**TO PRESERVE THE CONFIDENTIALITY OF THE ONGOING INVESTIGATION ASPECTS OF THE PUBLISHED JUDGMENT HAVE BEEN REDACTED**

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

**CIV-2016-404-002975**
**[2017] NZHC 1847**

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| BETWEEN | JOHN JAMES LOUGHLIN<br>Plaintiff |
| AND | THE DIRECTOR OF THE SERIOUS FRAUD OFFICE<br>Defendant |

Hearing: 14 June 2017

Appearances: G M Illingworth QC and A K Hyde for Plaintiff
P J Morgan QC for Defendant

Judgment: 4 August 2017

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## JUDGMENT OF VENNING J

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**This judgment was delivered by me on 4 August 2017 at 3.00 pm, pursuant to Rule 11.5 of the High Court Rules.**

**Registrar/Deputy Registrar**

**Date.....**

Solicitors: Morrison Mallett Lawyers, Wellington
Copy to: Serious Fraud Office, P O'Neil, General Counsel, Auckland
G Illingworth QC, Auckland
P J Morgan QC, Hamilton

**The decision under challenge**

[1] Mr Loughlin is a former director and chairman of the Board of Zespri Group Limited (Zespri). The Serious Fraud Office (SFO) is conducting an investigation into the affairs of Zespri.

[2] On 25 October 2016 the Director of the SFO issued a notice under s 9 of the Serious Fraud Office Act 1990 (SFO Act) requiring Mr Loughlin to attend the SFO offices in Auckland for an interview in relation to its investigation. On the same date the SFO informed Mr Loughlin that while he was entitled to have counsel, his preferred counsel, Mr Corlett QC, was excluded from attending the interview with him. The reason given was that Mr Corlett had attended SFO interviews with other persons (including a Mr Z) during the course of the SFO's investigation into Zespri. The SFO regards Mr Z as an important witness.

[3] Mr Loughlin challenges the Director's decision to exclude Mr Corlett from attending the interview with him.

**The basis for the challenge**

[4] It is accepted that the Director's decision to exclude Mr Corlett was the purported exercise of a statutory power for the purposes of the Judicature Amendment Act 1972 and is reviewable.

[5] Mr Illingworth QC submitted that the Director erred in law in that:

(a) The Director does not have an implied power of veto over Mr Loughlin's choice of counsel.

(b) Even if there is such an implied power the Director has interpreted the implied power overbroadly and in exercising the power has gone beyond the lawful scope of her power. This is also an error of law.

(c) Even if there is such an implied power in the circumstances of this case the threshold requirement for the exercise of the power was not satisfied.

(d) The limit imposed on Mr Loughlin's rights under s 9(5) of the SFO Act and s 23(1)(b) of the New Zealand Bill of Rights Act 1990 (NZBORA) to counsel of choice is not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

[6] Mr Illingworth emphasised that although important, unreasonableness was a secondary issue. The primary question was whether the defendant had erred in law and exceeded her lawful powers.

**SFO response**

[7] Mr Morgan QC submitted that the Director does have an implied power, in certain circumstances, to exclude counsel of choice. The power is incidental and consequential to an express power and is a reasonable limit which can be demonstrably justified in a free and democratic society. It does not impair the rights of Mr Loughlin more than is reasonably necessary. The exercise of the implied power in this case is not arbitrary, capricious or unreasonable and should not be set aside.

**Does the Director have an implied power to exclude counsel of choice?**

[8] The first issue is whether the Director has an implied power to exclude counsel of choice.

[9] Not every power exercisable by the Director of the SFO is set out expressly in the SFO Act. The Director has a number of implied powers necessary to give effect to the operation of the Act.[1]

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[1] *Jaffe v Bradshaw* (1998) 16 CRNZ 122 (HC); *R v Aspinall* CA295/06, 19 September 2006; and *R v Aspinall* HC Auckland CRI-2005-004-19057, 11 August 2006.

