

**IN THE DISTRICT COURT
AT MANUKAU**

**CRI-2015-092-004024
[2018] NZDC 8692**

**THE MINISTRY OF PRIMARY INDUSTRIES
Applicant**

v

**BRETT EDWARD EDWARDS
MANGERE BULK SEAFOODS LIMITED
CAROLE SHERROCK
ROGER WILLIAM RAWLINSON
RMD MARINE LIMITED
Respondents**

Hearing: 8 and 9 March 2018 and 10 April 2018

Appearances: T McGuigan for the Applicant
D Jones QC for Respondents Brett Edwards and Mangere Bulk Seafoods Ltd

Judgment: 8 May 2018

**RESERVED JUDGMENT OF JUDGE A J JOHNS
Re Application pursuant to s 101 of the Criminal Procedure Act 2011**

Introduction

[1] All defendants face the following charges:

- (a) 19 charges pursuant to s 233(1) of the Fisheries Act 1996 (the FA) for which the maximum penalty is 5 years imprisonment or a fine not exceeding \$250,000; and

- (b) One charge pursuant to regulation 28(1)(a) of the Fisheries (Recordkeeping) Regulations 1990, for which the maximum penalty is a fine not exceeding \$10,000.

Background

[2] Brett Edwards is a permitted commercial fisher and he and his wife Johanna are the owners of Mangere Bulk Seafoods 2012 Limited and Mangere Bulk Seafoods Limited. The defendant Carole Shorrock was the previous owner of Mangere Bulk Seafoods and sold the business to Mr and Mrs Edwards in August 2012. Ms Shorrock stayed on as manager of the business.

[3] The business, Mangere Bulk Seafoods 2012 Limited is a retail seller of fresh fish from its premises at the Mangere Town Centre and wholesale fish to restaurants, takeaways and other food service providers in the Auckland area. The second allied business of Mangere Bulk Seafoods Limited is a licenced fish receiver (LFR) entitled to receive fish direct from a commercial fisher and they are supplied by several fishers. All fish that is received by Mangere Bulk Seafoods Limited is immediately transferred to the retail business, Mangere Bulk Seafoods 2012 Limited. During the time of the alleged offending, the largest supplier of fish to Mangere Bulk Seafoods was the permitted commercial fisher RMD Marine Limited.

[4] RMD Marine Limited has four directors all from the Rawlinson family. The defendant Roger Rawlinson is one of the directors and largely responsible for managing the company. He also skippers vessels on fishing trips and organises landing and supply of fish to a number of licenced fish receivers.

[5] In July 2012 a fisheries officer received information that Brett Edwards was selling fish illegally and was slaughtering animals unregulated at his home address. As a result of receiving this information, the MPI initiated an undercover operation in August 2012 named Operation Partridge targeting the activities of the Edwards families and others associated with their businesses. This operation was terminated on Thursday 19 September 2013 with the execution of warrants at 77 and 77A Pukaki Road in Mangere which are the residences of Ted and Avis Edmonds, Brett Edwards parents and Brett and Johanna Edwards and their children. The properties are in a semi- rural part of Mangere.

[6] Though a number of items were seized during the course of the search, only Mr Brett Edwards and Mangere Bulk Seafoods was charged with any offences and all were under the Fisheries Act.

[7] His counsel Mr Jones QC sought a sentence indication on 30 September 2014 on the basis of guilty pleas to 3 charges with the remainder being withdrawn. During his dealings with counsel for the MPI, undertakings were given both to Mr Jones and the Court that there was no ongoing investigation and no further charges were going to be laid. Mr Edwards accepted the sentence indication given but unfortunately on the day he was due to be sentenced, counsel for the MPI indicated that there had been an ongoing investigation and there were to be further charges laid in relation to documents found in a sewer outlet at Mr Edwards' property when the warrant was executed on 19 September 2013. These are the charges currently before the court.

[8] Because of the conduct of the MPI, in October 2016 an application was made on behalf of Mr Edwards and Mangere Bulk Seafoods Limited for a stay of proceedings on the basis of abuse of process. In a detailed reserved judgment dated 28 February 2017 Judge RE Neave dismissed the application but made significant criticisms of the conduct of the MPI, including the conduct of the execution of the warrants on 19 September 2013.

