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Yu v Zespri International Limited [2017] NZEmpC 146 (17 November 2017)

Last Updated: 23 November 2017

IN THE EMPLOYMENT COURT AUCKLAND

[\[2017\] NZEmpC 146](#)

EMPC 25/2015

EMPC 132/2015

IN THE MATTER OF a challenge to a determination of
the
Employment Relations Authority

BETWEEN JOSEPH YU Plaintiff

AND ZESPRI INTERNATIONAL LIMITED
Defendant

Hearing: 2 August 2017, and on documents received 6, 12, 13
and 26
September 2017; 2, 17, 18, 19 and 20 October 2017

Appearances: P Skelton QC and C Pearce, counsel for the plaintiff
M Richards and A Kirk, counsel for the defendant

Judgment: 17 November 2017

JUDGMENT OF JUDGE B A CORKILL

What are the problems?

[1] This judgment resolves complex issues of disclosure, as raised by

Mr Joseph Yu against his former employer, Zespri International Ltd (Zespri). [2] Four main issues are raised for Mr Yu. These are:

- a) whether certain documents are subject to solicitor-client privilege;
- b) whether certain documents are subject to litigation privilege;
- c) whether certain documents are confidential; and
- d) whether certain documents are relevant to the issues in the proceedings.

JOSEPH YU v ZESPRI INTERNATIONAL LIMITED NZEmpC AUCKLAND [\[2017\] NZEmpC 146](#) [17

November 2017]

[3] The Court is also required to consider whether it should make a verification order requiring a suitable person from Zespri to swear an affidavit of documents, thereby confirming on oath its statements that particular documents should not be disclosed, and the reasons for this.

[4] Although there was originally a claim that some documents were the subject of either a common or joint privilege, the Court is not now required to consider that issue.

The factual context

[5] Having regard to the pleadings, I summarise the following facts for the purposes of considering the challenge.

[6] Mr Yu began working for Zespri in its Taiwan office in 2001 as marketing manager.

[7] In about 2005, he commenced the undertaking of marketing work in China. Initially this was a small part of his role, but it steadily grew until by 2009 he was working in China full-time.

[8] At all material times, Zespri sold its fruit into China through local importers. In 2008, it incorporated a Chinese subsidiary, Zespri Management Consulting (Shanghai) Co Ltd (ZMCC) to carry out marketing activities in that territory.

[9] From 1 January 2009, Mr Yu worked full-time at the ZMCC offices in China, under secondment from Zespri. That role was extended for two years in 2010. During his secondment, he was responsible for coordinating Zespri's marketing activities in China.

[10] In about May 2011, the Shanghai Customs Anti-Smuggling Bureau (SCASB) commenced an investigation into the customs' valuation practices of one of Zespri's importers, Shanghai Neuhof Trade Company Ltd (Shanghai Neuhof). The principal, Mr Liu Xiongjie was arrested, and later convicted of evading customs duty by declaring kiwifruit at artificially low prices.

[11] Then on 5 September 2012, Mr Yu was arrested under suspicion of being involved in the illegal practices of an importer. Zespri's subsidiary ZMCC was also investigated. Subsequently charges were laid against ZMCC for collusion with the Shanghai importer to evade customs duty, and Mr Yu was charged alongside that entity as its "directly responsible executive member". In March 2013, both were found guilty. Mr Yu was imprisoned; he served a sentence of four years.

[12] On 30 July 2014, while Mr Yu was in prison, Zespri terminated his employment agreement on the legal ground of frustration of contract; this was on the basis he could no longer carry out his employment-related duties whilst he was in prison.

[13] Mr Yu claims that he was dismissed unjustifiably. In particular, Mr Yu says that Zespri cannot rely on the doctrine of frustration of contract to terminate his employment agreement since it caused or contributed to the act of frustration, a double invoicing system which Zespri introduced and used when exporting kiwifruit to China.

[14] Other claims include alleged breaches by Zespri of its duty of good faith under [s 4](#) of the [Employment Relations Act 2000](#) (the Act), of its duty not to carry on a corrupt or dishonest business; of its duty to provide a safe working environment; and a claim that there was a breach of an agreement as to the payment of costs. Zespri denies all these claims.

Key factual issues in the case

[15] Mr Skelton stated that the plaintiff's case is that long before he became involved in the China market, and throughout his employment there, Zespri knew both at executive and governance (or Board) level that:

a) Zespri's business in China and its relationship with its local importers

operated on a consignment basis;

b) Zespri and its importers had agreed to use a double invoicing system to

declare fruit at reduced values for customs' purposes;

c. the purpose of declaring fruit at a reduced value was to reduce the amount of custom duty ultimately payable;

d) the reduction in customs duty accrued to Zespri's benefit; and

e) that using the above business model gave rise to certain risks.

[16] As mentioned, Zespri denies these assertions. It says that at all relevant times, Zespri relied on its Asian-based management team, which included Mr Yu, for information relating to indicative pricing and volumes to be sold in China each year, on which the invoicing was based. Zespri says that at the start of each kiwifruit season, the China importers advised its Asia-based management team of the specific price to be included on pro-forma invoices. That team would advise New Zealand personnel of the pro-forma invoice price. It contends there were no direct discussions between Zespri and the importers in respect of the pro-forma invoice price, which New Zealand personnel relied on the company's Asia-based management team to communicate.

[17] It also issued tax invoices for amounts owing from the importer. The China importers were treated as a single account for finance purposes. Payments received in respect of shipments of kiwifruit to China were applied by Zespri's New Zealand- based finance team against the outstanding balance of the importer's account, typically against the oldest outstanding tax invoices.

[18] Zespri states that it believed that its business model was commonly used in China. It also says that it made appropriate enquiries as to the legitimacy of these arrangements, from time to time.

The history of the disclosure process

[19] Both parties served notices of disclosure. This judgment is concerned with issues arising from Mr Yu's notice of 15 December 2016, which requested disclosure of 139 categories of documents.

[20] An aspect of the disclosure process related to documents which were held on a laptop. The laptop had been provided to Mr Yu when employed by Zespri. Following his arrest and detention in China, it was seized from Mr Yu and was held for a time by the SCASB

in Shanghai.

[21] In due course, when the present proceeding came before the Court, Chief Judge Colgan, as he was at the time, made appropriate directions for the return of the laptop to the custody of the Registrar of this Court.¹ This occurred, and was followed by a process of cloning, analysing and summarising the documentary and other contents. Ultimately, each party prepared a comprehensive list of documents, which included reference to material derived from the laptop, as well as from other sources.

[22] As far as Zespri is concerned, this was a very comprehensive exercise. Ms Richards, counsel for Zespri, advised the Court that over 100,000 documents had been sourced by Zespri to comply with its disclosure obligations. Counsel had reviewed over 30,000 documents in response to key word searches approved by the Court. She said there were approximately 72,000 documents on the laptop alone.

[23] Counsel reported to the Court from time to time on the processes which were being undertaken. It is evident from this advice that there was a high degree of cooperation between the parties. As a result, there has been a significant reduction in the number of documents which the Court has ultimately been required to consider. The notice of application raising Mr Yu's challenge originally related to 468 documents; this had reduced to 156 by 2 August 2017, when the hearing commenced. Following discussions during that hearing, it was agreed that further initiatives would be undertaken.

[24] I reviewed progress in a telephone conference with counsel on

6 October 2017. The Court was told that by then the challenge had been reduced to

89 contested documents; this included 73 Board paper documents containing up to

200 pages, and 16 non-Board documents, totalling approximately 6,800 pages. The

1 Zespri International Ltd v Yu [2015] NZEmpC 107; *Zespri International Ltd v Yu* [2015] NZEmpC 140. A third judgment dealt with appropriate search terms for disclosure: *Zespri International Ltd v Yu* [2016] NZEmpC 37.

focus of dispute relates to redactions which have been made for Zespri on many, but not all, of those pages.