[10] In determining whether the Director has the implied power she purported to exercise in this case it is necessary to consider the statutory context in which she acted. As Cooke P said in *Commerce Commission v Telecom Corporation of New Zealand Ltd*:[2]

> Like any other Act, the Commerce Act should receive a fair, large and liberal interpretation, and the Courts will be ready to discern implications or to fill gaps in an Act if this is necessary to make the Act work as Parliament must have intended. But it is all-important in such a context to appreciate the basic structure and principles of the Act, for obviously the Courts could not hold a term to be implied if it were contrary to the legislative scheme. Inevitably therefore one has to undertake a reasonably full scrutiny of the legislation. …

[11] A power that may fairly be regarded as incidental to or consequential upon what the legislature has authorised ought not to be held ultra vires.[3]

[12] The power to require a party to attend for an interview and the provision of representation at that interview is contained in s 9 of the SFO Act:

> **9 Power to require attendance before Director, production of documents, etc**
>
> (1) The Director may, by notice in writing, require—
>
> (a) any person whose affairs are being investigated; or
>
> (b) any other person who the Director has reason to believe may have information or documents relevant to an investigation,—
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> at the time and place specified in the notice, to do any 1 or more of the following things:
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> (c) to attend before the Director:
>
> (d) to answer questions with respect to any matter that the Director has reason to believe may be relevant to the investigation:
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> (e) to supply any information specified in the notice with respect to any matter that the Director has reason to believe may be relevant to the investigation:

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2 *Commerce Commission v Telecom Corporation of New Zealand Ltd* [1994] 2 NZLR 421 (CA) at 424–425.

3 *Attorney-General v Directors of the Great Eastern Railway Co* (1880) 5 App Cas 473, 478 (HL); *Attorney-General ex relatione Lewis v Lower Hutt City* [1964] NZLR 438 (CA) at 462; and *Makin v Gallagher* [1974] 2 NSWLR 559 at 575–576.

(f) to produce for inspection any documents which are specified in the notice and which the Director has reason to believe may be relevant to the investigation.

…

(5) Any person who is required to attend before the Director under this section, shall, before being required to comply with any requirements imposed under this section, be given a reasonable opportunity to arrange for a barrister or solicitor to accompany him or her.

(6) Section 18 shall apply to any notice given under this section.

[13] Section 9(1) provides the Director with power to require a person being investigated or who the Director has reason to believe has information or documents relevant to an investigation to attend before the Director and, inter alia, answer questions with respect to any matter the Director has reason to believe may be relevant to the investigation. A person required to attend and answer questions under s 9(1) may not refuse to answer the questions on the ground that to do so would tend to incriminate them.[4] Refusal to answer questions is an offence.[5] A self-incriminating statement made in response to a question at the interview may, however, only be used in evidence against that person in a prosecution for an offence where that person gives evidence inconsistent with the statement.[6]

[14] As Mr Illingworth noted, s 9 of the SFO Act has been described by the courts as "draconian" and designed to give "rigorous and effective powers to investigate serious or complex fraud".[7]

[15] Given the powers vested in the Director under s 9(1) and the potential significance of the answers, s 9(5) provides for any person required to attend before the Director to be given a reasonable opportunity to arrange for a barrister or solicitor to accompany them. The notice requiring attendance at the meeting must inform the person that they may, if they wish, be accompanied by a barrister or a solicitor.[8]

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4 Serious Fraud Office Act 1990, s 27.
5 Serious Fraud Office Act 1990, s 45(d).
6 Serious Fraud Office Act 1990, s 28.
7 *Jaffe v Bradshaw*, above n 1, at 128.
8 Serious Fraud Office Act 1990, s 9(6) and s 18(4).

[16] In addition to the right provided for by s 9(5), s 23(1)(b) of the NZBORA is engaged in the present case. A person, such as Mr Loughlin, who is required to attend an interview in order to answer questions put by the Director under s 9 is detained under an enactment for the purposes of s 23(1) of the NZBORA.[9] Failure to attend and answer are both offences punishable by imprisonment or fine.

[17] Given that s 23(1) NZBORA is engaged, the right in s 9(5) of the SFO Act might arguably be seen as subservient given that it provides for the interviewee to be provided a reasonable opportunity to arrange representation, whereas s 23(1) provides for the more fundamental right to legal representation. In the present case, any difference between the two is immaterial, given that under s 23(1) of the NZBORA Mr Loughlin has the right to legal representation at the interview.