The Application

[9] The 20 charges each of the defendants face are based solely on a number of torn documents recovered from a sewer breather pipe in the backyard of Mr Brett Edwards' property on 19 September 2013. These have become colloquially known as the "sewer documents". These were analysed by a MPI investigator, Phillip Tasker and he produced a 76 page report which is the basis of this prosecution.

[10] Mr Jones QC on behalf of Mr Edwards and Mangere Bulk Seafoods Limited has challenged the admissibility of the documents recovered on the basis that the search and seizure was unreasonable and in breach of s 21 of The New Zealand Bill of Rights Act, the Edwards family were unlawfully detained during the course of the search, and that on the balance of probabilities the exclusion of the evidence is proportionate to breaches claimed by the defence.

[11] The Crown now applies under s 101 of the Criminal Procedure Act 2011 to admit these documents.

Questions for the Court

[12] Was the evidenced seized and relied on by the Crown, on the balance of probabilities, improperly obtained because:

- (1) The search and seizure unreasonable and in breach of s 21 of the New Zealand Bill of Rights Act (NZBORA)? and/or
- (2) Were the members of the Edwards' family unlawfully detained during the searches?

If the evidence was improperly obtained, is the exclusion of the evidence pursuant to s 30 of the Evidence Act proportionate to the breaches the Court has found?

The Search

[13] The search warrants granted gave the MPI and others the authority to enter both private dwellings at 77 and 77A Pukaki Road and enclosed gardens or curtilage situated at those addresses.

[14] The warrants stipulated that MPI would be searching for two fishing vessels, chillers, notebooks, diaries, MPI returns, scales, fish bins, cash, computers, personal records of fishing activities, packing materials, fishing gear and cell phones.

[15] Prior to the execution of the warrant, a decision was made by the MPI to involve the Police Asset Recovery Unit (ARU) because they believed large sums of money was involved in the alleged offending, though no evidence was given as to the basis of this belief. By referring the matter to the ARU, a risk assessment was required to be undertaken by Police. Detective Latimer understood a risk assessment and as a result of that risk assessment a decision was made to involve the Armed Offenders Squad (AOS). Reasons given for involving AOS was the presence of unsecured

firearms at the address, and that execution of search warrants “is inherently risky due to known and unknown hazards and other unpredictable nature of human behaviour”.

[16] It became apparent during the hearing that the properties had been under surveillance prior to the execution of the warrant, that it was known young children would be present at 77A Pukaki Road, there was no known history of any violence involving the occupants of both addresses, and Police considered there was little risk to any person. Prior to execution of the warrants Police described the proposed searches as “a very low key entry of family homes” and noted that forced entry was not required. The original plan was to execute both warrants at 9.00am, but for tactical reasons, it was brought forward to 7.00am. By doing this it was known that Brett Edwards children aged 12, 9 and 18 months would be at home.

Execution of the Warrant

[17] On 19 September at approximately 7:00 am eight AOS members went onto the properties armed with rifles and pistols, and approximately 24 to 26 police and MPI officers followed once it was deemed safe to do so. The search of 77 Pukaki Road lasted over eight hours and the search of 77A lasted a little over six hours. Mrs Avis Edwards remained at 77 Pukaki Road until approximately 10.40am when she left with her lawyer Mr Connell to travel to the Otahuhu Police station for interview. Mr Edwards senior remained at the address until after 2.00pm and Brett and Johanna Edwards remained at their property throughout the search which concluded about 1.30pm.

Search of 77 Pukaki Road

[18] Adam Plumstead, is a fishery officer employed by the MPI was officer-in-charge of the team assigned to search 77 Pukaki Road. He and eight other officers entered the premises at 7:24am. He spoke to Mrs Edwards and showed her the warrant. After speaking to Mrs Edwards he located Mr Edwards at the paddock at the rear of the house. He spoke to him and took him back to the house and placed him in the lounge with his wife.