[25] For the purposes of Mr Yu's challenge, a schedule had been prepared which provided basic information about each disputed document. From time to time, that schedule was refined and refiled by plaintiff's counsel, as agreement was able to be reached about the disclosure of some documents. At the telephone conference just mentioned, I requested Zespri to annotate the plaintiff's schedule, so that the Court could obtain an accurate appreciation of the extent and nature of the redactions which were in dispute.

[26] Copies of the non-Board documents had been provided to the Court, which showed the redactions to those particular documents; the Court was not provided with redacted copies of the Board documents, no doubt because of the sheer volume involved.

[27] The annotated schedule was duly provided. It recorded that some 80 documents were now in dispute. The number of redacted pages remains significant.

Inspection by the Court?

[28] Following receipt of the annotated schedule, I considered the question which had been raised earlier by counsel as to whether the Court should exercise its power under reg 45(2) of the [Employment Court Regulations 2000](#) (the Regulations) to inspect documents.

[29] Mr Skelton had submitted at the hearing on 2 August 2017 that given the extent of issues between the parties, founded on the concerns counsel held as to whether objections to disclosure had been properly raised, the Court should inspect the disputed documents.

[30] Ms Richards said that for her part, inspection could be an appropriate and pragmatic option. She also pointed out that disclosure in a case such as the present is far from straightforward, given the thousands of documents involved.

[31] The Court of Appeal has made it clear that inspection should never occur "as a matter of automatic practice",² and that the Court must be in "real doubt" before doing so.³

[32] As I have previously observed, the Court will usually wish to be satisfied that responsible efforts have been made to resolve the issues directly between the parties, who after all have primary knowledge of the factual matrix.⁴

[33] I have already commented on the high degree of collaboration between counsel to resolve the issues, and the progress which has been made. The steps taken since the hearing of the interlocutory application has demonstrated a continued commitment to a professional and practical resolution of disclosure issues on both sides.

[34] At the hearing on 2 August 2017, Mr Pearce, junior counsel for Mr Yu, took the Court to examples where dual disclosure of the same document had occurred; he said this showed inconsistencies of approach. That is, one such disclosure contained redactions, and the other did not. At the hearing, Ms Richards responded by stating that such a redaction may have occurred inadvertently, and that any such difficulties would be promptly reviewed. I infer that problems of this nature were resolved, because the Court has not been required to consider the specific illustrations which were raised at the hearing.

[35] Ms Richards also stated that it had been difficult for the defendant to appreciate in detail what the exact nature of the concern on the part of the plaintiff

was, in a given instance.

2. *General Accident Fire and Life Assurance Corp Ltd v Elite Apparel Ltd* [1987] NZCA 8; [1987] 1 NZLR 129 (CA) at 133.

3 *Guardian Royal Exchange Assurance of New Zealand v Stewart* [1985] 1 NZLR 596 (CA) at

599.

4 *Walker v Delta Community Support Trust* [2014] NZEmpC 187, [2014] ERNZ 743 at [11].

[36] On any view, disclosure in the present case is highly complex. It involves, as already mentioned, requests for 139 categories of documents, some of which were broadly expressed; and in dealing with its obligations, counsel for Zespri have created yet further categories. I have already referred to the volume of documents which indicates the scale of the process.

[37] In the end, the Court is required to consider the reliability of the assessments made by counsel for Zespri.

[38] In *Fox v Hereworth School Trust Board*, Chief Judge Colgan explained that:⁵

... An assurance to the Court by counsel, or a statement made on oath or affirmation by a responsible and knowledgeable person filed by counsel that, for example, know such documents exist, or that relevant documents are privileged, or the like, will usually be accepted by the Court. The Court will not go behind such compliance with these ethical obligations to it.⁶ The process of litigation can indeed only work on the basis of trust and confidence between Court and Bar and, in turn, depends upon an independent and strong legal profession.

[39] This dicta underlines the importance which the Court attaches to the role of counsel, which may be undertaken subject to undertakings or suitable protections such as inspection of documents by counsel alone; and to any affidavit evidence which may be provided on the topic of disclosure.

[40] Ms Richards submitted that she and her colleagues were well aware of their professional obligations, which included duties owed to the Court itself. She acknowledged that the Court routinely relies on counsel in this regard.

[41] The provision of affidavit evidence as filed by the parties for the present purposes, the annotated schedule which has been filed by counsel for Zespri, and the further context provided by the copies of the non-Board papers provided to the Court albeit with some portions redacted, have provided a significant range of information

against which the competing contentions can be assessed.

5 *Fox v Hereworth School Trust Board (No 6)* [2014] NZEmpC 154, (2014) 12 NZELR 251 at [5].

6 Refer Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.1.

[42] In light of all these considerations, I was satisfied that it was not necessary for the Court to inspect a very significant volume of documents to deal with disclosure issues, indicating this in a minute to the parties of 31 October 2017. As will be apparent later, the possibility of inspection would have been more relevant to the Court's consideration of the objections as to legal professional privilege.⁷

However, when considering the redactions made on that ground, the Court was not

left in sufficient doubt as to conclude that it was necessary to take this step.

[43] As for relevance, many of the documents in question were either generated by or considered by the Board or executive members of Zespri; it is obvious that they involve a complicated range of governance issues. The case itself is also potentially a complex one. In those circumstances, it is preferable that counsel who have an intimate knowledge of all aspects of this proceeding have access to the documents for the purposes of determining relevance. I shall return to this issue later.

General disclosure obligations

[44] Before turning to the individual grounds of objection as asserted by Zespri, it is worth summarising the legal principles which must be applied.

[45] The starting point is reg 40 of the Regulations which provides:

40 Availability of disclosure

(1) ... any party may require any opposing party—

(a) to disclose and make available for inspection any documents

which are in the opposing party's possession, custody, or control

...

[46] The grounds for objection to disclosure are described in reg 44(3), which states:

44 Objections to disclosure

...

(3) The only grounds upon which objections may be based are that the

document or class of documents–

7 *Todd Pohokura Ltd v Shell Exploration NZ Ltd* [2008] NZHC 1190; (2008) 18 PRNZ 1026 (HC) at [38].

(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.

[47] As already recorded, one of the issues in the present challenge relates to the relevance of documents, for the purposes of disclosure. Regulation 38 defines the concept in this way:

38 Relevant documents

(1) ... 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.

[48] The role of pleadings in assessing relevance is obviously important. The leading authority on this topic is *Airways Corp of New Zealand Ltd v Postles*, a Court of Appeal decision which considered the former reg 48 of the [Employment Court Regulations 1991](#).⁸

[49] For the purposes of that regulation, the Court of Appeal said:⁹

With respect we consider the judge erred in law in drawing for present purposes a distinction between pleadings and proceedings. The pleadings define the ambit of the proceedings and thereby define the issues to which questions of relevance must be related. While the concept of relevance should not be looked at narrowly, it can never be divorced from the issues raised by the pleadings. That is what is meant by the reference in reg 48 to any disputed matter in the proceedings.

[50] The former reg 48 did not state that a document is relevant if it “directly or indirectly” falls within any of the defined categories. That phrase was added when reg 38 of the current Regulations was introduced. But the addition of these words reinforces the conclusion of the Court of Appeal that whilst the pleadings define the

ambit of the issues, the concept of relevance should not be looked at narrowly.

⁸ *Airways Corp of New Zealand Ltd v Postles* [2002] NZCA 155; [2002] 1 ERNZ 71 (CA).

⁹ At [5].

