

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CIV-2008-485-2452

UNDER The Judicature Amendment Act 1972

BETWEEN UNITED FISHERIES LIMITED
First Applicant

AND UFL CHARTERS LIMITED
Second Applicant

AND THE CHIEF EXECUTIVE OF THE
MINISTRY OF FISHERIES
Respondent

Hearing: 23 March 2009

Appearances: Mr Cooke QC with Mr Sullivan and Ms Standage for the Applicants
Mr Powell for the Respondent

Judgment: 6 May 2009 at 12.30 pm

JUDGMENT OF MALLON J

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Introduction

[1] The Ministry (the respondent) is investigating whether false or misleading returns have been filed in respect of fishing by the *Kapitan Rusak*. The *Kapitan Rusak* is a Ukrainian owned vessel which had been fishing in New Zealand waters under a time charter contract with the second applicant, which is a subsidiary of the first applicant (collectively referred to in this judgment as United Fisheries). As part of its investigation officers of the Ministry conducted a search and seizure operation at United Fisheries' premises on the morning of 5 November 2008. As a result of this search and seizure the Ministry presently holds clones of three of United Fisheries' computers and other information which it wishes to examine in order to find documents relevant to its investigation.

[2] United Fisheries applies for judicial review of this search and seizure contending that it was unlawful and unreasonable. It says that the Ministry is seeking to engage in a general search rather than one focused on documents it has identified as being relevant to the alleged offending. It says that the Ministry has no power to seize and clone information much of which is known to be irrelevant and some of which is subject to legal professional privilege. The Ministry says that it is not conducting a general search and that it is entitled to look through all of United Fisheries records to find documents relevant to the offending. It says that it was entitled to seize and clone the information for this purpose. It says that it intends to examine the information in a manner that will protect privilege.

[3] The information held by the Ministry is presently subject to interim orders preventing the Ministry from accessing it pending the determination of this application: see HC WN CIV-2008-485-2452 16 December 2008. There is a two year time limit within which the Ministry must bring any charges in respect of the investigation: s 236(2)(b) of the Fisheries Act 1996. Because of this there is some urgency to the determination of the judicial review application.

Background

The alleged offending

[4] United Fisheries has an Allowable Catch Entitlement (ACE) for Ling of approximately 50 tonnes in Fishery Management Area LIN5 and approximately 245 tonnes in Fishery Management Area LIN6. The Ministry believes that the *Kapitan Rusak* has caught substantial quantities of Ling from LIN5 and reported it as being from LIN6 in the returns required pursuant to the Fisheries Act 1996. The Ministry believes this to have occurred in the 2007 and 2008 fishing years. The Ministry says that the catch yield in LIN5 is much higher than in LIN6. It says that reporting catch from LIN5 as catch from LIN6 would avoid the need to acquire, at considerable cost, additional ACE for the over fishing in LIN5. The alleged illegal activity is known in the industry as “trucking”.

[5] A permit holder is required to submit three kinds of returns under the Fisheries (Reporting) Regulations 2001. These are the trawl catch effort and processing return (TCEPR), the catch landing return (CLR) and the monthly harvest return (MHR). Section 230 of the Fisheries Act makes it an offence to make any false or misleading statement in these returns. If trucking has occurred there will be false or misleading statements in the returns.

[6] The obligation to complete and provide the returns is imposed on the permit holder. However, in the case of the TCEPRs they are required to be completed on each day at sea and so, although the obligation remains on the permit holder, they are in fact completed by the master while at sea. The Ministry confirms that the principal subject of the investigation, and the person likely to be prosecuted if the investigation discloses offending against s 230, is the second applicant as the permit holder.

Power to search

[7] Fishery officers can conduct searches without a warrant. The power to do so is provided by s 199(2) of the Fisheries Act, which is in these terms:

- (2) If a fishery officer believes, on reasonable grounds,—
 - (a) That an offence is being or has been committed against this Act; and
 - (b) That—
 - (iii) Any article, record, document, or thing which there is reasonable ground to believe will be evidence as to the commission of an offence against this Act,—

may be concealed or located or held in any vessel, vehicle, conveyance of any kind, premises, place, parcel, package, record, or thing—

then, for the purpose of the enforcement of this Act, that officer may at any reasonable time enter or pass across any land in order to enter, examine, and search any such premises or place, or any such vessel, vehicle, or conveyance of any kind (by stopping or opening where necessary), and may examine and search (by stopping or opening where necessary) any such parcel, package, record, or thing.

[8] There is also a power to take copies of documents, and to take possession of documents for that purpose, provided by s 206 of the Fisheries Act which is in these terms:

- (1) In exercising powers under this Act, a fishery officer may—
 - (a) Make or take copies of any record or document, and for this purpose may take possession of and remove from the place where they are kept any such record or document, for such period of time as is reasonable in the circumstances:

[9] There is also a power of seizure provided by s 207 of the Fisheries Act which is in these terms:

- (1) A fishery officer may seize—
 - ...
 - (c) Any article, record, document, or thing which he or she believes on reasonable grounds is evidence of the commission of an offence against this Act.

Grounds for belief

[10] The Ministry has filed affidavit evidence from Mr Robinson setting out the basis on which the Ministry formed the belief that an offence had been committed (s 199(2)(a) of the Fisheries Act). Mr Robinson is a fishery officer under the Fisheries Act with 19 years' experience in that role. He has a designation of senior investigator. His evidence is that the belief that the *Kapitan Rusak* has engaged in trucking is based on information received from the skipper of another vessel fishing in the same area as the *Kapitan Rusak*, analysis by Ministry staff of the Vessel Monitoring System (VMS) data (showing the movements of the *Kapitan Rusak*), analysis of the TCEPRs and of the Catch Landing Returns (CLRs) compiled for the vessel, and information obtained from a Ministry Observer on board the *Kapitan Rusak* on one of the voyages. Mr Robinson discusses this information and says that in his experience the evidence indicates misreporting. Essentially the time the *Kapitan Rusak* was in each area as against the reported catch in each area is not consistent with the expected yield from each of those areas.

[11] Mr Robinson then sets out the grounds for his belief that records, documents or things, which there are reasonable grounds to believe will be evidence as to the commission of an offence, may be found at United Fisheries' premises (s 199(2)(b)). His key points are:

- a) As permit holder, United Fisheries is responsible for ensuring correct completion and lodgement of the returns to the Ministry;
- b) It would be standard practice for there to be an agreement between the *Kapitan Rusak* and United Fisheries as to how the *Kapitan Rusak* will be utilised over the fishing year and what ACE is available to be fished;
- c) The type of documents to be found at United Fisheries' premises "would include briefing documents, fish plans, charter agreements, used TCEPR and CLR books, ACE transactions, compliance contracts

between [United Fisheries] and the vessel owners and both written and electronic records”;

- d) There might also be found a red book, which the observer onboard the *Kapitan Rusak* had seen being used to record tow by tow information, since the two obvious places this book might be found in a search were on the vessel and at United Fisheries’ premises;
- e) Communication between the vessel and shore as to the location and species and quantity of fish being caught was vital in the fishing industry;
- f) United Fisheries had an incentive to maximise all available ACE (and trucking could achieve that); and
- g) It is “relatively easy” to analyse the 2007 records “and any assessment would have created immediate suspicion or concern”. United Fisheries had access to this information and “should/could have known about the area mis-reporting”. That the alleged offending continued over the next fishing year suggests that United Fisheries ought to have known about the misreporting and “was either complicit in the offending or negligent by allowing it to continue”.