[19] Both Mr and Mrs Edwards were advised that they were not permitted to make or receive phone calls and that he would be seizing their cellphones. Mr Plumstead

said that he asked them if there were any pressing issues that needed to be attended to and Mr Edwards advised he needed to speak to his personal assistant Ms Little. He allowed Mr Edwards to do this after receiving a call from her at 9.20am. This is in stark contrast to the evidence given by Mr Edwards and Ms Little which I will come to shortly. Two other officers at the address were tasked with interviewing Mr and Mrs Edwards

[20] In cross-examination he confirmed that the directive in the operation orders was to detain people, but maintained that Mr Edwards and Mrs Edwards had the ability to leave the property if they needed to. He confirmed that the Edwards' were not free to make any calls with whoever they wanted because there was a risk that would jeopardise some of their investigation. He was questioned as to why matters recorded in his job sheet about allowing Mr Edwards to speak to Ms Little were not recorded in his notebook at the time. The only explanation he could offer was he didn't have time or see fit to write it down. It was suggested to Mr Plumstead that his actions were designed to send a very clear message that he was in control and that Mr and Mrs Edwards had to do what he wanted. Mr Plumstead responded that they were exercising their legal powers in conducting a search and part of that is controlling the scenes so that evidence can't be destroyed.

[21] Avis Edwards was in her backyard at about 7:00 am when she saw a gentleman walking down the drive with a rifle. She was told to secure her dogs and then go inside which she did. She sat at her kitchen table and others entered her home including an officer with a money dog. She sat down at the kitchen table and was given a copy of the warrant and told that they were there to search her home. At this stage, she recalls there being four or five people in the home described by her as official looking and she described feeling nervous. She was asked if she needed a lawyer and she said that she would get one, but she thought that her husband would ring on her behalf because she did not know their lawyer's phone number.

[22] Mrs Edwards evidence is she stayed at the kitchen table and that she had very limited freedom of movement within her house. She said she was allowed to go to the toilet on one occasion but was not allowed to move unless one of the officers accompanied her. Their family solicitor, Mr Connell did eventually arrive after her

husband contacted him. He spoke with her and she was then taken to the Otahuhu Police Station and in the presence of Mr Connell interviewed the MPI. When she returned home later that afternoon around 2:00 pm, MPI and the police were still at her address.

[23] Mr Edwards senior was on his property attending to horses at the time the Armed Offenders Squad arrived. He described seeing people in uniform carrying guns and dressed in black. He thought there was something major going on, but was not aware it was anything to do with him or his family.

[24] As he approached his home he was advised by one of the officers that they were going to search his house and that he had to go inside. He estimated there were about 15 to 18 people outside his home. He went inside to find his wife, but was taken by one of the officers to the front lounge and confirmed that he would be kept separate from his wife. He called Mr Connell and made arrangements for Mr Connell to come out to his home. He was interviewed shortly after 8.00am by one of the attending officers.

[25] Mr Edwards recalled about 12 people being inside his house and described them as virtually tearing the house apart. He said that the people remained at the house until about 2:00 pm when he was finally free to leave. Up until that time an officer sat with him. He described the whole thing as a major overkill and confirmed that he was not allowed to make any calls other than to Mr Connell. He was not able to ring Ms Little and did not speak to her until he left the farm at about 2:20 pm.

[26] Ms Little recalled that on 19 September when Mr Edwards did not arrive at work she became concerned because he had meetings scheduled that morning. She tried to call his mobile but could not get hold of him. Eventually his phone was answered by an unknown male and she was told Mr Edwards was unavailable. She asked if a message could be given to Mr Edwards for him to contact her, but she did not hear from him.

[27] Mr Connell has been a Barrister and Solicitor since 1974 and has acted for the Edwards family for many years. He received a call from Mr Edwards a little after

9:00 am on 19 September. Mr Edwards advised him what was going on and asked if he could come out to his address immediately. Mr Connell arrived at the address at about 9:30 or 9:45 am and described what he saw once he arrived at the address is something you would expect to see in a homicide scene.

[28] He described a large number of official vehicles including police vehicles on the side of the road and he could see police officers dressed in black uniform with guns. He recalled there were about half a dozen people outside the house when he first arrived and three inside. When he went inside Mr Edwards was sitting down in the lounge and a MPI officer was sitting opposite him keeping an eye on him. Mr Connell saw a number of people searching the rooms in the house. Mr Connell ultimately accompanied Mrs Edwards to the Otahuhu Police Station for interview and the interview started at 11 o'clock in the morning.

[29] When pressed in cross-examination about the presence of the Armed Offenders Squad, Mr Connell was certain that members of the Armed Offenders Squad were still there when he arrived before 10:00 am, that they were in black uniforms carrying rifles and he said "I've never experienced this before Your Honour as it is stuck in my memory. I remember the MAF officers were in green. I remember officers in black, I don't actually remember officers, police officers in blue uniforms as we know them, but I certainly remember officers in black and MAF officers in green overalls and green shirts."