[51] I turn now to consider each ground of objection, referring where appropriate to particular factors pertaining to that objection, including case law.

Solicitor-client privilege

[52] There are two sub-heads of legal professional privilege as referred to in reg

44. For present purposes, it is to be noted that there is a distinction, as summarised

in Thanki’s *Law of Privilege*:¹⁰

- Legal advice privilege – communications between *lawyer and client* for the purposes of giving or receiving legal advice, in both the litigation and the non-litigation context.

- Litigation privilege – communications between a client or his lawyer and *third parties* for the purposes of litigation.

[53] In New Zealand, the first of these privileges is known as solicitor-client privilege; it is described in s 54 of the [Evidence Act 2006](#) (the EA) which relevantly states:

54 Privilege for communications with legal advisors

(1) A person who requests or obtains professional legal services from a legal advisor has a privilege in respect of any communication between the person and the legal advisor if the communication was–

- (a) intended to be confidential; and
- (b) made in the course of and for the purpose of–
- (i) the person requesting or obtaining professional legal services from the legal advisor; or
- (ii) the legal advisor giving such services to the person.

...

[54] Although the provisions of the EA are not expressly applicable to this Court, they form an instructive guide as to the exercise of its powers regarding the

admissibility of evidence: *Maritime Union of New Zealand Inc v TLNZ Ltd*.¹¹

10 Thanki Bankim *The Law of Privilege* (2nd ed, Oxford University Press, Oxford, 2011) at para

[1.10] (original emphasis); and see *Waugh v British Railways Board* [1979] UKHL 2; [1980] AC 521 (HC) at 541

– 542 per Lord Edmund-Davies.

11 *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 (EmpC) at [14].

[55] Ms Richards referred to this as being a “confidential communications privilege”. However, in the annotated schedule prepared for Zespri, objections are raised both on the grounds of “confidentiality” and “solicitor-client privilege”. Solicitor-client privilege is a discrete and different concept from confidentiality. Because reference is made to both in the annotated schedule, I assume that a distinction is intended. Although solicitor-client privilege requires the subject communication to be confidential, along with other elements, it is appropriate in this case to describe it as being a “solicitor-client privilege” rather than a “confidential communications privilege”.

[56] Ms Richards advised the Court that Zespri had relied on this privilege to withhold documents which related to legal advice it had sought from various external legal advisors, on issues relevant to this proceeding. This included advice from its China-based external legal advisors (Baker and McKenzie, and Highways Law Firm). Zespri also claims the privilege should apply to qualifying legal advice given by General Counsel, primarily Ms Katherine Evans, but also Mr Murray Denyer.

[57] Ms Evans, in an affidavit sworn for the purposes of the challenge, expanded on the obtaining of legal advice for the purposes of issues which are relevant to this proceeding. She stated that following the raid on the offices of Shanghai Neuhof by the SCASB in June 2011, at which point Zespri became aware that there was an investigation of alleged underpayment of customs duty on kiwifruit imported into China, Zespri engaged counsel to provide legal advice. She said it soon became apparent that Zespri and its China subsidiary were also being investigated, at which point it was apprehended that either could be subject to a proceeding, or proceedings. Accordingly, legal advice was sought and received over the period from June 2011 to September 2012, the date on which Mr Yu was detained by Chinese authorities, and indeed for some time beyond that.

[58] She explained that as Zespri’s General Counsel, she had responsibility for instructing all law firms engaged by Zespri to provide legal advice to, and solely for the benefit of, Zespri. She said that the purpose of these instructions was primarily to provide advice to Zespri on risks for its business arising from the detention of the

importer, including matters such as collection of outstanding accounts, ongoing shipments to China during that season and understanding any potential risk to the company relating to the China customs’ issues, and the matters under investigation by the SCASB. As part of this, she said she was also responsible for collecting all relevant information, coordinating that within Zespri, and providing it to Zespri’s legal advisors.

[59] The claim for legal professional privilege, in either of the categories which are raised, must be assessed in this context.

[60] Turning to counsel’s legal submissions as to solicitor-client privilege, Mr Pearce emphasised that the purpose of solicitor-client privilege was to protect confidential communications between a solicitor and client, and that it did not protect all discussions of legal matters. He referred to the speech of Lord Scott in this regard, in *Three Rivers DC v Bank of England (No 6)*.¹² However, he stated that case law also demonstrated that privilege can attach to material that the law treats as the equivalent of such communications, such as documents that reproduce, or evidence the contents of a solicitor-client communication, or documents created with the intention of being passed to a solicitor to obtain advice, but which for whatever reason are not so passed.¹³

[61] Mr Pearce went on to say that solicitor-client privilege does not attach to a company’s internal communications that discussed legal affairs but which are not solicitor-client communications or their legal equivalent. He emphasised that the privilege would not apply to communications which occurred after legal advice had been taken, but which do not reproduce or evidence the content of that advice. Particular reliance was placed on the dicta of Richards J in *Financial Services Compensation Scheme Ltd v Abbey National Treasury Services Plc*.¹⁴ In that case,

the Court dealt with the question of whether a document would be protected which

¹² *Three Rivers DC v Bank of England (No 6)* [2004] UKHL 48; [2005] 1 AC 610 (HL) at [24].

13 Thanki, *The Law of Privilege*, above n 10, at [249], [253] and [257].

14. *Financial Services Compensation Scheme Ltd v Abbey National Treasury Services Plc* [2007] EWHC 2868 (Ch) at [16] – [19].

did not state the substance of the advice, but from which it could be inferred advice had been given. The Court said:¹⁵

... Unless perhaps the inference is obvious and inevitable in which case the document is in substance a statement of the advice or communication, privilege does not attach to such documents. First, it is the communication between the client and the lawyer which is privileged either in its original form or in a summarised or paraphrased form. A document which does not contain the communication in any form contains nothing to which privilege attaches.

[62] With reference to this dicta, counsel submitted that secondary documents should only be protected in situations where such a document is the equivalent of a primary document in that it reveals the content of the advice sought or given.

[63] It was also submitted that solicitor-client privilege does not apply to a bare statement that legal advice has been, or will be, obtained, even if the general subject matter is identified.¹⁶

[64] Mr Pearce also said that the privilege does not cover communications that are merely made *en passant* of a solicitor, such as where a solicitor is copied into an email between persons whose purpose is to speak to each other, not to obtain legal services.¹⁷ Nor could a non-privileged document be cloaked with solicitor-client privilege simply by sending it to a legal advisor.¹⁸

[65] Whilst a collation of documents could reveal the trend of legal advice,¹⁹ such documents should be privileged only in the circumstance where the collation unambiguously reveals the content of the legal advice.

[66] In her submissions, Ms Richards said that with regard to communications with general counsel such as Ms Evans, it was clear that solicitor-client privilege

could apply, providing such a person was acting in their capacity as legal advisor.²⁰

15 At [17].

16 See *Citic Pacific Ltd v Secretary for Justice* [2011] HKCFI 1843 at [78]; *USP Strategies v*

London General Holdings Ltd [2004] EWHC 373 (Ch) at 30.

17 *Todd Pohokura Ltd v Shell Exploration NZ Ltd*, above n 7, at [58].

18 *Gowing & Co Lawyers Ltd v Police* [2013] NZHC 2177 at [16] – [19].

19 *Walker v Delta Community Support*, above n 4, at [29].

20. *Commerce Commission v Caltex New Zealand Ltd* HC Auckland CL33/97, 10 December 1998 at 5.

She submitted that all communications for which the privilege is asserted occurred whilst Ms Evans was acting in her capacity as a legal advisor. She clarified that on those occasions where Ms Evans had provided comments that were not directly related to her work as a legal advisor, the information had been disclosed to the plaintiff.

