment relationship problem arising from an alleged breach of the employment agreement between Mataura Valley and Mr Scott. What is in issue is the potential use or misuse of Mataura Valley's confidential information in breach of that agreement. It follows that the problem is exclusively between Mataura Valley and Mr Scott. Happy Valley has not established that it ought to have been joined in the proceeding when it began or that its participation will assist in resolving the employment relationship problem.

[15] I agree with Mr Smith that Happy Valley's interest is not about the subject matter of the proceeding, but is confined to protecting its own interests in the integrity of its confidential information. Happy Valley's presence as a party would not enable

5. See [High Court Rules](#), r 4.4; and the discussion in *McGechan on Procedure* (online ed, Thomson Reuters) at r 4.4.

effective disposal of this proceeding in accordance with the merits and equities of the case.

[16] As to being able to intervene, cl 2(2) of sch 3 to the Act empowers the Court to allow any person to be heard who, in the opinion of the Court, is justly entitled to be. In this case Happy Valley's interest in its confidential information on the laptop seized under the search order is a sufficient basis for granting a limited right to be heard. It was granted leave to intervene on that limited basis.

Application to vary search order

[17] Mataura Valley applied to vary the search order in three respects:

- (a) To allow the independent computer expert to inspect the items seized and produce a schedule listing the files identified as potentially including Mataura Valley's confidential information.
- (b) For its Chief Executive, Bernard May, together with the independent computer expert, to be permitted to review the schedule produced by the independent computer expert to identify documents which are Mataura Valley's confidential information.
- (c) For Mr May, together with the computer expert, to be permitted to inspect the items seized, including the laptop owned by Happy Valley, to identify whether Mataura Valley's confidential information has been incorporated into files stored on the devices.

[18] Some conditions were incorporated into the application and amplified on in submissions and in an affidavit by Mr May. In summary, the proposed conditions were that:

- (a) the inspection would be undertaken at the office of the independent solicitor, Wynn Williams;
- (b) the inspection would be subject to an undertaking from Mr May to abide by any orders of the Court regarding the inspection for the

purposes of preserving the confidentiality of any third party, including but not limited to Happy Valley, that may be stored on the devices;

- (c) the information inspected would not be copied;

(d) any notes made by Mr May to assist him during the inspection would be retained by the independent solicitor; and

(e) Mr May would not disclose to any other person any confidential information disclosed to him (presumably pending further orders being made).

[19] In addition, Mr Smith explained that Mataura Valley accepted that Happy Valley's marketing material could be removed by the independent solicitor, or computer expert acting under his direction, before any inspection took place.

[20] Subject to the proposed conditions, Mataura Valley is seeking to vary the search order so it can inspect the documents, to identify those that will be or may be relevant to the litigation between it and Mr Scott. Mr Scott did not oppose the first two proposed variations to the search order but opposed the third one, about Mr May being able to inspect documents. Mr Scott's objection was not intended to prevent Mr May from inspecting them, but was to propose a process that would enable combined inspection. That was seen as a mechanism through which some protection, or assurance, might be provided to Happy Valley about its confidential information and to Mr Scott about his private information also stored on the devices that were seized.

[21] Mr Scott's proposal was fleshed out in Ms Drewitt's memorandum and required an initial screening of the documents by the independent computer expert to create two schedules. The first schedule would be for those documents containing Mataura Valley's confidential information. The second schedule would be for those documents containing Happy Valley information.

[22] The proposal was that the items identified in the first schedule would be inspected by Mr May and Mr Scott, under the supervision of the independent solicitor and/or computer expert. The second schedule would be inspected by Mr May, Mr Scott and Mr Wood. The purpose of the inspections would be to identify documents considered to fall into one of three categories; irrelevant, contentious or disputed documents. The memorandum proposed how those distinctions would be made.

[23] As to those documents identified as containing Mataura Valley's information but identified as contentious, the proposal was that they would be inspected by Mr May under supervision. Those contentious documents falling into the second schedule would be inspected by Mr Wood and potentially redacted.

[24] Part of this proposal was that Mr Scott's property would be returned to him once the copies of Mataura Valley's information had been identified and removed from the devices. Except where there was a disputed document, any copies of Mr Scott's information would be destroyed or returned to him and not retained by Mataura Valley.

[25] Under this proposal Happy Valley's laptop and charger would be returned to it at the conclusion of this process, regardless of whether there were disputed documents in existence. Furthermore, except where there were disputed documents notionally identified as Happy Valley material, any copies would be destroyed or returned and not retained.