Instructions for search and seizure operation

[12] Subsequent to the interim order, United Fisheries obtained discovery from the Ministry (HC WN CIV-2008-485-2452 19 February 2009). One of the documents obtained in discovery is a formal document, described as “Operation Phantom”, prepared by the Ministry for the search and seizure operation. This document summarises the basis for the allegations that illegal fishing had been undertaken by the *Kapitan Rusak* and is consistent with Mr Robinson’s evidence (referred to at [10] above).

[13] The document includes analysis of the time the *Kapitan Rusak* was in the LIN5 and LIN6 areas as against what it reported in the TCEPRs as having caught in those areas. It refers to a number of records. These include a “vessel factory log book” which is a hard covered exercise book which recorded tow by tow processing information (and which appears to be the red book referred to by Mr Robinson in his evidence). The “Operation Phantom” document also includes reference to a “working copy” of the TCEPR. This latter record was said to be a photocopy of the TCEPR book which was completed in pencil and which, according to the observer (the Ministry Officer on board the *Kapitan Rusak* on one of its voyages), was often changed when entered on the actual TCEPR form. The review of the information concludes with a reference to “possible offences” that may have been committed by United Fisheries and/or the crew of the *Kapitan Rusak*. These are said to be an offence under s 230(1)(b) of the Fisheries Act in respect of the TCEPRs and an offence under reg 30(1)(b)(ii) of the Fisheries (Reporting) Regulations 2001 (failing to complete the TCEPRs in accordance with the explanatory notes).

[14] The document states “the mission” as being:

To gather evidence of offending against the Fisheries Act 1996 in relation to the fishing activities and reporting of fish catch of the **FV Kapitan Rusak** and its permit holder **UFL Charters Ltd** for the period September/October 2007 and October 2008.

[15] The document then sets out the “execution” of the mission which involved searching the vessel and United Fisheries and “offender” interviews. In respect of the search of United Fisheries the document states:

- Uplift copies of briefing notes
- Uplift any used TCEPR books
- Uplift copies of any compliance contracts between UFL charters and the vessel owners
- Uplift office computers
- Uplift communications with the Kapitan Rusac [sic] (electronic or printed copy)

[16] The Ministry has filed affidavit evidence from Mr Smith. He is a forensic investigatory accountant employed by the Ministry. He is responsible for the

forensic examination of electronic records recovered by fishery officers. He briefed the officers before they conducted their search at United Fisheries' premises. Mr Smith says that he recommended the approach to be taken by the search team to the electronic records. He discussed how a key word search could be conducted on the computer server. He says that he explained that this is not always a practical means to identify relevant documents and it can take many hours or days to finish, during which period the server cannot be accessed by those being investigated. He says that he advised that a far more practical method was to copy the entire contents of specific directories and then to identify, by key words and file type searches, files to be reviewed for relevance. Mr Smith said that he advised the search team that it was normal practice to uplift PCs and laptops attached to the server so that they could be forensically examined, previewed and cloned if required at the Ministry's office, before being returned to United Fisheries.

The search and seizure operation

[17] The leadup to the search and seizure at United Fisheries is set out in the interim order judgment. For convenience I set out paragraphs from that judgment:

[4] When the *Kapitan Rusak* arrived in port at Lyttleton on the morning of 5 November 2008 it was met by a large number of fishery officers who boarded the vessel and immediately cordoned it off. Mr Kotzikas, a director of companies in the United Fisheries group, received a telephone call about this. He made his way to the port and was met by a Mr Southern, a fishery officer who Mr Kotzikas understood to be in charge of the search. He was told that the officers were investigating potential misreporting of LIN5 and LIN6 in the Trawl Catch Effort Processing Returns ("TCEPRs").

[5] Mr Dovbysh, who supervises the *Kapitan Rusak* on behalf of United Fisheries, was also at the wharf. He received a telephone call from a fishery officer advising him that fisheries officers had authority to enter his private home address in Christchurch and that his presence was required there. Mr Dovbysh informed Mr Kotzikas of the telephone call and left the wharf shortly after this telephone call.

[6] Mr Kotzikas then telephoned Mr Southern (who by this stage was onboard the *Kapitan Rusak*) and asked whether there were any other surprises he should be aware of. Mr Kotzikas was told that there were two officers on their way to United Fisheries' premises in Christchurch and that they were intending to search those premises. As a result of this information, Mr Kotzikas returned immediately to the United Fisheries' premises where he was met by two fishery officers who were waiting at the reception area for him. ...

[18] The search of United Fisheries' premises commenced at around 8 am. The two officers who were in the reception area, together with three further officers who had been waiting in vehicles outside, conducted the search. Mr Robinson, who was one of the two officers in the reception area, describes in his affidavit what Mr Kotzikas was told at this time. He says that Mr Kotzikas was informed that the Ministry was investigating the fishing activities of the *Kapitan Rusak* in LIN5 and LIN6 and the subsequent misreporting of the Ling and hoki catch from the 2006/2007 fishing year to the present. Mr Robinson said that they were at United Fisheries premises as it was a party to the vessel charter, the permit holder and the holder of the quota. Mr Robinson says that Mr Kotzikas said he was aware of the investigation and United Fisheries was seeking legal advice. Mr Robinson says that he told Mr Kotzikas that they intended to search and seize "documentation and records in relation to the *Kapitan Rusak*, its fishing activities, records, returns, communications, the on-sale of fish, charter agreements and other related matters". Mr Kotzikas informed the fisheries officers that some of the information being seized would be legally privileged. He was told that the information would be sealed until the issue of privilege had been resolved.

[19] Mr Robinson said it was proposed that relevant hard copy documents would be identified in consultation with United Fisheries' staff and seized for further examination. He said Mr Kotzikas would be able to look at what was taken and take copies of anything he needed. As to electronic records Mr Robinson says he discussed that the computer would be taken and clones taken of the hard drives. The computers would then be returned. He says:

Mr André Kotzikas did not raise any objection to the proposals raised with him relating to the course of action the Ministry proposed to adopt and I inferred that he agreed to the proposal.

[20] Mr Kotzikas says this:

It was first reported to me by Mr Robinson that the Ministry would conduct their search for these records by way of "key word search". I understood that a key word search would identify files and documents that contained reference to the key words being searched for and then those files and documents could be copied. Within minutes of this being said, the Ministry's approach changed to the effect that they no longer intended to conduct a key word search but instead would take possession of what they could physically remove from the premise (e.g. my laptop and other

hardware) with the intention of cloning and therefore taking possession of the entire contents of that hardware.

...

Mr Robinson indicates ... that I did not raise any objection to the proposed course of action concerning the removal of computers or the copying of the hard drive and he inferred I agreed to the proposal. Mr Robinson has previously referred to general knowledge in the fishing industry. Fishery Officers have a reputation in the industry of having extremely broad powers and being quite assertive in the use of those powers.

I was not invited by any Officer to approve what they were doing. They operated in a manner that did not suggest that they were seeking my consent, and as a result of their reputation, I was under the impression that they had the powers to do whatever they saw fit. ...

Certainly if I was told I had a choice, I would not have allowed the removal of the computers or large scale copying of data from the server. The Ministry had computer experts available to it and we also had our own IT person, who could have provided access to the server in one of the vacant offices so that the Ministry could have accessed and copied any evidence of an offence without disrupting the day to day activities of the company.

I refute Mr Robinson's suggestion that he sought agreement from me as to procedures adopted. All of the Ministry's Officers simply went about their business and told me what they were doing. I did not take this as an invitation to discuss procedures with a view to reaching agreement.