[18] The right to legal representation has been held to be a presumptive right to counsel of choice based on the social value of freedom of choice and the view that the State should not intervene in the private and professional relationship between lawyer and client.[10] The right to counsel of choice is not, however, absolute and is subject to reasonable and practical limitations. In practical circumstances it may be overridden as the Court of Appeal confirmed in *Ministry of Transport v Noort*.[11]

[19] Mr Illingworth accepted that there could be exceptions to the right to counsel of choice, but he argued such circumstances were limited, such as in the context of drink driving legislation and the assignment of counsel on legal aid under the Legal Services Act 2001 (now the Legal Services Act 2011) as was discussed by the Court of Appeal in *Clark v Registrar of the Manukau District Court*.[12]

[20] Mr Illingworth was also prepared to accept that *D v Sturt* confirmed the right to counsel of choice might also be limited when the lawyer of choice was not available to attend the interview within a reasonable time, although he did note that, in *D v Sturt*, Gault J did not refer to the New Zealand Bill of Rights Act 1990.[13]

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9 See *R v Goodwin* [1993] 2 NZLR 153 (CA).

10 *Clark v Registrar of the Manukau District Court* [2012] NZCA 193, (2012) 9 HRNZ 498 at [92]; and *Barrie v R* [2012] NZCA 485, [2013] 1 NZLR 55 at [27].

11 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).

12 *Clark v Registrar of the Manukau District Court*, above n 10.

13 *D v Sturt* (1990) 5 PRNZ 17 (HC).

[21] In *D v Sturt* notice was served on 7 December for an interview on 12 December. The Director refused to change the date of the interview to 14 December to enable counsel of choice to represent the proposed interviewee. The application for review was advanced on the basis that denying the opportunity for the interviewee to be accompanied by counsel of choice breached his right to counsel under s 9(5) and was unreasonable. As in the present case, it was accepted that the interviewee was entitled to be represented by counsel. The focus of the case was on whether the interviewee had been given a reasonable time to arrange for counsel rather than on his right to counsel of choice. In dismissing the application for review Gault J concluded that the issue was whether reasonable opportunity was afforded to the interviewee to arrange for a barrister to accompany him. The Judge considered that, having learnt of the unavailability of senior counsel on the evening of Monday, the interviewee had sufficient opportunity to arrange for a barrister to accompany him on the Wednesday morning.

[22] In a number of overseas jurisdictions, albeit under different legislative provisions, courts have recognised an implied power in similar authorities or investigatory bodies to exclude particular lawyers from appearing at interview.[14]

[23] To similar effect, although in the context of the Court's inherent jurisdiction there are a number of other cases which confirm the Court has power to restrain particular counsel from acting in particular cases where the interests of justice so require.[15]

[24] Finally, as Mr Morgan submitted, the Director must surely have the right to exclude a lawyer selected by a person to be interviewed where the lawyer might be a possible suspect or possible witness in the investigation themselves.

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[14] *Law Society of Ireland v The Competition Authority* [2005] IEHC 455, [2006] 2 IR 262; *National Crime Authority v A* (1988) 18 FCR 439 (FCAFC); *Australian Securities Commission v Bell* (1991) 32 FCR 517 (FCAFC); *Macquarie Advisory Group Pty Ltd v Australian Securities and Investments Commission* [1999] VSC 403, (1999) 33 ACSR 106; *Collard v Australian Securities and Investments Commission (No 3)* [2008] FCA 1681, (2008) 173 FCR 117; and *R (Lord) v Director of the Serious Fraud Office* [2015] EWHC 865 (Admin), [2015] 2 Cr App Rep 340.

[15] *Black v Taylor* [1993] 3 NZLR 403 (CA); *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587 (HC); and *Beggs v Attorney-General* [2006] 2 NZLR 129 (HC).

[25] Once it is conceded, as it must be, that the Director has the implied power to exclude counsel of choice in certain circumstances, for example, either because they are unavailable and the investigation would be unreasonably delayed, or the investigation could be compromised because of the lawyer's personal circumstances, the issue then becomes whether in the context and circumstances of this case the power was exercised lawfully.

**Rights under s 23(1) of the NZBORA**

[26] Again whether the Director's exclusion of counsel of choice is justifiable in a free and democratic society must be informed by and dependent on the particular circumstances of the case under consideration. In an appropriate case it will be a reasonable limit on the right.