[67] In the resolution of the claims for solicitor-client privilege I have applied the principles just mentioned, taking into account the methodology adopted by counsel for Zespri.

[68] A significant aspect of Mr Yu's challenge relates to the objections as to solicitor-client privilege. Accordingly, I have paid particular attention to the question of whether in-house counsel acted in their capacity as legal advisors, and not in some other role. On this point, I respectfully adopt the comments of Fisher J:²¹

Where in-house counsel are involved, one must be careful to ensure that the relevant act was performed in their capacity as legal advisors, especially if their activities and duties also extend to other work. This does not mean that every communication to the in-house counsel must be an express request for legal advice or that every communication from him or her must amount specifically to legal advice. But to be privileged, the communications must be directly related to the performance of the advisor in his or her professional capacity as a legal advisor ...

[69] The other main factor which has required consideration is whether secondary documents which refer either to the obtaining of legal advice, or to the content of such advice, should be protected by solicitor-client privilege. Most of the documents I have been required to consider on this topic have been in this category. In such instances, the issue which has arisen for consideration is whether the Court could properly infer that the communication, either in a single document or in a collation of documents, is likely to reveal the content of legal advice. This is an assessment which, in my view, must be undertaken in a common-sense way having regard to the totality of the information available to the Court; and the Court can draw inferences

where there is an adequate evidential basis for doing so.

21 At 5. See also, in this Court, *Draper v Timms* (EmpC) Wellington WC58/00, 4 December 2000.

[70] My conclusions as to this objection are recorded, with regard to each document, in the Appendix which is annexed to this judgment.

Litigation privilege

[71] As Mr Pearce submitted, litigation privilege effectively extends the scope of solicitor-client privilege, so that it protects communications not only between a litigant or their lawyer, but also between those persons and third parties, if made for the dominant purpose of preparing for actual or reasonably apprehended litigation.

[72] [Section 56](#) of the EA provides guidance as to the scope of the privilege, and relevantly states:

56 Privilege for preparatory materials for proceedings

(1) Subsection (2) applies to a communication or information only if the communication or information is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the **proceeding**).

(2) A person (the **party**) who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of—

(a) a communication between the party and any other person:

(b) a communication between the party's legal advisor and any other person:

(c) information compiled or prepared by the party or the party's legal advisor:

(d) information compiled or prepared at the request of the party, or the party's legal advisor, by any other person.

...

[73] Mr Pearce made three points with regard to this privilege. He said that, first, the person claiming the privilege must be party to an actual or apprehended proceeding. In the latter case, the litigation must be a real likelihood rather than a mere possibility.²² As it has been put, “the mere spectre of eventual litigation is not

enough for the privilege to trigger”.²³

²² *Financial Markets Authority v Hotchin* [2014] NZHC 2732 at [46].

²³ At [46] per Winkelmann J.

[74] Secondly, even if a proceeding is apprehended, the document in question must be created for the dominant purpose of preparing for that proceeding.²⁴ It is not enough that the apprehended litigation was merely one factor in mind in making the document or communication.²⁵

[75] Thirdly, Mr Pearce said there was an obvious exception to the scope of litigation privilege. That is, such a privilege could not be asserted over communications between the party and the opposing party in the actual or apprehended litigation.²⁶ Such communications are not privileged to either party, unless made on a without prejudice basis.

[76] For her part, Ms Richards referred also to [s 56](#) of the [Evidence Act](#). Then she submitted that the documents for which litigation privilege is asserted were compiled after June 2011, in relation to proceedings that Zespri contemplated may occur in China. Ultimately, ZMCC was subject to such proceedings. However, there were reasonable grounds for those involved to believe that Zespri itself may become a party to proceedings in China. These grounds arose in the context of the SCASB investigation of the transactions at issue, which were in fact between Zespri and the China importers, and they included the conduct of ZMCC and Zespri. This submission was supported by the evidence of Ms Evans.

[77] Ms Richards went on to state that documents subject to litigation privilege included circumstances where employees of Zespri or ZMCC were gathering information from within the business to provide to legal advisors concerned with the investigations being undertaken by the SCASB. An example was documents which were obtained and ultimately provided to Ms Evans, or to Baker and McKenzie, for the purposes of legal advice that was to be provided. Counsel submitted that the evidence showed they were gathered for the dominant purpose of seeking legal advice with regard to apprehended proceedings. Accordingly, Zespri had claimed privilege over the communications which requested such documents to be gathered, but it had disclosed the documents themselves since these were not prepared for the

purposes of preparation for apprehended proceedings.

²⁴ *Whitcombe v Clerk of the House of Representatives* (2008) 6 NZLR 186 (EmpC) at [31] – [33].

²⁵ *Guardian Royal*, above n 3, at 605 per Richardson J.

²⁶ *Osborne v WorkSafe New Zealand* [2015] NZHC 264, (2015) 22 PRNZ 560 at [18].

[78] In the resolution of the claims for litigation privilege, I have applied the legal principles just summarised, again taking into account

the methodology adopted by counsel for Zespri. In particular, the assertions in respect of this privilege have been considered in light of Ms Evan's evidence²⁷ that soon after June 2011, Zespri or its subsidiary could be subject to a proceeding or proceedings. There was a basis for those involved to conclude there was a real likelihood of such a proceeding; indeed, ZMCC was prosecuted. I have also considered the question of whether the dominant purpose of any particular document or part document could be said to relate to preparation for such a proceeding.

[79] My conclusions as to this objection are again recorded in the amended schedule.

Confidentiality and relevance

[80] A frequent ground of objection raised by Zespri was on the basis that documents were said to be confidential. I have already discussed the apparent distinction between a claim for confidentiality as distinct from a claim for solicitor-client privilege.²⁸

[81] Confidentiality or commercial sensitivity are not grounds for withholding disclosure or inspection. That is evident from reg 44 of the Regulations.²⁹

[82] This much appeared to be common ground between counsel, although Ms Richards put it on the basis that "confidentiality in and of itself is not necessarily a valid ground for withholding information in proceedings". She said, however, that Zespri was entitled to withhold information that is not relevant. In oral argument, she clarified that Zespri's concern related to documents or parts of documents

containing confidential information that is not relevant to the proceeding.

²⁷ Above at para [76].

²⁸ Above at para [55].

²⁹ Above at paragraph [46]; and *New Zealand Fire Service Commission v McEnaney* EmpC Auckland AC 36A/03, 21 August 2003 per Judge Colgan at [14].

[83] The annotated schedule clarified this objection by specifically identifying the documents or parts of documents which it was asserted were not relevant.

[84] Following the provision of the annotated schedule, Mr Skelton advanced a supplementary submission, in which he commented on some claims made for Zespri that documents were not relevant because they did not relate to payment of customs duty in China, or Mr Yu's employment. It was submitted that the disputed matters raised by the pleadings were much wider, and include:

a) the nature of the legal and economic relationship between Zespri and its

Chinese importers;

b) the details of Zespri's business model in China (including pricing, invoicing and payments);

c) the legality of that model, in particular what counsel describes as Zespri's double invoicing practice; and

d) as already mentioned, Zespri's knowledge of the above matters, as evidenced by discussions at executive and Board level.

[85] Mr Skelton went on to give particular examples of these issues. One such related to any discussions of transfer pricing (the practice of artificially adjusting the price of cross-border transactions between related parties in order to achieve a tax or customs' advantage). I agree that all these issues arise from the pleadings.

[86] In reply to this submission, Ms Richards stated that it was accepted that relevance should be assessed in light of the pleaded allegations. She said that assessments of relevance had been advanced for Zespri on this basis. This included, but was not limited to, the payment of customs duty in China, and/or matters relating to Mr Yu's employment with the defendant.