Search 77A Pukaki Road

[30] Geoffrey Hall, is an investigator and appointed fisheries officer employed by MPI. He and seven others of his team arrived at the address 77A Pukaki Road about 7:10 am and once AOS had cleared the address he and his team entered. He went to the lounge with Mr Edwards and his wife and their three children. He explained that he was executing a warrant and he showed them a copy. He advised Mr Edwards that a pellet gun, a rifle and a shotgun had been located in a bedroom. At 7:18 am the AOS left the address. He instructed a dog handler present to stand by outside to keep control over any dogs loose on the property. Mr Hall maintained oversight of the MPI's activities but was not actively involved in the search or seizure of any items. A little

after 8:00 am a police cash detector dog and handler arrived at the address. At 10:40 am another fishery officer arrived at the address and at 1:18 pm the search was completed and he left the address.

[31] Mark Scott, senior investigator for MPI, arrived at 77A Pukaki Road at 7:30am. He had been assigned the job of interviewing Brett Edwards. He introduced himself and produced his warrant of authority and the copies of the search warrant for the address. He discussed the nature of the allegations against Mr Edwards, gave him his rights, told him he would need to be formally interviewed. Mr Edwards ultimately contacted a Mr Gilchrist who spoke with Mr Scott and arrangements were made for Mr Edwards and Mr Gilchrist to be available for interview at the Otahuhu Police Station the following day. Just before midday he went outside for a break and noticed a pile of documents visible in a sewer breather pipe at the back of the address. He brought these to the attention of a fishery officer who retrieved the documents. He stayed with Brett Edwards for most of the time he was at the address and left at about 1.30pm.

[32] Mr Edwards was in bed when the AOS arrived at his address. One of his daughters ran into his bedroom to tell him that the police were outside and that they were coming in. Mr Edwards thought they were preparing to go to the neighbours across the road in relation to possible drug offending. He got out of bed, went to the back door and there was an officer walking up the back stairs telling him to get his dogs out the back that were barking and that if he did not, that they would be shot. One of his daughter's overhead this and became upset. He could see that a lot of people and he could see Glocks and semiautomatic rifles. He thought there were maybe ten or more officers at his home. He said most of the officers that entered his home were armed.

[33] When asked if there were firearms in the house, he indicated they were and his wife found his firearms licence which was taken by one of the officers. He was then told to stay in the lounge. Their three young children were at home at the time. The two older girls were aged 12 and 9 and the youngest girl was 18 months old. The two school aged children were permitted to go to school, but Mr and Mrs Edwards were not free to leave the address. He recalls two officers remaining with him and his

wife the whole time they were at the address, and they had to remain in the lounge while others searched the various rooms in the house. He thought there ten or more officers at home during the search.

[34] He recalled that the search concluded at about 2:00 pm, he had not felt able to leave the address at any stage because he was given the clear impression that he was not allowed to. He and his wife were watched by two officers who stayed with them the entire time. He said he felt intimidated by what took place and he felt like he did not have any rights. He described being shocked by what occurred and that the events have affected his children, his wife and himself, and they have all attended counselling as a result of the conduct of the officers executing the warrant that day, and even now they were still suffering from the effects of what occurred.

[35] Mr Edwards said that the armed officers were there for a number of hours, but he could not give the exact time. He recalled them being in the lounge where the TV was on showing the Americas Cup and being particularly intimidated by presence of assault rifles.

[36] Mrs Edwards was also in bed when her daughter coming into the bedroom to say the police were outside. She put her dressing gown on thinking she would have to help somebody and thought maybe it was a road incident or something to do with a neighbour. She walked to the back door behind her husband and she could hear a commotion and saw a man at the door. He had a warrant and asked almost immediately about guns in the house and they directed him to where the guns were.

[37] She confirmed that there were police officers and other people in uniform with weapons, but that she could not really focus because of the stress she was under. She described the weapons as being long black things. She said that she and her husband stood in the living room for a short while and were then they told to sit on the couch in the lounge. She said that she was in shock asking herself if this was really happening or whether they had got the wrong people. After about 40 minutes in the lounge she recalls being allowed to go to her bedroom to get dressed, but that a female officer followed her. She returned to the lounge with her husband and she thought they were there until about 1 o'clock. She felt she had no ability to move, let alone leave the

address because she was being watched the whole time. She recalled a number of police officers in the lounge area, and she could hear people going in and out of various rooms in her home. She thought there were ten or more people in the house. She was distressed and felt intimidated by the presence of so many officers and the weapons.