[21] During the search the Ministry seized the following:

- a) Hardcopy documents. According to Mr Kotzikas these were of a general nature containing references to the vessel and included complete sets of financial and catch information for the vessel's voyages from 2006 onwards and photocopies of the returns that had been furnished to the Ministry;
- b) Mr Kotzikas' laptop. This laptop contains virtually the entire business records of the United Fisheries Group and includes communications with legal advisers on a range of company affairs. It also includes private and personal information including the private affairs of the Kotzikas family trusts;
- c) A computer from the office of Mr Kotzikas' brother (who is a shareholder and director of United Fisheries Holding Limited) which

contains largely the same types of information as that held on Mr Kotzikas' laptop;

- d) A laptop which monitors and records the vessel's position in real-time;
- e) A clone of the G drive (containing information generally accessible by staff of the United Fisheries Group), a clone of the H drive (containing folders specific to individuals and accessible only by those individuals), a clone of parts of the M drive (containing commercially sensitive information to which access is limited to management personnel) and complete copies of the email folders of six United Fisheries personnel (containing a wide range of information including commercial, legal, personal and family related information) – all of these from the central server at the United Fisheries premises.

Subsequent events

[22] The next events, leading up to the interim order, are set out in the interim order judgment as follows:

[9] On 5 November 2008 solicitors for United Fisheries wrote to [the Ministry] challenging the lawfulness of the search and seizure. It advised that proceedings would be filed and it sought confirmation that the information would not be accessed in the meantime.

[10] On the morning of 6 November 2008 a fishery officer provided United Fisheries with a list of the documents that had been taken. This list did not include the electronic information. At this time Mr Kotzikas' laptop and his brother's desktop computer were returned, their hard drives having been cloned by [the Ministry] prior to their return. (The process of cloning the laptop of the vessel's movements took longer but was completed by 20 November 2008 and the laptop was returned at this time.)

[11] On 6 November 2008 [the Ministry] replied to the letter from United Fisheries' solicitors. It disagreed with the alleged unlawfulness of its actions, said that it would co-operate to identify and exclude privileged information and said that it was "solely interested in documents and files that relate to this investigation and as such are keen to work with you to ensure no irrelevant personal or any privileged documents are seized".

[12] This response was unsatisfactory to United Fisheries and, following further correspondence which did not resolve matters, on 10 November 2008 United Fisheries commenced a proceeding under the Judicature Amendment Act 1972 seeking a declaration that the search and seizure operation was unlawful and directing that the material taken, cloned and copied be returned to United Fisheries. This was accompanied by the interim order application ...

[13] The documents and clones [the Ministry] obtained are now being held in tamper-proof evidence bags and [the Ministry] has agreed not to examine them pending the determination of the application for an interim order.

[23] The interim order was made on 16 December 2008. The order prevented the Ministry from taking further action to examine or access the seized information until further order of the Court. In making that order I noted that the parties remained free to resolve a method for searching the information in a way satisfactory to both parties which could, for example, involve the kinds of procedures similar to those used in Anton Pillar orders which are discussed in *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586 (CA) at [107] and [108]. The parties were, however, unable to reach an agreement as to how the search could proceed.

The Ministry's intention

[24] The Ministry acknowledges that much of the information it has will be irrelevant and that at least some of the information may be commercially or personally sensitive or subject to legal professional privilege. If the interim order is discharged the Ministry intends to narrow down the information it will examine by searching the information with a combination of search words and file types and a date range. The initial search words likely to be used are broadly framed. They are listed in correspondence from the Ministry's solicitors to United Fisheries' solicitors as probably being the English and Russian translations of "*Kapitan Rusak*", "Ling", "LIN", "LIN5", "LIN6", "Hake", "HAK", "Hoki", "Hok", "King Clip", "Snares", "UFL Charters", "Dovbysh", "Catch", "Change", "Report", "Catchrep", "Master", "Captain", "Kernaukhov", "Chief Technologist", "Samysko", "Quota", "ACE", "Boundary", "Line", "Area", "Mis-reporting", "Tucking", "Rough", "Damage", "Observer", "MAF", "MoF", "Mfish", "Ministry" and "Compliance".

[25] Mr Smith explains that the keywords may need to change as the search unfolds. For example, relevant abbreviations used may become apparent. He also points out that a subject may be discussed in terms that are clearly understood by the parties but using words which investigators do not anticipate. He says that it is therefore useful “to also conduct a generic search based upon file types (such as email or document type files) possibly within a set timeframe of interest so as to be confident that all reasonable steps had been taken in reviewing the electronic evidence for relevant evidence”.

[26] He says that an electronic search is “potentially fraught with challenges and difficulties as you never know exactly what you are going to encounter until you actually commence the forensic examination”, that he cannot predict with any certainty how an individual will have used his or her computer and that is why an electronic search evolves as he gets a feel for what each PC has been used for by each person.

[27] Mr Smith says that the search will pick up not only the current files but also files that have been deleted or earlier versions of documents that have been modified. The process is expected to take some time. When it is completed the narrowed down files and documents would be provided to the Ministry’s investigators for examination.

[28] The Ministry’s initial proposal for dealing with privilege was that United Fisheries would identify records or categories of records over which privilege was claimed and Mr Smith would locate the documents and consider whether he agreed with the claim. If he did agree then the document would be marked privileged and not accessed further. If he disagreed he would seek assistance from the Ministry’s legal staff and in the meantime the document would not be accessed further. A representative of United Fisheries could be present while Mr Smith located the documents over which privilege was claimed.

[29] In my judgment on the interim order application I expressed concern about this process because it involved Ministry personnel accessing the information. The Ministry’s revised proposal involved United Fisheries identifying the documents

over which it claimed privilege with those documents then referred to an independent person, such as a barrister from the Crown Panel, for determination. Disputes could be referred to the High Court. This proposal was also unacceptable to United Fisheries.

Justiciability

[30] The Ministry refers to submissions it made at the interim stage that the pre-emptive judicial review of a criminal investigation is not justiciable. Without entirely conceding the point, the Ministry does not advance it any further for the purpose of the substantive hearing. The submission was based mainly on *R v Inland Revenue Commissioners Ex parte Rossminster Ltd* [1980] AC 952 (where the House of Lords would not permit a judicial review application of a search warrant to interfere with a tax prosecution) and also *South East Resources (2001) Limited v Chief Executive Ministry of Fisheries* [2004] NZAR 715 (“South East Resources (MacKenzie J)”) at [19] (accepting that declaratory relief concerning the lawfulness of a search could be declined pending the completion of the fisheries investigation). However, *Rossminster* was decided prior to the enactment of the Human Rights Act in the United Kingdom, in *South East Resources (MacKenzie J)* the Court was not saying that declaratory relief would never be given when an investigation was pending but was making its decision to decline relief in the circumstances of that case, the New Zealand courts have been prepared to consider the validity of searches during the investigation phase (eg. *South East Resources Ltd v Chief Executive of the Ministry of Fisheries* HC WN CP 211/01 18 December 2001 (“*South East Resources (Heron J)*”) and *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA)) and, because the Ministry does not press the point, I do not consider there is a basis on which I should take a different approach than that permitted by the Court of Appeal in *Tranz Rail*.

Section 199

Introduction

[31] Search and seizure powers facilitate the important public interest in investigating suspected offending and bringing offenders to justice. However such powers interfere with a person's privacy and property rights. In the context of search warrants the competing public and private interests have been balanced by the need to apply to a Judge for the warrant and a requirement that the warrant be specific as to the scope of the authority it confers. The requirement for specificity was the position prior to the enactment of the New Zealand Bill of Rights Act 1990 (NZBORA): *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA) at 736-738, *Rosenberg v Jaine* [1983] NZLR 1 CHC at 5 to 7. Post NZBORA, s 21 of which affirms a person's right to be free from an unreasonable search and seizure, the requirement for specificity has remained: *R v Sanders* [1994] 3 NZLR 450 (CA); *Television New Zealand Ltd v Attorney-General* [1995] 2 NZLR 641 (CA); *Tranz Rail Ltd v Wellington District Court* at [38] to [42]; and *A Firm of Solicitors* at [104].