[87] The plaintiff's detailed formulation of issues for the purposes of assessing relevancy is broad, and possibly wider than had originally been appreciated – noting Ms Richards' comment that counsel for the defendant had at times found it difficult to appreciate the full extent of the plaintiff's concerns.

[88] In my view, any objection on the ground of confidentiality can be dealt with by suitable restrictions on disclosure, that is, the process of inspecting, copying and providing documents. This conclusion is reinforced by the fact that counsel have been able to reach agreement on at least two occasions during the disclosure process as to the provision of privileged documents on a restricted basis.³⁰

[89] I have already observed that counsel are better placed to assess issues of relevancy, since at this stage they are more familiar with the complexities of the circumstances giving rise to the litigation than the Court is. I am also mindful of the broad nature of the definition in the Regulations of relevance, for disclosure purposes.³¹

[90] Drawing these threads together, I consider the appropriate way forward that will protect confidentiality where it is asserted on the

one hand, and provide a fair and constructive means of assessing relevancy on the other, is to allow disclosure of those documents according to the following standard terms:³²

a) The redacted documents, or sections of them, (excluding the communications which the Court has ruled are privileged) may be inspected by counsel for the plaintiff (Mr Skelton and/or Mr Pearce) on a strictly confidential basis; that is, no information derived from the inspected documents is to be provided by counsel to any other person, except as is provided in the following clauses, or with the consent of counsel for the defendant.

b) Counsel for the plaintiff may request copies of these documents if they are relevant to one or more of the issues referred to in Mr Skelton's memorandum dated 19 October 2017; or are otherwise agreed by all counsel to be relevant.

c) Leave is reserved to either party to apply to the Court for review of any dispute as to relevance which may thereby arise.

30 That is, the parties' agreement as to the use of privileged material previously disclosed to Mr Yu, dated 14 July 2017; and the information contained in the memorandum of counsel for Zespri dated 18 October 2017, which resulted in my making a consent order on 20 October 2017.

31 Above at paras [47] – [50].

32 These are based on the previous agreements of counsel.

d. Once provided, documents are to be held on a counsel-only basis, meaning that:

i. Counsel instructed by the plaintiff may make or retain hard and/or electronic copies of those documents.

ii. Legal or other advisors instructed by the plaintiff for the purpose of the current proceedings, other than counsel, may review those documents under supervision of counsel, but will not make or retain hard or electronic copies.

iii. Counsel will not permit any person other than those identified above to view the documents, or to make or retain hard or electronic copies.

iv. The plaintiff will promptly inform the defendant of any Court order, request for discovery or other process that might require him to provide the documents to any person.

[91] These conditions on disclosure are, where applicable, described in the

Appendix of this judgment as "standard terms".

[92] The standard terms do not at this stage govern the process which should take place if the plaintiff were to be requested for a copy of any one or more of the subject documents by a third party. Disclosure to a third party of such a document would not be permitted under the standard terms in their current form; such disclosure would require either agreement between the parties, or appropriate directions from the Court. Nor does the current formulation of the standard terms deal with any issues as to admissibility of those documents at trial. Having regard to these factors, I reserve leave to both parties to apply for any necessary modification of the standard terms.

Verification order?

[93] As matters have unfolded, I am satisfied that Zespri has, to this point, met its obligations with regard to disclosure in a responsible fashion; and that a considerable

degree of detail has been provided to the Court which has permitted a proper resolution of the disclosure issues. Inspection of documents by the Court was offered. Given the comprehensive process which has been followed, I do not consider it necessary to require Zespri now to file an affidavit of documents.

Conclusion

[94] Mr Yu's challenge as to Zespri's objections to disclose documents is resolved according to the rulings contained in this judgment and its Appendix.

[95] In addition to the specific reservations of leave referred to above, I reserve leave, generally, for either party to apply for any necessary directions as to the logistics of disclosure of particular documents. All such applications for leave are to be made on reasonable notice.

[96] At the interlocutory hearing on 2 August 2017, I discussed a range of case management issues with counsel. I note that the defendant has indicated that further and better particulars should be provided for several paragraphs of the statement of claim; this is an issue which can presumably be discussed in the first instance by counsel. There was a consensus that although it was unlikely there would need to be any further interlocutory applications, if it proved necessary to do so any such step should occur within one month of the date of this judgment.

[97] Subject to determinations of any further interlocutories, appropriate timetabling directions will need to be given.

[98] I accordingly direct the Registrar to establish a telephone directions conference with counsel five weeks after the date of this judgment, and preferably before the end of the Court year. Counsel are to file a joint memorandum (or if necessary, separate

memoranda) as to proposed directions for the substantive hearing. I will also discuss with counsel whether a judicial settlement conference should be convened.

[99] I have considered whether the Court should deal with costs with regard to the application which the present judgment resolves. I have already observed that the

disclosure exercise has been complex. Moreover, the Court has been required not only to resolve multiple objections, but generally to oversee disclosure over many months. There may be yet further disclosure issues. It is accordingly preferable for costs issues to be reserved.

B A Corkill

Judge

Judgment signed at 3.30 pm on 17 November 2017

Appendix

Resolution of Defendant's Objections to Disclosure

Non-Board Documents Discussion

- 1 ZES.JY.140.1.00000020 *Confidentiality was originally asserted; now it is also asserted that those parts of the document are not relevant. The document is to be disclosed in its entirety to plaintiff's counsel on standard terms.*
- 2 ZES.JY.002.1.00000022 *Confidentiality was originally asserted; now it is also asserted that the document is not relevant. The document is to be disclosed to plaintiff's counsel on standard terms.*
- 3 ZES.JY.002.1.00000018 *Confidentiality was originally asserted; now it is also asserted that parts of the document are not relevant. The document is to be disclosed to plaintiff's counsel on standard terms.*
- 4 ZES.JY.140.0.00000262 *Solicitor-client privilege is asserted. The relevant pages of the document (pages 3, and 5 – 7), including a timeline, were prepared for the purposes of legal advice. Both are privileged.*
- 5 ZES.JY.009.0.00000012 *Solicitor-client privilege and litigation privilege are asserted in respect of several lines on page 22. Zespri states that the redacted reference was in relation to the fact that legal advice was to be obtained regarding the title to and insurance of goods in China. Such a bare statement is not privileged. The document is to be disclosed to plaintiff's counsel.*
- 6 ZES.JY.140.0.00000280 *Solicitor-client and litigation privilege are asserted.*
The documents arose in the context of pending litigation, and include advice given by Ms Evans as General Counsel. The redacted pages (1 – 3 and 5) are protected by litigation privilege.
- 7 ZES.JY.140.1.00000100
Solicitor-client privilege and confidentiality are asserted. The asserted privilege applies to information provided to Baker and McKenzie. It is privileged. The balance of the redacted portion of the document is to be disclosed to plaintiff's counsel on standard terms.
- 8 ZES.JY.140.1.00000102 *Confidentiality was originally asserted, and now part of the document is not relevant. The document is to be disclosed to plaintiff's counsel on standard terms.*
- 9 ZES.JY.140.1.00000105 *Confidentiality was originally asserted; now it is also asserted that those parts of the document are not relevant. The document is to be disclosed to plaintiff's counsel on standard terms.*

- 10 ZES.JY.140.1.00000106 *Solicitor-client privilege and confidentiality were originally asserted, and now parts of the document are not relevant. The asserted privilege applies to information provided to Baker and McKenzie, and to Ms Evans as General Counsel. This material is privileged (pages 12 – 13, 27, 28 and 33). The balance of the document is to be disclosed to*

plaintiff's counsel on standard terms.