[38] Her youngest child was 18 months old at the time and was difficult to keep still. At one point her younger daughter went down the hall and she was told by one of the officers to get her out of the hall. She described herself as being overwhelmed and did not focus on what kind of weapons the officers were carrying. Because of what occurred that day, she does not trust anybody anymore, she had thought people in uniforms were good people, but now she does not know. She said what occurred has affected her children. The two oldest daughters were angry and upset.

[39] Ms Edwards confirmed that she did not feel she had the ability to leave any time. She felt the officers had the right to do whatever they felt like doing. She described herself as frozen and permanently watched. She did not know what the real situation was and she could not really comprehend what was going on and why nobody was talking to her to her husband.

Was the search and seizure unreasonable?

[40] Section 21 of NZBORA states:

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

[41] The Crown submit the searches of both addresses were carried out reasonably and in good faith. The MPI had virtually no involvement in the decision to involve the AOS. Information had been passed to the MPI about the possibility of unsecured firearms being present at both addresses. An expert risk assessment was prepared by Police and the decision made based on that risk assessment. The use of the AOS was not unreasonable in the circumstances, and unsecured firearms were located at both addresses. Despite the evidence given by witnesses for the respondents the AOS would have left after the addresses were secured and Mr Hall recorded they left 77A at 7.18am.

[42] While the presence of 32 officers plus the AOS at the addresses may appear to be excessive, the properties were substantial residential sections which required a substantial number to assist in the search. AOS left shortly after their arrival and three officers had returned to their offices by 10.00am. Moreover, the MPI having been formed approximately six months before the termination of Operation Partridge, had never conducted a search of residential premises under both the Fisheries Act and the Animal Products Act. The planning was more nuanced and a greater number of officers was needed because not every MPI officer was appointed as a warranted officer under both Acts. There is no suggestion that the amount of officers' present caused any harm.

[43] Mr Jones submits the MPI had overall control of the search operation having obtained the search warrants and has to take responsibility for the presence and actions of all participants. It is common ground the Edwards' family had no history of firearms misuse or of engaging in violence of any kind. It is against his background that the actions of the searches must be assessed.

[44] Eight AOS were deployed over the two properties and there is evidence to suggest armed officers were at the address for considerably longer than suggested by the Crown. Mr Connells evidence is that they were there when he arrived at 9.50am which would be close to three hours from their arrival.

[45] The number of fisheries and other officers over both properties was unnecessary and excessive. There is no evidence to suggest that the number reduced significantly if at all, over the course of the day. There were several searches of both dwellings and an inordinate amount of time seems to have been taken with searching these homes. The farm houses were normal three bedroom dwellings. Parts of the properties were searched more than once. The actions were complete overkill in the circumstances.

Decision

[46] As stated by Elias CJ in *Hamed v R*¹:

¹ *Hamed v R* [2011] NZSC 101

“there may be ...unreasonableness in the manner of investigation under lawful authority, so that lawfulness is not exhaustive of unreasonable search and seizure”.

[47] In *R v Pratt* the Court held that an authorised search maybe unreasonable under s 21 of the NZBORA if it is carried out in an unreasonable manner, which requires consideration in the context of the subject matter, time, place and circumstance.

[48] While the Court acknowledges that there were firearms at both addresses, this has to be put into context. One of the businesses conducted on the properties was the slaughtering of animals, and, it is not uncommon for firearms to be present at semi-rural properties. Brett Edwards was licenced and as acknowledged by the Crown there was no history of misuse of firearms or of any history of violence in relation to any occupants of the both addresses.

[49] The Police description of the proposed searches, given what they knew, was “a very low level entry of family homes”, and they considered there was little risk to any person. What occurred on 19 September was anything but a very low key entry of family houses. What occurred is best described as a raid one might expect if Police were executing warrants involving serious criminal offending and serious criminals. Here they were looking for evidence of illegal activity involving fish, and illegal activity involving home kill of pigs. Mr Jones is right to describe what occurred as complete overkill.