[32] The above authorities have been in the context of search warrants. The search in this case was carried out pursuant to s 199(2) of the Fisheries Act. That power is one of the relatively rare examples where a warrantless search is provided for. Section 21 of the NZBORA applies to warrantless searches (as was said in *R v Williams* [2007] 3 NZLR 207 (CA) at [266]) as it does to searches pursuant to warrants and the parties agree that s 199(2)(b) must be interpreted in light of the NZBORA (submissions were made as to how that should be done but any differences are not material in my view). The Ministry emphasises the highly regulated nature of the fishing industry, but (as was said in *Tranz Rail* at [28]) even in a regulatory environment corporations have privacy expectations.

[33] United Fisheries does not challenge whether the first requirement of that power (s 199(2)(a)) was satisfied. Therefore, for the purposes of this proceeding, there is no issue as to whether a fishery officer had reasonable grounds to believe that an offence against the Fisheries Act had been committed. United Fisheries

challenge is as to whether s 199(2)(b) was satisfied. The parties agree that if s 199(2)(b) purported to authorise a general search power then that would raise an issue under the NZBORA (which might then need to be resolved in accordance with the approach in *R v Hansen* [2007] 3 NZLR 1 (SC) and *Brooker v Police* [2007] 3 NZLR 91 (SC)). They disagree however as to the interpretation to be given to s 199(2)(b) and as to whether the Ministry's interpretation would constitute a "general" search.

Competing submissions on meaning of s 199(2)

[34] United Fisheries submits that, applying a common law and NZBORA consistent interpretation, the requirement for a particular rather than a general search arises from the requirement that the officer have a reasonable belief that the "article, record, document, or thing... will be evidence as to the commission of an offence". It says that the Ministry must have reasonable grounds to believe that there is material that "will be" evidence. It says that the "may be concealed or located" words relate only to uncertainties as to where the evidence is located. It says that s 199(2)(b) does not permit the Ministry to search United Fisheries' premises to go through United Fisheries' entire business records to find anything that "may" be evidence. It says that if this were permitted then s 199(2)(b) would be authorising a general search contrary to the common law and NZBORA.

[35] United Fisheries says that it is no answer to say that the Ministry must search through everything before it is able to locate what it is looking for. It says that the fact that there may be a specific document found by a general search does not authorise a general search. It says that the requirement for a particular search enables the nexus between the offence and the material sought to be demonstrated and understood by the individual being searched. It submits that unless a fisheries officer has identified in advance of the search the documents he or she believes will be evidence of an offence then he or she cannot hold a reasonable belief that the document that may be located at the premises will be evidence. It submits that there is no difference in this respect between a warrantless search and a search conducted pursuant to a warrant.

[36] The Ministry says that United Fisheries seeks to give an artificial interpretation to the “will be evidence” component of the test. It submits that the practical consequence of United Fisheries’ position is that unless the searcher already knew what they were looking for and where to find it the power to search could not be exercised. It submits that s 199(2) does not require that the documents found at the premises of United Fisheries directly implicate it. It says that the section does not contain that limitation and the purpose of the section is to secure the evidence from wherever it may be located. It submits that the particularity as to how the evidence will prove the offending that is required to be set out in an application for a warrant is not required in a warrantless search.

Cases

[37] United Fisheries relies particularly on *South East Resources* (Heron J). In that case a search of the charter company’s premises was carried out in respect of suspected trucking by Korean owned vessels. During the search the charter company’s computer server and hard-drives were cloned. An interim order was granted by the Court declaring that the Crown ought not to take further action in respect of the information obtained pending further order of the Court. In reaching this view the High Court Judge said

[13] The offence or offences which are being considered in this case, must be being a party to trucking or the exercise where fish is wrongly recorded as being taken from one area, when in fact it is taken from another. The connection seems to be that based on the apparent activities of the boats that were chartered, and the knowledge of the catch history of the area a year before, gives reasonable grounds to believe that an offence was being committed by this company by way of being a party by aiding or abetting, counselling or procuring.

...

[19] Whilst there may have been reasonable grounds for believing that the masters of the three vessels chartered by the plaintiff were committing misreporting offences, and that there may be some vicarious liability for the charterer and permit holder, that in itself would not in my view alone justify a search based on the provisions of S.79 [the predecessor to s 199(2)]. There must be a reasonable ground to believe [sic] there will be evidence as to the commission of offence against this act [Fisheries Act 1983] located in the computer records. The two relevant requirements are that a fishery officer believes on reasonable grounds that an offence is being or had been committed, and that the officer had reasonable grounds to believe that there

was a record, document or thing that would be evidence as to the commission of the offence.

[20] All statutory powers of search must be construed in accordance with S.21 New Zealand Bill of Rights Act 1990. However, in this case, I think one only needs to follow the wording of the Act referred to above. Looked at objectively as the Court is entitled to do, I am left without any information as to what it was [sic] might be found on the computer. Obviously their [sic] could be information directly suggesting that the plaintiff was encouraging trucking and giving directions accordingly. There is nothing to suggest that and the affidavits do not suggest that the mere relationships of ship owner and charterer allows [sic] such direction or that such directions may follow as of right. If the chartering agreement so provided I would no doubt have been told.

...

[22] This is an interim application and at the moment I am not satisfied that the second part of S.79 is met. Even if the actions of the three masters are deemed to be the actions of the plaintiff, that is not the offending the evidence of which is sought by the defendants as I understand it. It is something more such as criminal party liability under S.66 Crimes Act 1961.

[38] The Ministry says that *South East Resources* was wrongly decided. It says it proceeded on the basis that the charterer would not be liable unless there was evidence that it had encouraged or abetted the offending. It says this was wrong because the charterer was liable to submit the returns and its offending arises from its submission of the returns that are false or misleading.

[39] Both parties accept that s 198 of the Summary Proceedings Act 1957 has similar wording. As to that wording in *R v Sanders* it was said (at p 460) that it required the judicial officer to be satisfied that there are reasonable grounds for belief in three matters:

... first that there has been the commission of an offence punishable by imprisonment, second that there are things present at or in a stated location and third that the things to be found there will be evidence as to the commission of the offence.

[40] In the Fisheries Act s 199(2)(a) corresponds with the first requirement, the “may be located” part of s 199(2)(b) corresponds with the second requirement and the “will be evidence” part of s 199(2)(b) corresponds with the third requirement.

[41] In respect of the second and third of the three identified requirements the Court in *R v Sanders* said (at p 461):

As to the second, the things alleged to be present at the stated location may be defined in generic terms (as, for example, in *Rural Timber Ltd [v Hughes]* [1989] 3 NZLR 178 (CA)) at p 181, (CA)) but the exercise must be more than a fishing expedition with nothing in particular in mind. As to the third, a thing will constitute evidence of the commission of an offence if its form or existence would directly or indirectly make one or more of the factual elements of the offence itself more likely.