[26] Ms Scampion supported this proposal. It was seen as providing adequate checks and balances to enable an inspection while assisting Happy Valley by ensuring that its confidential information was protected.

[27] Mr Smith made three pertinent observations in response to this proposal. The first was that the computer expert should not be asked to assess the significance of documents to place them in each proposed schedule. The second was that the proposed process conflated the inspection of documents that necessarily follows a search order being executed with decisions about the content and relevance of documents to the litigation.

[28] Mr Smith's third observation was that the process vested too much decision making in the hands of Mr Wood at a stage in the proceeding where documents were being assessed to consider the relevance of them to the litigation. His concern was that Mr Wood would be placed in a position of being able to screen certain documents

in assessing if they contained confidential information improperly obtained from Mataura Valley. That would mean Mr Wood would be able to pre-empt inspection of documents by Mataura Valley in a situation where it would be unable to review or dispute the screening decision.

[29] In contrast, Mr Smith suggested that the appropriate order, allowing proper inspection while safeguarding the interests of Mr Scott and Happy Valley as far as reasonably possible, was to adopt a practice similar to the one used in the High Court in dealing with inspection of documents where the interests of competitors are concerned.⁶

[30] Ms Scampion did not accept the appropriateness of Mr Smith's suggestion. She considered the circumstances here are different from cases where inspection was required in proceedings where the parties are competitors. In this case Happy Valley may be inadvertently tangled up in what happened because Mr Scott possessed its laptop when the search order was executed. She considered that justified the approach proposed by Ms Drewitt to protect Happy Valley's information.

[31] Ms Scampion's concern about protecting Happy Valley's confidential information was overly cautious and involved an element of speculation about the information to be considered. For example, there was no evidence that the information could be assimilated other than through studying it over time. In fact, that is an aspect of this proceeding. Mr Scott was said to have been able to have access to Mataura Valley's confidential information over time, which was necessary precisely because it cannot be readily absorbed and remembered without being studied.

[32] While Ms Scampion is correct in describing the differences between this proceeding and the cases relied on by Mr Smith, I agree with him that it is inevitable an inspection has to take place and that it must involve Mr May considering all of the documents. That is because of Mr May's uncontradicted evidence, that he is the only person still employed by Mataura Valley who is conversant with the highly technical information it is concerned about.

6 Relying on *Krone (NZ) Technique Ltd v Connector Systems Ltd* [1988] NZHC 549; (1998) 2 PRNZ 627 (HC); and *Business Distributors Ltd v SIA Abrasives Australia Pty Ltd* [2014] NZHC 3365.

[33] Unfortunately, Ms Drewitt's memorandum does not present a realistic alternative. The proposed process is complex and involves value judgments that are misplaced. It is also difficult to see how a combined inspection would provide any real protection for Happy Valley or Mr Scott. The documents would still need to be inspected and Mr Wood's presence would not alter that situation or improve it.

[34] There is, as was acknowledged by Mr Smith, something of an irony in the application because allowing an inspection would expose Happy Valley to having its confidential information disclosed to a competitor and that is exactly what is behind Mataura Valley taking this action. While acknowledging that irony, in the end a pragmatic result is required because it is inevitable that the files will need to be inspected by Mr May. Given the nature of the information, no other mechanism is workable without incurring a great deal of unwarranted expense and delay, such as by paying a consultant to become familiar with Mataura Valley's confidential information and then inspecting the files.

[35] A straightforward and simple process of allowing inspection, preventing copying and retention, supported by an order that Mr May is not to disclose any information pending further order is sufficient. The application is granted subject to the conditions identified at paragraphs 1(a)–(c) of the application dated 12 August 2020 together with the following further conditions:

- (a) The inspected documents are not to be copied (in whole or in part).
- (b) The documents are only to be inspected at the office of Wynn Williams and, at all times, that inspection is to be supervised by Mr Campbell, the independent solicitor.
- (c) Any notes made by Mr May to assist him during the inspection are not to be removed from the office of Wynn Williams and are to be retained by the independent solicitor.
- (d) There is to be no disclosure of the content of information inspected by Mr May to any person (with the exception of counsel) unless first authorised by the Court.

[36] Leave is reserved to apply for any necessary further orders.

[37] Costs are reserved.

K G Smith Judge

Judgment signed at 4.40 pm on 2 September 2020