**Has the Director acted beyond the lawful scope of her power or exercised it unreasonably?**

[27] Mr Illingworth submitted that even if the Director had an implied power to exclude counsel of choice she had interpreted the power "overbroadly" and had therefore gone beyond the lawful scope of the power. He also submitted that the limit she had purported to place on Mr Loughlin's rights to representation was not a reasonable limit prescribed by law. He submitted the Court would first need to determine the threshold for the application of the implied power and then determine whether, in the circumstances of the case, the threshold requirement was satisfied.

[28] Mr Morgan focused on the issue of whether or not the implied power had been exercised reasonably.

[29] While I accept that acting beyond the scope of a power is an error of law, in the present case I do not consider the different approaches taken by counsel make any practical difference to the outcome.

[30] In *Bryson v Three Foot Six Ltd* the Supreme Court discussed Lord Radcliffe's discussion of the issue in *Edwards v Bairstow*, particularly his opinion that there will

be an error of law where the true and only reasonable conclusion contradicts the determination.[16] The Supreme Court said to similar effect:

> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable — so clearly untenable — as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test.

[31] The Court of Appeal suggested in *Lewis v Wilson & Horton Ltd* that:[17]

> [63] Where the facts cannot support a decision, judicial review is available on the partially overlapping grounds of error of law (on the basis that it must be inferred that the decision-maker has misconceived the law) or unreasonableness. Why error of law is to be inferred was described by Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14; [1955] 3 WLR 410 (HL), at p 36; p 423:
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> > ``If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law."
>
> [64] The ground of unreasonableness restated by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; [1947] 2 All ER 680 (Eng CA), at pp 228 – 229; pp 682 – 683 may be viewed as coinciding with the second category of error of law recognised in *Edwards (Inspector of Taxes) v Bairstow*, although it is usually treated as a distinct ground.

[32] The implied power exists. It must be exercised reasonably. If it has not been exercised reasonably then the decision will be struck down either on the basis that in exercising the power unreasonably the Director exceeded the scope of the implied power or alternatively that the decision was unreasonable.

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16 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 citing *Edwards v Bairstow* [1956] AC 14 at 36 (HL).

17 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA).

[33] It is helpful to review the consideration that overseas authorities have given to the exercise of similar powers.

[34] In *Law Society of Ireland v The Competition Authority* the Law Society challenged the vires of a notice issued by the Competition Authority in which it set out its policy in relation to legal representation.[18] The Authority stated that in general it would not permit the same lawyer to represent both persons. The Court accepted that as an incident of the right to fair procedure under art 40.3 of the Constitution of Ireland 1937 a witness had the right to freely select the lawyer to represent them but that there would be rare cases where the choice of lawyer may hamper or impede the Authority from discharging its lawful function. O'Neill J concluded the appropriate balance between the constitutional right of a person facing a tribunal to freely choose their legal representative and the right and duty of the tribunal to control its proceedings so as to discharge its function was achieved:[19]

> … by the aforesaid strong presumption in favour of a freedom of choice of legal representation, but with the retention in the tribunal of a discretion to deny that freedom of choice where it is apparent that, to permit a particular legal representative to act, would have the likely result of frustrating or impeding the tribunal discharging its lawful function.

[35] In *National Crime Authority v A* a Full Court of Appeal of the Federal Court allowed an appeal against a decision setting aside the Authority's decision to exclude a particular legal counsel from the hearing.[20]

[36] In allowing the appeal the Federal Court of Appeal emphasised that the right for counsel to be present was a right of the witness to have counsel present rather than a right of the lawyer to be present. It also considered the representation by the same legal practitioner of earlier witnesses and of the respondents, all of whom were to be examined about the same or similar matters, could lead to a situation where additional information obtained from one witness was disclosed to another.

[37] The Court noted that in the normal course the expectation would be that the legal representative would confer with the witnesses before they gave evidence and

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18 *Law Society of Ireland v The Competition Authority*, above n 14.
19 At 282.
20 *National Crime Authority v A*, above n 14.

would have a clear idea of what the nature of the investigation was, what matters concerned the Authority and the general thrust of the questions likely to be asked. Counsel would be under a duty to each to represent them adequately. On the other hand counsel would be unable, because of the secrecy provisions in the legislation, to disclose to them what he had learnt at his previous appearances. What the Authority feared was that a legal practitioner anxious to do his duty might quite unintentionally, perhaps subconsciously, reveal to one or more of the respondents matters which should forewarn them of what they might expect to be asked.