- 11 ZES.JY.140.0.00000040 *Confidentiality was originally asserted; now it is also asserted that those parts of the document are not relevant. The document is to be disclosed to plaintiff's counsel on standard terms.*
- 12 ZES.JY.140.1.00000123 *Litigation privilege and confidentiality were originally asserted; now it is also asserted that parts of the document are not relevant. Legal advice obtained by the defendant, including information provided to Ms Evans, as General Counsel, for that purpose is privileged (pages 2, 63 and 69 – 70). The remainder of the document is to be disclosed to plaintiff's counsel on standard terms.*
- 13 ZES.JY.044.0.00000334 *Solicitor-client privilege is asserted. Zespri says the redacted portions of a sequence of emails related to Mr Yu's termination, on which one of the participants, Ms Evans, as General Counsel, was advising. None of the emails were authored by Ms Evans. It is not asserted, and there is no evidence, that the document contains communications made for the purposes of giving or receiving advice. The document is to be disclosed to the plaintiff's counsel.*
- 14 ZES.JY.004.0.00000048 *Solicitor-client privilege and confidentiality were originally asserted; now it is also asserted that the majority of the document is not relevant. The redacted pages relate to potential answers to shareholders' questions at an AGM. Three pages contain advice from Ms Evans, as General Counsel, as to managing such questions. That material is privileged (pages 33 – 35). Since the balance of the redacted material relates to information which was potentially to be made public which is not privileged, the remainder of the document is to be disclosed to plaintiff's counsel on standard terms.*
- 15 ZES.JY.044.0.00000052 *Solicitor-client privilege and confidentiality were originally asserted; now it is also asserted that the majority of the document is not relevant. The redacted pages relate to potential answers to shareholders' questions at an AGM. Three pages contain advice from Ms Evans, as General Counsel, as to managing such questions (pages 33 and 34). That material is privileged. Since the balance of the redacted material relates to information which was potentially to be made public which is not privileged, and is not otherwise privileged, the remainder of the document is to be disclosed to plaintiff's counsel on standard terms.*

Discussion

16 ZES.JY.002.1.00000002 *Confidentiality is asserted; now it is also asserted that part of the document is not relevant. It is to be disclosed to plaintiff's counsel on standard terms.*

17 ZES.JY.140.0.00000077 *Confidentiality is asserted; now it is also asserted that part of the document is not relevant. It is to be disclosed to plaintiff's counsel on standard terms.*

18 ZES.JY.002.1.00000007 *Confidentiality is asserted. The document is to be disclosed to plaintiff's counsel on standard terms.*

19 ZES.JY.002.1.00000019 *Confidentiality is asserted. The document is to be disclosed to plaintiff's counsel on standard terms.*

20 ZES.JY.002.0.00000072 *Confidentiality is asserted. The document is to be disclosed to plaintiff's counsel on standard terms.*

21 ZES.JY.002.0.00000075 *Confidentiality was originally asserted; now it is also asserted that part of the document is subject to solicitor-client privilege. Pages 34 – 35 relate to legal issues as described by Ms Evans, as General Counsel. One relevant aspect of that summary has been provided to plaintiff's counsel. The remainder of those pages in respect of which the privilege is asserted are described as not relevant. The material on these pages is privileged. Apart from the*

privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.

22 ZES.JY.002.0.00000126 *Confidentiality was originally asserted; it is also asserted that part of the document is not relevant. It is to be disclosed to plaintiff's counsel on standard terms.*

23 ZES.JY.002.0.00000148 *Confidentiality was originally asserted; now it is also asserted that part of the document is not relevant. Some pages have been provided to the plaintiff. The remainder of the document is to be disclosed to plaintiff's counsel on standard terms.*

24 ZES.JY.002.0.00000109 *Confidentiality was originally asserted; now it is also asserted that those parts of the document are not relevant. It is to be disclosed to plaintiff's counsel on standard terms.*

- 26 ZES.JY.002.0.00000003 *Confidentiality was originally asserted. The document is to be disclosed to plaintiff's counsel on standard terms.*
- 27 ZES.JY.002.0.00000087 *Confidentiality was originally asserted; now it is also asserted that part of the document is subject to solicitor-client privilege. The solicitor-client material does not relate to issues in the proceeding. It is, however, privileged (pages 41, and 135 – 140). Apart from that material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 28 ZES.JY.002.0.00000009 *Confidentiality was originally asserted; now it is also asserted that parts of the document are not relevant. It is to be disclosed to plaintiff's counsel on standard terms.*
- 29 ZES.JY.002.0.00000017 *Confidentiality was originally asserted; now it is also asserted that parts of the document are not relevant. It is to be disclosed to plaintiff's counsel on standard terms.*
- 30 ZES.JY.002.0.00000089 *Confidentiality was originally asserted; now it is also asserted that part of the document is subject to solicitor-client privilege. The material for which privilege is claimed was prepared by Ms Evans, as General Counsel; part of this relates to legal advice received by Zespri in China, and part relates to other litigation/legal matters. All such information is privileged (pages 31 – 32). Apart from that material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 31 ZES.JY.002.0.00000131 *Confidentiality was originally asserted; now it is also asserted that part of the document is subject to solicitor-client privilege. It is contended that the privileged material includes reference to China customs' issues which has already been disclosed to the plaintiff; the remainder of the privileged material is described as not relevant to this proceeding. Apart from the non-disclosed privileged material (page 31), the document is to be disclosed to plaintiff's counsel on standard terms.*
- 32 ZES.JY.002.0.00000077 *Confidentiality was originally asserted; now it is also asserted that part of the document is subject to solicitor-client privilege. It is contended that the privileged material includes reference to China customs' issues which has already been disclosed to the plaintiff; the remainder of the privileged material is described as not relevant to this proceeding. Apart from the*

non-disclosed privileged material (pages 71 – 76 and 152), the document is to be disclosed to plaintiff's counsel on standard terms.

- 33 ZES.JY.002.0.00000005 *Confidentiality was originally asserted; now it is also asserted that some parts of the document are not relevant, some of which has been disclosed to the plaintiff. It is to be disclosed to plaintiff's counsel on standard terms.*
- 34 ZES.JY.002.0.00000117 *Confidentiality was originally asserted; now it is also asserted that part of the document is subject to solicitor-client privilege. It is contended that the privileged material includes reference to China customs' issues which already has been disclosed to the plaintiff. The remainder of the privileged material is described as not relevant to this proceeding. Apart from the non-disclosed privileged material (pages 54 – 55), the document is to be provided to plaintiff's counsel on standard terms.*
- 35 ZES.JY.002.0.00000101 *Confidentiality was originally asserted; now it is also asserted that part of the document is subject to solicitor-client privilege. It is contended that the document refers to a particular legal matter in a progress report given by Ms Evans, as General Counsel, (pages 63 – 64); with regard to issues in China, reference was made by her to legal advice which had been received (pages 65 – 66). Save for a passage on page 36, which it has been confirmed will be disclosed to the plaintiff, this material is privileged. Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 36 ZES.JY.002.0.00000158 *Solicitor-client privilege and confidentiality were originally asserted. It is contended that references to three particular legal matters, which do not relate to this proceeding, are privileged. That objection is upheld (pages 53, 219 – 220 and 221 – 222). Apart from the privileged material, the documents are to be disclosed to plaintiff's counsel on standard terms.*
- 37 ZES.JY.002.0.00000128 *Solicitor-client privilege and confidentiality were originally asserted; now it is asserted that parts of the document are not relevant. It is contended that the documents include legal advice provided by external law firms as to changes of the corporate structure of the defendant in China; and that the background section of the paper included information about the customs' investigation in China (pages 53 – 54). It is not asserted that the background information discloses legal advice, so it is*

not privileged; the legal advice given by the external law firm is. Apart from the privileged material, the document is to be provided to plaintiff's counsel on standard terms.