[42] *Television New Zealand Ltd v Attorney-General* also concerned s 198 of the Summary Proceedings Act. In that case the warrant stated that there were reasonable grounds to believe that there would be video and film recordings made at Waitangi on a particular date at TVNZ's premises which it was believed on reasonable grounds would be evidence as to offences of disorderly behaviour contrary to s 9 of the Summary Offices Act 1981. It authorised the person executing the warrant to enter and search TVNZ's premises "and also seize any thing which there is reasonable ground to believe will be evidence as to the commission of the offences". The High Court Judge had considered the warrant was too broad because of these latter words. The Court of Appeal disagreed. It said:

The wide words just quoted from the prescribed form and the warrant should not be read as authorising a roving or "fishing" search of the premises for any items which there is reasonable ground to believe will be evidence as to the commission of the offences. They should be construed as confined to materials found in the search for the video or film recordings made at the places and on the date specified, and having some association with those recordings.

...

A search of a television company's premises for unspecified materials as to which, at the time of the issue of the warrant, no ground exists for any such suspicion or belief as is required by s 198(1) of the Summary Proceedings Act, would be unreasonable. The legislation, that is to say the Act and the prescribed form, need not and therefore should not be interpreted as going so far. Neither should the warrant itself.

[43] So, although the Court of Appeal found the warrant was not too widely drawn (as to authorise a roving search for any relevant items which it considered would be an unreasonable search), it did so by interpreting the warrant as being confined to the specific items referred to in the application for the warrant.

[44] The width of a search was considered more recently by the Court of Appeal in *Tranz Rail*. In that case a search warrant was issued pursuant to s 98A(2) of the

Commerce Act 1986. A warrant could be issued under that section where there were reasonable grounds to believe that it was necessary for the purpose of ascertaining whether or not a person had engaged in conduct that constituted or might constitute a contravention of the Commerce Act. A warrant could authorise the person executing it to “search for and remove documents” which the person “believes on reasonable grounds may be relevant” and “[w]here necessary, to take copies of documents, or extracts from documents, that the person believes on reasonable grounds may be relevant”: s 98B of the Commerce Act.

[45] The Court of Appeal considered that the requirement that the warrant be necessary was not met on the facts. But it also considered that the warrant was too widely drawn, when it ought to have been “as specific as the circumstances allow[ed]” (at [41]). The warrant was too wide because it authorised a search for the purpose of ascertaining whether there was conduct that did or might constitute contraventions of ss 27 and/or 36 of the Commerce Act when it ought to have identified the nature of the contravention.

[46] The Court of Appeal addressed the question of whether the warrant was “necessary” in part by reference to whether it had a realistic prospect of “bearing fruit” (at [29]). It concluded (at [31]) that Tranz Rail’s head office was somewhere that documents in issue were likely to be found. The Court of Appeal went on to state (at [40]) that the person executing the warrant had powers based on documents or things relevant to the investigation and this must be based on the premise that the “warrant itself will delineate its ambit with reasonable specificity”. It said (at [41]) that “the person executing the warrant, and those whose premises are the subject of the search, need to know, with the same reasonable specificity, the metes and bounds of the Judge’s authority as evidenced by the warrant”. It said (at [42]):

Judges who issue warrants which are not as specific as reasonably possible are not balancing the competing interests appropriately. An irony of the present case is that the Commission found it possible to brief its search party in writing and in some detail about what they were supposed to be looking for, yet no attempt was made at similar detail in the terms of the warrant.

[47] The Court of Appeal again considered the width of a search, this time in respect of a search warrant issued under s 10 of the Serious Fraud Office Act 1990,

in *A Firm of Solicitors*. Under that section a warrant can be issued where there are reasonable grounds for believing that there may be at the place to be searched any document or thing “that may be relevant to an investigation or may be evidence of any offence involving serious or complex fraud”. Pursuant to s 12 of the Serious Fraud Office Act, the person executing the warrant was authorised to “search for and remove any documents or other thing that the person executing the warrant believes on reasonable grounds may be relevant to the investigation or may be evidence of any offence involving serious or complex fraud”.

[48] The Court of Appeal discussed whether and when the cloning of a hard drive would be permitted which I discuss further below (see [78] to [81] below). As to the degree of specificity of the search required, the Court of Appeal took the same approach as in *Tranz Rail* and said (at [76]) that the warrant must be as specific as the particular circumstances allow. It said that on the facts there was no reason not to be “specific about the documents” it sought because (at [78]):

The SFO knew the details of the purported transaction and the names of the parties to it, already had a copy of the letter written by a partner in the firm and already had a copy of the allegedly fraudulent agreement for sale and purchase which was suspected to have been prepared on the firm’s computer system. It was therefore in a position to exclude from the ambit of the search the vast bulk of the documents and electronic data held by the firm for its own purpose or on behalf of its other clients.

[49] Those decisions provide some support for United Fisheries’ position that it is not enough to merely specify the offending in respect of which relevant documents will be searched for. Although the search was not pursuant to a warrant the need to confine the search to relevant documents, and for the persons executing the search and those being searched to know the metes and bounds of the officer’s authority, remains. I agree with United Fisheries’ submission that the absence of a prior judicial check on the exercise of the power is not a reason for taking a more generous view of the specificity with which the search should be directed. In order to search records or documents that the officer believes on reasonable grounds will be evidence of an offence the officers would need to have considered what records or documents United Fisheries may have which on reasonable grounds are believed will be evidence of the commission of an offence.

My view

[50] I agree with United Fisheries that as a matter of statutory interpretation there are three separate matters under s 199(2) of the Fisheries Act for which there must be a belief on reasonable grounds, namely that:

- a) An offence has been committed;
- b) Any article, record, document, or thing will be evidence as to the commission of an offence;
- c) The article, record, document, or thing may be concealed or located or held at a particular premises/place.

[51] If these requirements are met then, under s 199(2)(b), a fishery officer may “enter or pass across any land in order to enter, examine, and search any such premises or place” and may “examine and search ... any such ... record, or thing”.

[52] While the second and third requirements must each be satisfied, they are linked. That is, the records or documents which the officer believes on reasonable grounds will be evidence of an offence, must be the records or documents that the officer believes on reasonable grounds may be located at the particular place. It is not enough to believe that, because United Fisheries is the permit holder, relevant evidence of some kind might be uncovered at its premises as to whether the returns that have been filed are false or misleading. The wording indicates that the officer must have in mind something in particular that he or she is looking for which he or she believes will be evidence of the offence. To require the officer to have something specific in mind does not mean that the officer has to know what precise form the evidence will take. Nor does it mean that the records or documents must be direct evidence of the offence. It will be evidence of the offence if it “directly or indirectly makes one or more of the factual elements of the offence more likely” (*R v Sanders*).

[53] This interpretation gives meaning to all parts of the words used in s 199(2). It is supported by *R v Sanders*, *Television New Zealand*, *Tranz Rail* and *A Firm of Solicitors*. It is consistent with the right to be free from an unreasonable search.

Application of s 199(2)(b) on the evidence

[54] United Fisheries says that the evidence shows that this was a general search rather than a search for any particular material. It says that no indication was given as to what was to be looked for (so that there was not even the kind of briefing referred to in *Tranz Rail* in the extract set out [46] above). Mr Kotzikas was not told of any limitation the officers were intending to apply to the search and says that he had the impression that it was not a search for specific information they believed was evidence of the commission of an offence, but rather “a search for any information or documents they considered could potentially be relevant to their enquiries”.

[55] United Fisheries refers to the Ministry’s intention to search through the entire electronic database it has cloned to locate relevant documents. It points to the absence of any “key words” identified in advance of the search and the Ministry’s Operation Phantom document ([12] to [15] above) which simply said “[u]plift office computers”. It also refers to affidavit evidence from Mr Johannes Te Kaat, a former Ministry employee (who was part of a Ministry committee responsible for developing investigation and prosecution policy for the Ministry). Mr Te Kaat says that the Ministry has adopted a very broad view of its powers. He says that the “general methodology” has been “to seize anything that could possibly be relevant to the enquiry for later examination”. He says that “[i]n effect search and seizures are akin to a trawling operation” and that in recent years it has been the increasing practice “to clone large amounts of information, including whole computers”.