[38] The Court noted that once it was conceded that the right to representation was not absolute and must be qualified to some extent the answer was that the Authority was empowered to refuse to permit a particular legal representative to appear if it concluded on reasonable grounds and in good faith that to allow the representation either would or might prejudice the investigation which it was obliged to carry out. The appeal was allowed. The witness could be represented by a lawyer of his or her choice save a practitioner excluded by the Authority for good reasons.

[39] In a subsequent decision of *Hogan v Australian Crime Commission* Mansfield J in the Federal Court came to a different conclusion on the facts.[21] Mansfield J accepted he should follow the formulation of the relevant test in *National Crime Authority v A*, noting the examiner's reasons for the decision in the case before him reflected the view that a legal practitioner who had appeared for one examinee at one examination would not be permitted to appear subsequently for another. The reason for the view was the risk of the special investigation being "overtly or inadvertently" compromised. The Judge noted there was no suggestion that counsel was unaware of the stringent confidential obligations imposed on him. The reference to the danger of overt disclosure was not capable of being supported on the material before the Judge. The Judge accepted that the legal representative attending an interview would gain certain knowledge which could not be used for any purpose outside the particular client's examination, but noted the Authority could not prevent the legal representative from being consulted by any other person summonsed to be examined in respect of the same investigation. It was for the legal practitioner whether to accept instructions from the proposed examinee in light of

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21 *Hogan v Australian Crime Commission* [2005] FCA 913, (2005) 154 A Crim R 336.

the practitioner's knowledge and inability to disclose the fact of the earlier summons or the information revealed at the earlier examination. It was for the examiner to ask how the presence of the legal representative at the second examination might be more prone to prejudice the investigation than that person's presence at the early examination at which the legal representative was and was entitled to be present. In the Judge's view the examiner did not address the exercise of the power as was required by the test in *National Crime Authority v A*. The examiner failed to apply proper, genuine and realistic consideration to the merits of the case. The examiner had not properly considered how allowing the representation would or might prejudice the investigation.

[40] In *Australian Securities Commission v Bell*, the Commission was concerned that the lawyer representing the examinee had represented other examinees and his firm had drafted the prospectus which the Commission had refused to register. At first instance the Judge had set aside the Commission's decision that neither the lawyer nor any other lawyer from his firm could attend the examination. The Commission's inspector had not given evidence as to his reasons for excluding the lawyer. The Full Court dismissed the appeal. It posed a test of reasonable grounds for a bona fide belief that to allow the lawyer to attend would or would be likely to prejudice the investigation.[22] In stating that test Lockhart J expressly stated it to be a higher threshold than that set out in *National Crime Authority v A*, although noted that the difference in practical application would depend on the judicial approach to the facts of the particular case.[23] On the wording of the statute in that case the Court considered that the right was conferred on the lawyer rather than the examinee.

[41] Burchett J stated that the onus on the Commission to justify exclusion:[24]

> [It] was not a light burden. It could not be discharged simply by showing that the solicitor had acted for other examinees in the same examination, nor by showing that he had been involved, as solicitor, in legal work for the company relevant to the subject matter of the inquiry.

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22 *Australian Securities Commission v Bell*, above n 14.
23 At 522.
24 At 533.

[42] In *Macquarie Advisory Group Pty Ltd v Australian Securities and Investments Commission* Byrne J applied the principles set out in the *Bell* decision, summarising them as:[25]

> 1. The right conferred on an examinee by s. 23 to have a lawyer present does not mean that the inspector cannot refuse to permit a particular lawyer to be present.
>
> 2. The inspector may, as a condition to permitting a lawyer to be present, give to the lawyer a direction as to confidentiality.
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> 3. The inspector may exclude a particular lawyer pursuant to s. 22(1) where there are reasonable grounds for a bona fide belief by the inspector that the presence of the lawyer will or is likely to prejudice the investigation of which the examination is part.
>
> 4. Where the inspector refuses to permit a particular lawyer of the examinee's choice to be present, the correctness of that decision may be challenged in the courts.
>
> 5. Upon such a challenge the onus lies on the inspector to show that there were reasonable grounds for the decision.