- 38 ZES.JY.002.0.00000129 *Solicitor-client privilege and confidentiality were originally asserted; now it is also asserted that none of the passages sought by the plaintiff are relevant. No evidence as to the nature of the privileged material was provided. The document is to be disclosed to plaintiff's counsel on standard terms.*
- 39 ZES.JY.002.0.00000147 *Solicitor-client and confidentiality were originally asserted; now it is also asserted that parts of the document are not relevant. It is contended that all extracts relevant to this proceeding have been disclosed. Apart from any other privileged material, the document is to be provided to plaintiff's counsel on standard terms.*
- 40 ZES.JY.002.0.00000114 *Solicitor-client and confidentiality were originally asserted; now it is also asserted that part of the document is not relevant. It is contended that pages 7 - 8 refer to information that was included in a protected disclosure, and describe the steps Ms Evans, as General Counsel, was taking in response. This material is privileged. Apart from privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 41 ZES.JY.002.0.00000110 *Solicitor-client privilege and confidentiality were originally asserted; now it is also asserted that part of the document is not relevant. The privilege claim is made in respect of legal advice regarding an investigation being undertaken by Dalian customs. This advice is privileged (page 32). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 42 ZES.JY.002.0.00000011 *Solicitor-client privilege and confidentiality were originally asserted. Zespri says the document includes confidential material containing legal advice relevant to the proceeding. Also included are other pages referring to legal advice on matters not relevant to the proceeding. All such material is privileged (pages 13, 30, 69 – 74, 119 – 121, 126 and 129 – 133). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 43 ZES.JY.002.0.00000121 *Solicitor-client privilege and confidentiality were originally asserted; now it is also asserted that parts of the document are not relevant. Zespri says the document includes*

confidential material containing legal advice relevant to the proceeding. It also says there are other pages referring to legal advice on matters not relevant to the proceeding. All such material is privileged (pages 8, 13, 30, 69 – 74, 119 – 121, 125 – 126 and 129 – 133). Apart from the

privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.

- 44 ZES.JY.002.0.00000157 *Solicitor-client privilege and confidentiality were originally asserted; now it is also asserted that part of the document is not relevant. Zespri says the document includes material prepared by Ms Evans summarising key legal issues for Zespri at the time, although none of this is relevant to the litigation. This material is privileged (pages 41 – 42). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 45 ZES.JY.002.0.00000150 *Solicitor-client privilege and confidentiality were originally asserted; now it is also asserted that part of the document is not relevant. A passage is referred to which references legal advice Zespri obtained from Baker and McKenzie (part of page 8). This material is privileged. Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 46 ZES.JY.002.0.00000153 *Solicitor-client privilege and confidentiality were originally asserted; now it is also asserted that part of the document is not relevant. The document contains material prepared by Ms Evans, as General Counsel, summarising key legal issues for Zespri. The section relating to China customs' issues has been disclosed already to the plaintiff. It is asserted that the remaining legal topics are not relevant to the proceeding. This material is privileged (pages 33 – 34). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 47 ZES.JY.002.0.00000119 *Litigation privilege and confidentiality were originally asserted; now it is also asserted that part of the document is not relevant. The asserted privileges are in respect of material prepared by Ms Evans, as General Counsel, containing a summary of the key legal issues for Zespri at the time. Some of this relates to this proceeding, while other material does not. All such material is privileged (pages 35 – 36). Apart from the privileged material the document is to be disclosed to plaintiff's counsel on standard terms.*

- 48 ZES.JY.002.0.00000130 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; now it is also asserted that parts of the document are not relevant. It is asserted that portions of the document are privileged on both grounds of legal professional privilege. Each of the four redactions relate to privileged material (pages 1 – 2, 8, 13 – 14 and 77 – 92). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 49 ZES.JY.002.0.00000070 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; now it is also asserted that parts of the document are not relevant. Part of the document is a paper relating to the China customs' investigation. It sets out the terms of reference for an investigation undertaken by Baker and McKenzie, and discloses legal advice provided to the defendant. This material is privileged (pages 77 – 92). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 50 ZES.JY.002.0.00000132 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; now it is also asserted that parts of the document are not relevant. Page 11 contains a summary of legal advice provided by Baker and McKenzie in relation to an investigation undertaken for Zespri. It appears that this document includes the privileged material arising under number 48. This material is privileged. Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 51 ZES.JY.002.0.00000133 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; now it is also asserted that parts of the document are not relevant. It is asserted that there is privileged material, relating to advice being provided by Baker and McKenzie; and other privileged material not relevant to the proceedings. All such material is privileged (pages 2, 3 and 97). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 52 ZES.JY.002.0.00000142 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; now it is also asserted that parts of the document are not relevant. It is asserted that reference was made to work being conducted by Baker and McKenzie. That material is privileged (page reference not provided). Apart from the privileged material, the document is to be disclosed to*

plaintiff's counsel on standard terms.

53 ZES.JY.002.0.00000149 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; now it is also asserted that parts of the document are not relevant. A part of the document relates to a report which referred to the progress of proceedings in China and included comments from Ms Evans, as General Counsel, about steps being taken with regard to the litigation. That material is privileged (page 3). Apart from the privileged material, the document is to*

be disclosed to plaintiff's counsel on standard terms.

54 ZES.JY.002.0.00000154 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; now it is also asserted that parts of the document are not relevant. It is contended that sections of the document contain legal advice provided by Ms Evans, as General Counsel, as to matters which are the subject of the proceeding (pages 15 to 18); and separately, a reference to legal advice which had been sought from Baker and McKenzie (page 36). The former is the subject of litigation privilege, and the latter is the subject of solicitor-client privilege. Other material was prepared by Ms Evans, as General Counsel, discussing matters not relevant to the proceeding (page 154). It is subject to solicitor-client privilege. Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*

55 ZES.JY.002.0.00000156 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; now it is also asserted that parts of the document are not relevant. An appendix contains legal advice from Ms Evans, as General Counsel, who assisted in its preparation. This material is privileged (pages 121 – 123). Apart from the privileged material the document is to be disclosed to plaintiff's counsel on standard terms.*

56 ZES.JY.002.0.00000118 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; now it is also asserted that parts of the document are not relevant. In the annotations to the schedule, no information was provided in support of the claim for privilege, from which I infer those objections are not pursued. The document is to be disclosed in its entirety to plaintiff's counsel on standard terms.*

57 ZES.JY.002.0.00000161 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; now it is also asserted that parts*

of the document are not relevant. It is asserted that information prepared by Mr Denyer, then General Counsel, contained a summary of key legal issues for Zespri at the time, dealing with four matters, none of which are relevant to the proceedings. This material is privileged (page 35). Apart from the privileged material the document is to be disclosed to plaintiff's counsel on standard terms.

58 ZES.JY.002.0.00000143 *Solicitor-client privilege, litigation privilege and confidentiality are asserted. In the annotation to the schedule, no information was provided in support of the claim for privilege, from which I infer those*

objections are not pursued. The document is to be disclosed in its entirety to plaintiff's counsel on standard terms.

59 ZES.JY.002.0.00000145 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted, and now that a portion of the document is not relevant, the privilege sought relates to material prepared by Ms Evans, as General Counsel, one aspect (page 35) of which is relevant to the present proceeding; and four others of which do not relate to the present proceeding. This material is privileged (page references not provided). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*

60 ZES.JY.002.0.00000151 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; now it is also asserted that parts of the document are not relevant. On page 2 reference was made to a meeting with Zespri's lawyers in relation to the China customs' issues. It refers to legal advice given with regard to the litigation. It is privileged. Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*

61 ZES.JY.002.0.00000002 *Litigation privilege was originally asserted. Page 3 contains a summary of a relevant hearing prepared by Ms Evans, as General Counsel; it sets out legal advice for Zespri as a consequence of that hearing. This part of page 3 is privileged. Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*

62 ZES.JY.002.0.00000008 *Solicitor-client privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim. Two redacted sections of the Board paper are said to be privileged, since they relate to legal information provided by then*

General Counsel, and neither of which are relevant to the proceeding. This material is protected by solicitor-client privilege (pages 40 and 135 – 140). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.