[56] United Fisheries refers also to the broad category of information that will be identified by reference to the general terms of the intended key word search. It refers to Mr Smith’s evidence as to the difficulty of identifying the words that will pick up a relevant file and the consequent need for the search to evolve as it proceeds. United Fisheries says that this evidence shows that the search will be an extremely broad one.

[57] United Fisheries says that there is no dispute that it was likely that it held records or documents involving communications to and from the vessel and as to its intended fishing activities. But it says there was no basis for a belief that such documentation would be evidence of an offence. In the absence of reasonable grounds for a belief that United Fisheries were participants in the offending, it says that there were not reasonable grounds to believe that their communications or documentation relating to their planned fishing activities would be evidence of the offence. It says the same is true of the ACE transactions. The Ministry may say that it is relevant to know if United Fisheries attempted to purchase more, but this is too speculative. It says that if the Ministry were entitled to search for anything that might be relevant then the legislation would have said so.

[58] In respect of the laptop computer which monitors the vessel in real time, United Fisheries says that this will only provide a duplicate of information which the Ministry already holds. This is because it is a regulatory requirement for the vessel to have a satellite recording device that reports its position directly to the Ministry. It therefore says that the location of the vessel cannot be in issue since everyone knows exactly where the vessel was at all times. It says that there is no suggestion that there was any misreporting of the vessel's location, only what was caught at these locations. It says that the vehicle's location as recorded by the laptop is without evidential value and is not mentioned in the Operation Phantom document.

[59] The Ministry says that there are two categories of document which will be evidence of offending. The first category of documents it says will be the actual returns submitted by United Fisheries (which the Ministry already has). It says the second category of documents it says will be documents tending to prove the actual fishing activity which is alleged to have been misreported. In this second category the Ministry says that the documents will not necessarily be conclusive evidence in and of themselves and their significance may arise from inferences that can be drawn from them.

[60] The Ministry says that relevant documents include the communications between the vessel and the shore based officials because they "may contain evidence relevant to the proof of where the vessel was and what it was doing". It says that

“[i]f that proves that the fishing activity actually undertaken was not consistent with the returns that [United Fisheries] submitted to the Ministry, there is evidence of the offending”. It also says that logs or records of fishing activity kept independently of those submitted to the Ministry, and earlier drafts of returns “will all be evidence by which the true extent of the fishing activity may be proven”.

[61] The Ministry submits that its allegation that these kinds of documents may be located at United Fisheries’ premises is not challenged. It says that all the ship to shore communication while the *Kapitan Rusak* is at sea is undertaken in United Fisheries’ offices. It says that United Fisheries is responsible for the returns to the Ministry, and for seeing that there is available ACE to cover the fishing activities the vessel is undertaking. It says that United Fisheries arranges storage and sale of the catch and that it is a party to the chartering agreement.

[62] The Ministry says that the operational orders confirm that the scope of the search was restricted to documents concerning the fishing activities of the *Kapitan Rusak*. It says that it did not become a general search merely because the fishery officer did not know where in United Fisheries’ computer system the relevant documents would be or what they would convey. It says that because the search was confined by reference to the offending it was not a general search. The Ministry says that, because it does not contend that the powers permitted a general search, its interpretation is consistent with s 21 of NZBORA.

[63] The Ministry submits that it is a mistake to equate a search of electronic records with a physical search of premises. It says that the cloning of the hard drive reproduces the hard drive rather than merely copying the files that the owner has saved on it. It says that this means that the analogy of cloning with the taking of a filing cabinet (as per *Calver v District Court at Palmerston North* (2004) 21 CRNZ 371) is not correct because the filing cabinet is a mere receptacle. The mere cloning is said not to be a search of the contents of the hard drive because at this point it is not in a form capable of human observation through being displayed on a screen or printed on to paper. It says that the search will not occur until the clone is examined.

[64] The Ministry also submits that the key word searching is less intrusive than searching paper records stored in a file box or cabinet. This is said to be because, in a search of paper records, a diligent searcher needs to pass her eye over every document to determine its relevance. In contrast it is said that the use of key words, creation dates and specific file types eliminates most of the irrelevant documents from an electronic search without any need to view them.

[65] I consider that the evidence before me does not identify in any clear way the kind of records or documents which the Ministry believes will be evidence of offending and may be located at United Fisheries' premises. The Operation Phantom document identifies some specific kinds of documents—briefing notes, TCEPR books, compliance contracts and communications. It also more generally refers to office computers. It does not identify why it is believed that any of these documents will be evidence of offending. The mission is also stated in general terms – that is “[to] gather evidence” of the offending. I agree with United Fisheries that this is not evidence of the kind of specific briefing described in *Tranz Rail*. There is also no mention in this document of how legal privilege is to be protected.

[66] Mr Robinson's evidence is similar. Some specific kinds of documents are referred to but these are described in a non-exhaustive way (Mr Robinson says “includes”) and further Mr Robinson more generally refers to “and both written and electronic records” (refer [11](c) above). This non-exhaustive and general description is consistent with his evidence as to what he told Mr Kotzikas (refer [18] above). Mr Robinson's evidence does provide grounds for a belief as to why the documents he refers to will be located at United Fisheries but he does not explain why it is believed on reasonable grounds that these documents will be evidence of the offending.

[67] An exception to this is Mr Robinson's reference to the red book. He discusses the observer's reference to a red book in which tow by tow information was kept and also expresses the view that the United Fisheries premises, as the permit holder, is one of the places where the book may be located. United Fisheries says that Mr Robinson does not explain why it is believed the red book will be at United Fisheries' premises. However I accept Mr Robinson's evidence that if it is

not on the vessel then the other place it may be found is at United Fisheries' premises. The basis for a search for this book is in my view made out.

[68] If there were an issue as to where the *Kapitan Rusak* had been fishing then the Ministry could search United Fisheries' premises for its records about that. However, I am told that the Ministry already has its own (accurate) information as to the vessel's location at any point in time. It seems unlikely that the search was conducted to find accurate records about where the vessel had been fishing.

[69] Mr Robinson says that communications between the vessel and the shore as to the location and species and quantity of fish caught are vital in the fishing industry. This provides a basis for a belief that such communications may be located at United Fisheries premises. But Mr Robinson does not say why it is believed these communications will be evidence of the offending. If there was a basis for a reasonable belief that United Fisheries was complicit in the offending then there could be a reasonable belief that the communications will be evidence of the offending. However Mr Robinson goes only as far as to say that, because it was relatively easy to analyse the records which United Fisheries had access to, it was either complicit "or" negligent. If it was the latter then it is not clear why it is believed that the communications will be evidence of the offending, beyond the evidence as to the vessel's location available from the real time recording and the information as to what was caught as recorded in the red book and/or the returns.

[70] The position is similar to that in *South East Resources*. I do not agree that *South East Resources* was wrongly decided. The High Court Judge understood that the permit holder would be vicariously liable (see [20] of that judgment) but understood that the Ministry was searching for evidence that the permit holder was a party (see [13] and [22] of that judgment). The Court was considering the matter on an interim order basis and therefore may not have had the benefit of full argument. However the Judge's concern about what was being searched for is consistent with the court's concern in other cases that searches be as specific as the circumstances allow.