[43] Byrne J noted that justification must turn upon the facts of each case, which may include the involvement of the lawyer and the conduct under investigation, either innocent or complicit. Where the lawyer seeks to represent multiple examinees it may involve a consideration of the role or alleged roles of the different examinees and the positions which they adopt towards the investigation. In *Macquarie* the inspector relied on the prospect of an examinee feeling ill at ease answering a question with the lawyer present knowing the answer given might conflict with or detract from the interests of another examinee for whom the lawyer also acted. The inspector alleged that might hinder a full, frank and honest response by the witness. Byrne J held that there was nothing on the evidence which posed a risk that the examination would or might be prejudiced by counsel representation.

[44] In *Collard v Australian Securities and Investments Commission (No 3)* the Court rejected a submission that counsel should be excluded.[26] In that case the proposed interviewees were all suspects in the investigation and already defendants in existing proceedings that had been commenced. They instructed the same lawyer

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[25] *Macquarie Advisory Group Pty Ltd v Australian Securities and Investments Commission*, above n 14, at [6].

[26] *Collard v Australian Securities and Investments Commission (No 3)*, above n 14.

after the proceedings were commenced and wanted that lawyer to act for them in the examinations. The Commission argued there was a conflict of interest between the examinees and that there was a risk that they may not be truthful, frank or forthcoming if accompanied by a lawyer acting for the other examinees and a risk that the lawyer representing more than one examinee would inadvertently disclose confidential information from an examination to another interviewee. The Court focused on the examination process itself rather than the investigation overall. It found the power to exclude was not engaged in the case before it as there was nothing in the inspector's letter to indicate what the conflict between the interviewees' accounts was, why that mattered, or what it was that made it necessary to exclude the lawyer.

[45] Mr Illingworth sought to identify a number of different threshold tests that might apply to situations where the implied power could be exercised:

(a) an implied power to exclude where there are exceptional circumstances such as the lawyer being a suspect or a witness in the matter under investigation (i.e. the lawyer was not professionally available) – which Mr Illingworth submitted was the only justifiable exception and did not apply in the present case;

(b) an implied power to exclude when the participation of the lawyer would have the likely effect of frustrating or impeding the SFO's statutory function;[27]

(c) an implied power to exclude if the Director concludes on reasonable grounds and in good faith that to allow the representation will or is likely to prejudice the investigation;[28]

(d) an implied power to exclude when the defendant concludes on reasonable grounds and in good faith that to allow the representation would or might prejudice the investigation;[29]

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27 *Law Society of Ireland v The Competition Authority*, above n 14.
28 *Australian Securities Commission v Bell*, above n 14.
29 *National Crime Authority v A*, above n 14.

(e) an implied power to exclude when the defendant in good faith and on reasonable grounds believes the integrity of an investigation might be affected by the representation – which Mr Illingworth submitted was the Director's position in the present case.

[46] To the extent it is necessary or appropriate to adopt one of the above thresholds, I favour the approach of the Federal Court in *Bell*,[30] that the implied power may be exercised if the Director concludes on reasonable grounds and in good faith that to allow the particular representation will or is likely to prejudice the investigation. I also note Lockhart J's observation that in practical terms there may be little difference between that test and the test in *National Crime Authority v A*.[31]

[47] What emerges from consideration of the relevant authorities is unsurprising. The outcome in each case is dependent on the particular facts and evidence before the Court in the specific case. It is thus necessary to consider the matter in the context of the particular facts of the present case.

[48] Both Ms Read, the Director, and Mr Tapper, the senior SFO investigator, have given evidence.