- 63 ZES.JY.002.0.00000144 *Solicitor-client privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claims. It is asserted that four sections of the document are privileged, being legal advice on topics which are not relevant to the proceeding. This material is privileged (pages 6, 18, 113 – 117 and 145 – 155). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 64 ZES.JY.002.0.00000146 *Solicitor-client privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim. Two sections of the document are said to be privileged, one of which is relevant to the proceeding; it refers to legal advice sought from Baker and McKenzie. The second section is not relevant to the proceeding, being a paper prepared by Ms Evans, as General Counsel. This material is privileged (pages 16 and 95 – 96). Apart from the privileged material the document is to be disclosed to plaintiff's counsel on standard terms.*
- 65 ZES.JY.002.0.00000122 *Solicitor-client privilege and confidentiality were originally asserted; now it is also asserted that part of the document is not relevant; the plaintiff no longer challenges the confidentiality claim. Page 31 contains information prepared by Ms Evans, as General Counsel, being a summary of key legal issues for Zespri which deals with six matters, none of which are relevant to the proceeding. This material is privileged. Apart from the privileged material the document is to be disclosed to plaintiff's counsel on standard terms.*
- 66 ZES.JY.002.0.00000112 *Solicitor-client privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim. Privilege is asserted for three parts of the document, all of which are relevant to the proceeding. They contain legal advice, either provided by Ms Evans, as General Counsel, or external counsel. This material is protected by solicitor-client privilege (pages 2 – 3 and 5 – 6). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*

- 67 ZES.JY.002.0.00000120 *Solicitor-client privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim. It is asserted that six portions of the document are privileged, four of which are relevant to the proceeding, and two of which are not. Each involves provision of legal advice either by Ms Evans, as General Counsel, or external lawyers. Privilege applies (pages 11, 12, 18, 63 – 64 and 65). Apart from the privileged material, the document is to be disclosed to plaintiff’s counsel on standard terms.*
- 68 ZES.JY.002.0.00000140 *Solicitor-client privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim. Privilege is sought for two parts of the document being advice provided by Ms Evans, as General Counsel, or an external lawyer. This material is protected by solicitor-client privilege (pages 1 – 2 and 8). Apart from the privileged material, the document is to be disclosed*

to plaintiff’s counsel on standard terms.
- 69 ZES.JY.002.0.00000113 *Solicitor-client privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim. Five parts of the document are said to be privileged, each of which refer to advice either given by or being obtained from external legal advisors; and which are relevant to the proceeding. This material is protected by solicitor- client privilege (pages 1 – 3, 6 – 7, 10, 13 and 103 – 104). Apart from the privileged material, the document is to be disclosed to plaintiff’s counsel on standard terms.*
- 70 ZES.JY.002.0.00000134 *Solicitor-client privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim. Privilege is sought for four portions of the document, each of which involve advice from external lawyers, one of which is not relevant to the proceeding. This material is protected by solicitor-client privilege (pages 7, 11 – 12, 17 and 79). Apart from the privileged material, the document is to be disclosed to plaintiff’s counsel on standard terms.*
- 71 ZES.JY.002.0.00000137 *Solicitor-client privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim of the three disputed parts. One is not relevant to the proceeding, and two are, at least partially. The majority of the section relating to issues in China has been provided to plaintiff’s counsel, but the information relating to the legal advice being sought has been redacted, as has information concerning an ongoing*

investigation which refers to legal advice obtained. The third part of the document summarises legal advice received with regard to the payment of a fine for illegal gains in China. This information is privileged (pages 18 – 19, 21 – 23 and 53). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.

- 72 ZES.JY.002.0.00000138 *Solicitor-client privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim. Six parts of the document are said to be protected by privilege, one of which concerns matters not relevant to the proceeding. In respect of one part of the document, information has been provided to plaintiff's counsel, apart from that which relates to the legal advice being sought. Each portion contains references to legal advice provided either by Ms Evans, as General Counsel, or external lawyers. This material is protected by solicitor-client privilege (pages 6 – 7, 9 of Board minutes 22 July 2014, page 2 of Board minutes 30 July 2014 and pages 29 – 30, 131, 132 – 138 of the August 2014*

Board papers). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.

- 73 ZES.JY.002.0.00000160 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; the plaintiff no longer challenges the claim for confidentiality. Privilege is sought for two aspects of the document, a report prepared by Mr Denyer, as General Counsel, which summarises key legal issues for Zespri at the time; it deals with four matters, none of which are relevant to the proceeding. The second category was also prepared by Mr Denyer, as General Counsel, concerning a matter which is not relevant to the proceeding. Solicitor-client privilege applies (pages 41 and 135 – 140). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*

- 74 ZES.JY.002.0.00000116 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim. Three parts of the document are said to be protected by privilege. They refer to information relating to legal matters prepared by Ms Evans, as General Counsel. They are protected by solicitor-client privilege (pages*

3, 10 and 77 – 78). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.

- 75 ZES.JY.002.0.00000028 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim. Page 3 refers to a summary of Ms Evans' meeting with Zespri's legal advisers and Mr Yu's family as to progress of the appeals, referring to Zespri's strategy. I infer from the statement of claim that they were representing Mr Yu's interests. There is no claim that the meeting was conducted on a without prejudice basis. This material is not privileged. Page 10 refers to advice given by Ms Evans, as General Counsel, as to a potential claim by Shanghai Neuhof. This material is privileged. Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 76 ZES.JY.002.0.00000124 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim. Privilege is asserted in respect of a report prepared by Ms Evans, as General Counsel. It appears this information is relevant to the proceeding, since there is no assertion to the contrary. It is protected by solicitor-client privilege (page 29 – 30). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 77 ZES.JY.002.0.00000135 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim. Three parts of the document are said to be protected by privilege, only one of which is said not to be relevant to the proceeding. The first and third relate either to advice given or information prepared by Ms Evans, as General Counsel. They are privileged (pages 4 – 5 and 115). The second part (page 15) is a comment referring to a legal opinion to be sought, which is not privileged. Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 78 ZES.JY.002.0.00000136 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; the plaintiff no longer challenges confidentiality. Privilege is sought for a summary of legal advice which had been given by Ms Evans, as General Counsel, on several topics. It is not asserted that these*

topics were not relevant. The material is protected by solicitor-client privilege (page 31). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.

- 79 ZES.JY.002.0.00000141 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim. Privilege is sought for three parts, two of which involve legal advice on topics which are not relevant to the proceeding. The third summarises legal advice that Zespri had received from external lawyers. These parts of the document are privileged (pages 10, 77 – 78 and 97). Apart from privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*
- 80 ZES.JY.002.0.00000139 *Solicitor-client privilege, litigation privilege and confidentiality were originally asserted; the plaintiff no longer challenges the confidentiality claim. Some of the material of one section has been provided to the plaintiff's. Privilege is sought for five parts. Each part refers to legal advice provided either by Ms Evans, as General Counsel, or external lawyers. Solicitor-client privilege applies to each such part, and litigation privilege applies to the third and fifth parts (pages 6, 21 – 23, 77, 119 and 121- 122). Apart from the privileged material, the document is to be disclosed to plaintiff's counsel on standard terms.*