[50] Involving the Police Asset Recovery Unit was in my view unwarranted. Brett Edwards was approached by undercover officers and ultimately purchased fish outside the quota system on three separate occasions involving 720kgs of fish over a 14 month period. The justification for involving the ARU is because the MPI believed large sums of money was involved in the alleged offending, but other than the sales to Mr Edwards there was nothing before me to indicate why the MPI considered this to be the case. In any event, I see no reason why experienced MPI officers would not have been able to deal with any seizure of money or assets at the addresses. Further the number of MPI and police officers deployed and the duration of the searches cannot be justified. This was not a complicated matter and the desired results could easily have been

achieved with a small number of MPI officers in a relatively short space of time. No reason was given as to why some rooms were searched more than once.

[51] Further the involvement of the Armed Offenders Squad was in my view completely unnecessary, even if they left soon after securing the properties. Mere presence of firearms in the circumstances of this case could not be said to warrant their use, and the information available clearly indicated little if any risk in the execution of the warrants. Further it was clearly a very frightening experience for some of the family members involved.

[52] I am satisfied that the search of 77 and 77A Pukaki Road was unreasonable in all the circumstances.

Were the members of the Edwards family unlawfully detained?

[53] There are two threads of case law in relation to arbitrary detention. In *R v M Blanchard* J provided the following definition of a detention:

“a mixed objective/subjective test: does the suspect have a reasonably held belief, induced by police conduct, that he or she is not free to leave?”

[54] In *Police v Smith* and *Herewini* detention was defined as “some form of substantial interference with the liberty” of the person concerned.

[55] The Crown concede that Ted Edwards, Brett Edwards and Johanna Edwards may have been unlawfully obtained, but do not accept Avis Edwards was unlawfully detained.

[56] Mr Jones submits all four were arbitrarily obtained. He submits the Edwards’ were subjected to such overt authority it was obvious to them that freedom of movement was not available in the circumstances.

Decision

[57] It is abundantly clear from all the evidence I heard and have detailed in paragraphs 18 through 37 that all four members of the Edwards family were arbitrarily detained.

[58] I accept the evidence of Avis Edwards that she was unable to use her phone or able to move about her house freely unless an officer moved with her and she was kept at the house for approximately 3 hours and 40 minutes having been separated from her husband at about 8.00am. The number, nature, and conduct of officers at her home leaves me in no doubt she was arbitrarily detained and her personal liberty substantially deprived.

[59] Ted Edwards was approached by armed officers and told to go inside. He was separated from his wife, watched until his interview at about 8.00am. He was then moved to a different area in the house and watched continually for the duration of the search. He was not permitted to use his phone and I accept his evidence and the evidence of Ms Little that there was no telephone contact between them that day, despite the evidence of Mr Plumstead. Again, the number, nature and conduct of the officers at his home leaves me in no doubt he was arbitrarily detained and was deprived of his personal liberty.

[60] Brett and Johanna Edwards were alerted to the police presence by their young daughter. Armed officers were present, Brett Edwards was told to sort out his dogs or they would be shot, a large number of officers entered their home and they were told to stay in the lounge which they did. They were watched at all times. At some point Mrs Edwards was allowed to get dressed but was accompanied by a female officer. She felt unable to move as she was being watched by officers the entire time, some which she recalled were armed. Again, the number, nature and conduct of the officers leaves me in no doubt they were both arbitrarily detained and were deprived of their personal liberty

[61] It follows therefore that having found the search to be unreasonable and their detention unlawful, I am satisfied on the balance of probabilities that the evidence was improperly obtained.

Is the exclusion of the evidence proportionate to the breaches found?

[62] Section 30(2)(b), (3) and (4) of the Evidence Act provides:

(2) The Judge must—

- (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety [and] takes proper account of the need for an effective and credible system of justice.
- (3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:
- (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
 - (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
 - (c) the nature and quality of the improperly obtained evidence:
 - (d) the seriousness of the offence with which the defendant is charged:
 - (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:
 - (f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant:
 - (g) whether the impropriety was necessary to avoid apprehended physical danger to the police or others:
 - (h) whether there was any urgency in obtaining the improperly obtained evidence.
- (4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.

[63] The Crown submit the evidence ought to be admitted because:

- (a) The unreasonableness of the search was negligible and there was no bad faith in how it was carried out;
- (b) The detention was not done deliberately or in bad faith;

- (c) The impropriety may be categorised as a mistake or a misunderstanding on the part of the MPI as to best practice in carrying out searches under an authority to enter;
- (d) The sewer documents are central to the crown case and without that evidence the charges against all defendants would need to be dismissed;
- (e) The alleged offending is serious as it represents an ongoing deliberate fraud against the FA involving financial gains of approximately \$67,000.