[49] Ms Read says that in November 2015 she was informed by the investigation team that they proposed to commence interviewing former and present board members of Zespri. One of those was Mr Y. Mr Corlett had advised the SFO investigator that he had been instructed to act for Mr Y and he expected to receive instructions from three other individuals who were also former or present board members. Ms Read took the view that Mr Corlett should be excluded from attending the interview of Mr Y for the following reasons:

a. Mr Corlett QC had represented Mr Z at all of his interviews and in doing so had become privy to the information provided by Mr Z during those interviews;

b. [Redacted];

c. [Redacted];

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30 *Australian Securities Commission v Bell*, above n 14.
31 *National Crime Authority v A*, above n 14.

d. Mr Corlett QC had been instructed to act for four Zespri Board members (present and former);

e. I considered that prejudice to the SFO's investigation might arise where Mr Z's legal representative also attended the interviews of one or more Board members at Zespri as there may be a conflict of interest between those Board members and Mr Z and/or Zespri;

f. There was a risk that the information provided by Mr Z may be inadvertently conveyed to the other clients of Mr Corlett QC, resulting in the tailoring of evidence (albeit unintentional); and

g. There was the potential for information to be disclosed in the course of the interviews of those directors that were previously unknown to one, some or all of those directors. I considered that it was possible that either the fact of there being a significant matter unknown to those directors and/or the substance of that information could be inadvertently disclosed to directors who were subsequently examined.

[50] Consistent with those concerns Ms Read informed Mr Corlett by letter of 17 November 2015 that she would not permit him to accompany Mr Y to the interview.

[51] Ms Read noted that while she proposed to also exclude Mr Corlett from attending interviews with Messrs Loughlin, X and W, Mr Corlett had represented Mr Z and before that Mr V, another witness, without objection.

[52] In a letter of 14 December 2015 to Mr Loughlin in which she advised of her decision to exclude Mr Corlett, Ms Read referred to the importance of protecting the integrity of the investigation, which she said was supported by s 36 of the SFO Act. While she did not expect there would be any deliberate disclosure of protected information by Mr Corlett she considered the disclosure might very well occur inadvertently as a result of his multiple instructions.

[53] [Redacted].

[54] Like Ms Read, Mr Tapper was not concerned about Mr Corlett attending the interview of Mr V. Mr V's tenure at Zespri pre-dated the events of particular relevance to the investigation [redacted].

[55] The SFO is also concerned that Mr Corlett as counsel has been briefed by Buddle Findlay, the solicitors acting for Zespri.

[56] In the SFO's more recent letter to Mr Loughlin on 25 October 2016 Mr Tapper noted the reasons for excluding Mr Corlett had not changed.

[57] For his part Mr Corlett confirms that he understands his obligations and says that he has obtained background information from a variety of sources including a review of relevant documents and instructions in addition to information from the meetings he attended with Mr Z. There were four such interviews with Mr Z.

[58] As noted the Director refers in her letter of 14 December 2015 to the importance of protecting the integrity of the investigation. The concept of the integrity of the investigation does not assist the Director or justify the decision made to exclude counsel of choice. I agree with the observations of O'Neill J in *Law Society of Ireland v Competition Authority* that the integrity of an investigation is achieved by ensuring that the investigation is carried out in accordance with relevant statutory provisions and respecting the constitutional rights of those affected by the investigations.[32] Reference to the general concept of the integrity of the investigation is not sufficient. There must be a more tangible and focused reason for excluding counsel of choice.

[59] The Director and Mr Tapper both refer to the possible issue of conflict of interest. The concept of conflict of interest is well understood generally, and will be well understood by Mr Corlett as senior counsel.

[60] In many situations of multiple representation there will be no conflict of interest. In the absence of evidence to the contrary (and there is none in this case), lawyers can be assumed to fulfil their professional duties and obligations and to identify conflict and decline to act. In the present case, the same counsel (Mr Foley) has represented a number of interviewees, including two directors (albeit one was a former director). The Director has also expressly said that she does not rely on Mr Corlett's ethical obligations, which I take to be an acceptance that Mr Corlett will observe his professional obligations, but rather relies on the risk of inadvertent disclosure.

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[32] *Law Society of Ireland v Competition Authority*, above n 14.

[61] Given the acceptance of Mr Corlett's compliance with his ethical obligations it is difficult to identify the practical reality of the concerns expressed by the Director in this case. As Byrne J held in *Macquarie Advisory Group Pty Ltd v Australian Securities and Investments Commission*:[33]

> I cannot see how they show anything more than that the common lawyer must preserve the confidence which he is directed to preserve. There is nothing on the facts of this case which would impose upon the examination a particular or further risk that it will or might be prejudiced by common representation.

[62] The Director also referred in her correspondence to the power being a necessary corollary of the secrecy of compulsory interviews and the public interest in the effective performance of the SFO's function to detect and investigate serious and complex fraud.