[71] Even though there was a reasonable basis for a belief that the red book will be evidence of the offending, and if it had been shown that there was a reasonable basis for a belief that the vessel to shore communications will be evidence of offending, my concern is that the Ministry appears to be conducting the search on a wider basis. Its view on the evidence and as advanced in submissions is that, because it has reasonable grounds for believing that the *Kapitan Rusak* was engaged in trucking, and because United Fisheries is ultimately responsible for the returns and will have records concerning the *Kapitan Rusak*'s activities, it can look to see if there is any evidence that may be relevant.

[72] I agree with the Ministry that the cloning is not the search (although it is copying and whether there is power to do this is discussed below) and it is relevant to consider what will be searched for on that clone. I also accept that a key word search may be less intrusive in some ways than a paper search. However it also may enable a more accurate and thorough search across a far greater number of documents and, as United Fisheries says, it is more intrusive as to the information it enables the searcher to access (such as, providing information as to previous versions of documents and the number of times they were accessed). But, in any event, the search must still be confined to records or documents that are believed will be evidence of the offending. Mr Smith's evidence indicates that the search will be for anything relevant that may be found, rather than with anything specific in mind. I accept that there are difficulties in knowing in advance how things will be described and filed and that flexibility in search terms is therefore necessary. But I am not persuaded on the evidence that the circumstances did not enable there to be a search focussed on particular kinds of records that are believed will be evidence of the offending – such as drafts of returns, or correspondence or communications concerning the catch (if it is believed on reasonable grounds that this will be evidence of the offending).

[73] I therefore do not accept the Ministry's submissions that it was sufficient that the search was intended to be and will be restricted to documents concerning the fishing activities of the *Kapitan Rusak* for the fishing years at issue. It was necessary for the search to be confined to documents or records for which there were reasonable grounds to believe would be evidence of offending.

Removal of computers for cloning

[74] Having considered what the fisheries officers were entitled to search for, the next question is what they were entitled to seize and copy. The Ministry emphasises that removing, cloning and promptly returning the computers is a more practical course than undertaking the exercise on site. It acknowledges that, regardless of practicalities, the seizure and cloning must either have occurred with United Fisheries' consent or must comply with the Fisheries Act. It says there was consent but, in any event, the seizure and cloning was authorised by the Fisheries Act. United Fisheries says there was no consent and that cloning everything that could conceivably be relevant so that the Ministry could go through it all to identify anything that might be of significance involves an invasion of fundamental rights.

Consent?

[75] Irrespective of what the statutory power authorised it is accepted that computers could be taken off-site for cloning with the consent of the person the subject of the search: *A Firm of Solicitors* at [103]. This recognises that this may be a less intrusive exercise than investigators carrying out the search of a computer on-site and for that reason a person the subject of a search may prefer that this method of searching be adopted.

[76] The Ministry submits that what will amount to consent depends on the circumstances, including the sophistication of the person confronted by the officer. It says that Mr Kotzikas was not like the immigrant being asked for his passport by a police officer described by Lord Denning MR in *Ghani v Jones* [1970] 1 QB 693. The Ministry submits that Mr Kotzikas acquiesced in Mr Robinson's proposal that he remove the computers for cloning "in the sense that he did not object". The Ministry refers to Mr Robinson's evidence that he took it that Mr Kotzikas did not intend any objection, that Mr Kotzikas's subsequent behaviour was co-operative, and that Mr Kotzikas's lawyer was involved. United Fisheries submits that the failure to object cannot be equated with consent.

[77] I consider that the evidence falls short of establishing that consent was given. Mr Kotzikas's evidence was that no proposed course of action was discussed with him and that he would have objected had the opportunity arisen. Mr Kotzikas may well have a greater level of sophistication than an immigrant being asked by a police officer for his passport, but to give consent to something that would otherwise be unlawful Mr Kotzikas would need to have understood that his consent was necessary in order for the computers to be lawfully removed (as per *Meates v Attorney-General (Customs Department)* [1981] 2 NZLR 335 at 351). Failing to object to the removal of the computers is not evidence of consent and Mr Kotzikas' evidence is that he did not consent.

Statutory authority?

[78] United Fisheries says that the discovered documents indicate some indecision about the statutory basis on which the electronic records would be obtained. It refers to Mr Robinson's evidence that he told Mr Kotzikas that they were intending to "seize" documentation and records in relation to the *Kapitan Rusak* (see [18] above). In a draft job sheet prepared by Mr Robinson and sent to another fishery officer, Mr Robinson said that he told Mr Kotzikas they were going to search "and take (for copying) documentation and/or electronic records". In a revised version of the job sheet this was changed to search "and seize documentation and copy electronic records". I do not see any significance in this. The relevant question now is whether there was power to take the computers and to clone their contents not what the Ministry thought they could do or how they expressed this in their documents.

Cases

[79] In *A Firm of Solicitors*, where there was power to remove and/or take copies of documents or remove other things that the person executing the warrant believed on reasonable ground might be relevant, it was said that the cloning of a computer would be the taking of a copy of a document and so would be permitted if the person executing the warrant believed on reasonable grounds that the hard drive was relevant to the investigation. That would be so if all the documents on the hard drive

were relevant. It also said that there may be circumstances in which the computer hard drive is a “thing” relevant to an investigation. It set out those circumstances as being (at [106]):

- (a) there are reasonable grounds to believe that there is data stored on the hard drive which is, or may be, relevant to the investigation;
- (b) this evidence cannot be extracted from the hard drive without the use of forensic investigative techniques;
- (c) it is not practicable to carry out those extraction measures on-site without the risk of destruction of the evidence or the risk that relevant evidence will not be successfully extracted; and
- (d) there is no practicable alternative to removing the hard drive itself for the purpose of undertaking the extraction measures off-site.

[80] Even if those circumstances existed the Court considered (at [107]) that the warrant would still need to be subject to conditions that protected privileged information and which prevented access to irrelevant material except for the purpose of determining that it was irrelevant. The Court (at [114]) saw this as analogous to the removal of a “book or very long document which contains a combination of relevant, irrelevant and privileged material”. In that situation the person executing the search warrant would not be required to read the whole book on-site and tear out the pages containing the relevant and non-privileged information.

[81] In the case before it the Court doubted that the removal of the computer and its cloning off-site could have been justified given the very narrow inquiry involved. The Court did not make a final determination about this because it did not have a proper factual basis on which this could be made. The search was invalid because it did not have conditions designed to protect privilege.

[82] The Court of Appeal (at [136] and [137]) went on to provide guidance for the future as to the conditions that might be attached to a warrant where it was proposed to remove a computer for cloning. It also said that the application for the warrant should be accompanied by an affidavit from a computer expert explaining why the removal and cloning was necessary and referring to the factors identified at [78] above.

[83] A similar view was taken in *Calver v District Court at Palmerston North* in the context of a search warrant issued under s 198 of the Summary Proceedings Act. The warrant authorised police to search and seize hard drives of a firm of solicitors containing documents relating to that solicitors' client, but which also contained documents which had no relevance to the offences which were the basis of the warrant and which were privileged. This was not a case where the police needed the firm's hard drive to reconstruct deleted files nor was there evidence that it was impossible to search the firm's computers for relevant documents using search programmes available to the police.

Submissions

[84] The Ministry does not rely on the power in s 207 of the Fisheries Act. That power is confined to seizing a thing, which could be a computer, if it is believed on reasonable grounds that the thing is evidence of the commission of an offence. The Ministry does not contend that the computer or the hard drive is evidence in the way discussed in *A Firm of Solicitors* and *Calver*.