[64] Mr Jones submits it is a longstanding principle that searches of residential property has the highest expectation of privacy attached to it, and the MPI encroached on the Edwards right to privacy in their respective for an extensive period.

[65] Further, all four members of the family were arbitrarily detained for prolonged periods. These are serious breaches of the Edwards' rights.

[66] There was no need for the presence of so many officers. The houses and curtilage was not significantly different from a normal suburban dwelling. The presence so many officials, particularly the AOS, was unnecessary in the circumstances and resulted in an intimidating scene. The presence of firearms did not justify the number of attendees and Brett Edwards had a gun licence and no history of violence or any breach of that licence. The MPI's actions were both deliberate and reckless as to the impact the execution of the search would have on the Edwards family. As to the quality of the sewer documents, these are scraps of paper with writing on them. There is no evidence as to authorship.

[67] Mr Taskers analysis of the documents is based on four assumptions and he accepted at the pre-trial hearing that these assumptions underlined his analysis and that any assumption that was debunked would render his analysis unreliable. His third assumption (that the recovered records relate to fish received by MBS Ltd) is made without any independent evidence to support it. Mr Taskers analysis is a circular argument; embedded in his analysis is the very conclusion that he comes to which

cannot be right. Their probative value and Mr Taskers analysis of them must be seriously compromised.

[68] It is accepted the documents are central to the crown's case but in *Hamed v R* Justice Tipping said at paragraph 56:

In my view the expression "nature and quality", as descriptive of improperly obtained evidence, is limited to the character of the evidence itself and is not concerned with the importance of the evidence to the Crown's case.

[69] As to the seriousness of the offences, Judge Neave classified the offending as moderately serious and though he did not grant the stay he canvassed possible significant reductions in sentence and Mr Jones submits this places the offending as low or at their highest low to moderate.

[70] There are no alternative remedies to exclusion that could be utilised. The only appropriate remedy is exclusion of the evidence.

[71] In terms of the proportionality test, the importance of the rights breached, the deliberate and reckless nature of the improprieties, and the seriousness of the breaches weighs in favour of the evidence being excluded.

Decision

[72] I do not accept the Crown submission that the unreasonableness of the search was negligible. What occurred was a gross breach of s.21 NZBORA. This was complete overkill on behalf of the MPI, and a serious breach of the Family's right to privacy over an extended period of time. The use of AOS was unnecessary and very intimidating for the Edwards family.

[73] The detention, particularly of Ted, Brett and Johanna Edwards was for significant periods of time. This was not a complicated search and I accept Mr Jones submission that the houses and curtilage were not significantly different to a normal suburban dwelling. There was no reason to search rooms more than once and the attendance of so many officers was oppressive. This was in my view a deliberate tactic adopted by the MPI and not a mistake or misunderstanding on behalf of the MPI as to

best practice in carrying out searches. The MPI officers that gave evidence are all highly experienced and would or should have known that their conduct on 19 September was unacceptable.

[74] As to the nature and quality of the evidence obtained, most of pieces of paper recovered have no reference to any of the respondents and are aptly described by Mr Jones as scraps of paper with writing on them and no evidence of authorship.

[75] There is also merit in Mr Jones submission that Mr Tasker's third assumption (that the recovered records relate to fish received by MBS Ltd) in fact assumes the analysis is correct, ie. that the pieces of paper represent fish delivered to MBS Ltd when there is no independent evidence of any such thing.

[76] In his report dealing with each charge, Mr Tasker concludes underreporting is either "evident", "highly probable" or "highly likely", and where he concludes the latter two his evidence would not be sufficient to sustain those charges. This of course reduces the value of the fish allegedly illegally obtained. My view is that the charges are moderately serious.

[77] While I acknowledge that the Crown case depends on the admission of the documents I remind myself of Tipping J comments in *Hamed*, and I accept Mr Jones submission that it is important not overemphasise the importance of the documents to the Crowns case.

[78] The Crown accept that with the benefit of hindsight the MPI could have conducted the search more appropriately. Important rights were breached in a sustained and deliberate fashion and the search was both unreasonable and excessive. Applying the test under s.30 Evidence Act I am satisfied that exclusion of the evidence is proportionate to the impropriety and pursuant to s.30(4) the evidence is excluded.



A J Johns
District Court Judge