[63] The provisions relating to secrecy are set out at ss 36 to 44 of the SFO Act. Section 41 in particular requires secrecy to be observed by other persons (such as Mr Corlett in this case) to whom protected information is disclosed pursuant to the Act. Protected information includes for present purposes, information supplied to or obtained by the Director under or in connection with the exercise of any power conferred by s 5 or s 9 of the Act and information derived from or based on such information.

[64] The prohibition is against disclosure of information obtained by Mr Corlett from his attendance at the interviews of Mr Z with the SFO. The Director's objection to Mr Corlett attending with Mr Loughlin proceeds on the premise that the information Mr Corlett may hold relevant to Mr Z was obtained during the course of the s 9 interview with Mr Z, rather than from another source, and that there will be inadvertent disclosure of that material at the interview of Mr Loughlin. It is important to note that the Director is not able to prevent Mr Corlett acting for Mr Loughlin and giving him general advice on the matter (or from representing him if proceedings are taken against him) even though Mr Corlett remains subject to the constraints that apply as a consequence of s 41 and the interviews he has already

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[33] *Macquarie Advisory Group Pty Ltd v Australian Securities and Investments Commission*, above n 14, at [13].

attended. There is little logical difference between Mr Corlett advising Mr Loughlin generally (which he is permitted to do) and attending the s 9 interview with him.

[65] To the extent the concern is that some of the Board members, for present purposes Mr Loughlin, may provide information which differs in material respects as to who knew what and when, that is not a matter which will be influenced by Mr Corlett's presence at the interview, or at least not to the extent that Mr Corlett holds information as to the state of Mr Z's knowledge about those matters. Importantly in the present case the representation in issue is representation at a compulsory interview where the interviewee cannot refuse to answer a question on the grounds of self-incrimination. The lawyer's role at an SFO interview under s 9 is different to that at a police interview. Mr Loughlin's answers will either be consistent with Mr Z's or inconsistent. If ultimately Mr Loughlin's explanations as to who knew what and when is different from Mr Z's records of interview that is not a matter that Mr Corlett would be in a position to influence during the course of the interview itself. If there is ultimately a difference between the two it would be a matter for Mr Corlett to determine whether professionally he may continue to act for both men if required to do so.

[66] Mr Morgan submitted that there was a risk of inadvertent disclosure, noting that the Director had an overall understanding of the investigation. Further, he noted that Buddle Findlay had instructed Mr Corlett and yet Buddle Findlay also acted for Zespri. But Mr Barker of Buddle Findlay has deposed that while on most occasions he or a colleague would receive a brief verbal or written report from the barrister after the interview:

> On no occasion did counsel attending disclose the substance of what was discussed in the course of the section 9 interviews, nor were they expected to do so given the statutory constraints.

[67] Mr Morgan next emphasised that the interviews were fact finding interviews. The prospect of the plaintiff electing to manufacture and tell lies to the SFO is just part of the risk. Whether particular items of information were material or not and whether the accounts SFO have been given are truthful or not are all matters that the Director will need to take into account at some stage in the future. Again however

there is no particular link between the fact Mr Corlett attended the Z interviews and such a risk. It exists independently of Mr Corlett's involvement at the Z interviews.

[68] Mr Morgan emphasised that the Director had acted in good faith and submitted as she has acted in good faith it could not be said she had acted arbitrarily, capriciously or unreasonably.

[69] Despite Mr Morgan's submissions, in the circumstances of this case, and accepting the Director was purporting to act in good faith, the decision to exclude Mr Corlett from attending the interview with Mr Loughlin was not reasonable. There is a strong presumption in favour of freedom of choice of legal representation at the s 9 interview. The grounds relied on by the Director in the present case to exclude Mr Corlett are not made out. The evidence does not support a conclusion or finding that to allow Mr Corlett to represent Mr Loughlin at the interview will or is likely to prejudice the investigation or the examination process.

**Result**

[70] The application for review is granted. The Director's decision to exclude Mr Corlett from attending the interview with Mr Loughlin is revoked and set aside.

**Costs**

[71] Costs are to follow the event. Costs are awarded on a 2B basis. I decline to award costs for second counsel. I expect counsel to agree quantum.

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Venning J