[85] The Ministry submits that, in the absence of consent, there was power to remove the computers for cloning under s 206. It submits that s 206 applies because the fisheries officer is "exercising powers under [the] Act" by conducting a search under s 199(2) of the Fisheries Act. It submits that, in contrast with *A Firm of Solicitors*, the power to copy is not constrained by a requirement that the document or record may be evidence of an offence. While it accepts that taking the computer (as opposed to the information stored on the computer) would not fall within the definition of "document" it says that "record" would include those parts of a computer on which data is recorded. It submits that the power to remove for copying is broad enough to cover removing the computer because this is the only practicable means of removing the documents that are contained on it. It says that cloning the documents does not broaden the search.

[86] The Ministry submits that the power under s 206 is not an unreasonable interference with the rights protected by s 21 of the NZBORA. It says that the interference with the exercise of possession and use of the property removed is

minimal and occurs in the context of a regulated industry. It says that there is no need to read down the ordinary meaning of s 206.

[87] United Fisheries says that the seizure of computers is not permitted and the Ministry can only copy documents when they have powers in relation to those documents. It refers to the huge range of information that is likely to be stored on a computer and the corresponding need for a high degree of specificity needed to protect a party's privacy rights. In support of this submission it refers to the New Zealand Law Commission report "Search and Surveillance Powers" NZLC R97 (30 June 2007) which recommends (at 7.53) that "[w]here enforcement agencies are authorised to conduct computer searches, they should not be able to access data indiscriminately" and a text, Fontana and Keeshan *The Law of Search and Seizure in Canada* (7ed, 2007) at p 975 which argues that a high degree of specificity is dictated by the capacity of the computer to hold vast amounts of stored data, most of which will be "innocent".

[88] In my judgment on the interim order application I expressed the preliminary view (on the basis of the submissions presented at that time and consistent with the Ministry's submissions advanced above) that the taking of the computer was authorised under s 206 and the power to copy documents was not limited in the way that it is in the statutory powers under consideration in *A Firm of Solicitors, Calver and Jacks v The Hastings District Court & Anor* HC NAP CIV-2004-441-93 16 December 2004. United Fisheries says this view is wrong because the power under s 206 is restricted by the requirement that the fisheries officer be "exercising powers under this Act". It submits that s 206 is an ancillary power and therefore to copy a document the officer must have authority over the document he or she is seeking to copy. It submits that under s 199(2) (the position will be different where the fisheries officer has broader powers such as under s 199(1)) the officer has no powers over irrelevant material. It submits that it would be remarkable if an ancillary power could authorise the cloning of entire contents of a fishing company's electronic records. It says that this would be inconsistent with the NZBORA and common law limits on the scope of search and seizure powers.

[89] United Fisheries further submits that the taking of a computer is not similar to the taking of a file cover or a box. It says that a computer contains hardware and software over which the Ministry has no independent powers. It says that the Fisheries Act was enacted when computers were in existence and in use and that if Parliament had intended to authorise a wholesale cloning of a computer through s 206 then far clearer words for that authority could be expected. It submits that the power in s 206 is not materially different from the powers considered in *A Firm of Solicitors* and *Calver* and that if anything, the powers were broader in those cases because they arose in respect of documents that are believed “may” be relevant rather than “will” as in s 199(2)(b).

Privilege

[90] A related issue is the taking and cloning of privileged information. United Fisheries submits that the search was also unlawful because it was not conducted so as to ensure that it did not invade United Fisheries’ rights to privilege. It refers to *Independent Fisheries Ltd v Chief Executive of the Ministry of Fisheries* [1999] NZAR 169 as establishing that the Ministry’s powers to search and seize do not override privilege, and to *A Firm of Solicitors* as establishing the need for a search to be conducted subject to conditions that ensure privilege is protected. It says that the Ministry’s initial proposal ([28] above) was objectionable because it involved a Ministry employee having access to the privileged information. It says that the Ministry’s revised proposal ([29] above) is also objectionable because it is premised on the Ministry’s view that it is entitled to have and search through the entire clone.

[91] The Ministry says that it was entitled to seize and clone the hard drives, that fisheries officers have no intention to search privileged information, and that it has set out how it intends to avoid even inadvertent disclosure of privileged material. It refers to *Calver* at [47] as accepting that privileged documents may be examined to determine whether or not they are privileged.

My view

[92] With the benefit of further submissions and time I agree with United Fisheries that the preliminary view as to the scope of the power under s 206 which I had at the time of the interim order application is wrong. The rationale for requiring a search to be as specific as the circumstances allow applies equally to the seizure and copying of records as it does to the search. If seizure and copying is not restricted to relevant documents the officers are able to take and copy a vast amount of information which may be commercially sensitive, private or privileged. The person the subject of the search may be left only with the officers' assurances that they will only look at documents to determine if they are relevant and will only extract documents that are relevant.

[93] *A Firm of Solicitors* indicates the concerns about the interference with a person's privacy and property rights that the wholesale cloning of computer records entails. Although s 12 of the Serious Fraud Office Act was expressly restricted to documents or things that may be relevant, that restriction implicitly arises from the requirement in s 206 that the officer be exercising his or her powers under the Act. The only relevant power the officer has in this case is under s 199(2) and that restricts the power to searching records, documents or things that are believed on reasonable grounds to be evidence of an offence. I therefore consider that in the absence of consent there was no power to remove hard drives or to clone them where the hard drives would contain at least some (and potentially much) information likely to be irrelevant.

[94] I acknowledge that the alternative was for the search to be conducted on-site and that this may have taken some time and have been disruptive for United Fisheries' operations. But it would have provided United Fisheries with greater assurance about what the officers were searching through and taking and therefore greater protection against the removal of irrelevant documentation (whether commercially sensitive, personal or privileged or not). The disruption to United Fisheries' operations, and the preference of the Ministry to clone and search off-site, could have provided the incentive for the parties to agree to the kinds of conditions discussed in *A Firm of Solicitors*.

Unreasonable search

[95] I have found that the search and seizure operation was unlawful. It is not necessary to separately consider whether it was unreasonable.

Result and relief

[96] I consider that the search and seizure operation conducted on United Fisheries' premises on 5 November 2008 and the subsequent cloning of the seized computers was unlawful. A declaration to this effect is sought and is made.

[97] The search and seizure was unlawful because it was conducted on the basis that, providing the search was restricted to looking for documents relating to the *Kapitan Rusak* in the relevant fishing years which might be relevant to the offending, any records could be uplifted and copied. The search and seizure did not proceed on the basis of a specific view as to what records or documents would be evidence of the offending, as was required by s 199(2)(b) of the Fisheries Act, but was in the nature of a "fishing" or roving exercise to find anything that might be of relevance. The result was that a considerable amount of irrelevant information came into the hands of the Ministry which was not subject to any specific conditions as to how it might be accessed and used.

[98] There may well have been reasonable grounds for a belief that documents that would be evidence of the offending might be found at United Fisheries' premises. These should have been identified in advance of the search, even in a generic way, so that both those conducting the search and United Fisheries' personnel who were subject to the search knew and understood "the metes and bounds" of the authority which the officers were exercising. If they could not have been identified in generic terms there should have been evidence before me as to why that was so. Mr Smith's evidence about the need to maintain flexibility in a computer search is accepted, but it does not relieve the Ministry of identifying what kinds of documents or records it believed on reasonable grounds would be evidence of the offending.

[99] In addition to the declaration, United Fisheries seeks an order for the return of the information held by the Ministry. The Ministry did not address me in any detailed way about whether this order should be made and if so on what terms. I seek further submissions from the parties (or, if agreement can be reached, a joint memorandum of counsel), to be filed and served within seven days of this judgment, as to the relief that should be ordered in light of my findings. In the meantime the present interim order remains in place.

Mallon J

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