

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2015] NZEmpC 115  
EMPC 71/2015**

IN THE MATTER OF      an application that the Court exercise its  
power to order compliance with a  
determination and orders of the  
Employment Relations Authority

BETWEEN                 RON LEVER AND WENDY LEVER  
Plaintiffs

AND                        YVONNE DICK AND JOHN  
ALEXANDER  
Defendants

Hearing:                 16 July 2015  
(Heard at Auckland)

Appearances:           W Reid, advocate for plaintiffs  
No appearance for the defendants

Judgment:               20 July 2015

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**INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS**

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[1] Before the Court is an application by the plaintiffs seeking to enforce, by way of orders of compliance, a determination and orders made by the Employment Relations Authority (the Authority) on 10 December 2014.<sup>1</sup> As a preliminary matter, when the proceedings were filed in Court, the defendants were named as “Yvonne Dick of Auckland, married woman and John Alexander of Auckland, formerly Trustees of Fitzgerald Trust”. For reasons which will become apparent in this judgment, there is no need for the defendants to be named as trustees as they are each personally liable for the money they have been directed to pay to the plaintiffs. Accordingly, there is an order amending the intituling in these proceedings to that set out above.

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<sup>1</sup> *Lever v Fitzgerald Trust* [2014] NZERA Auckland 510.

[2] When the proceedings were filed and served, no steps were taken by the defendants within the time prescribed by the Employment Court Regulations 2000 (the Regulations).<sup>2</sup> Affidavits as to service have been filed on behalf of the plaintiffs. It is clear from those affidavits that the defendants have been properly served and the proceedings have been brought to their notice. In addition, however, following such service the Registrar of the Employment Court at Auckland received a letter dated 14 May 2015 signed by a person describing himself as Ben Dick as agent for the Fitzgerald Trust. This letter confirmed service of the proceedings on the defendants. The letter put forward reasons, based on an incorrect interpretation of law, as to why the defendants would not be participating in the proceedings and why they regarded themselves as having no liability to the plaintiffs. The letter also contains a gratuitously scurrilous, irrelevant and apparently improperly motivated statement as to Mr Reid's entitlement to represent the plaintiffs in these proceedings. That matter has been primarily dealt with in a minute of Chief Judge Colgan dated 19 May 2015.

[3] It is unfortunate that the defendants have chosen not to take up the strong recommendation contained in Chief Judge Colgan's minute that they take legal advice and/or are represented professionally. Quite apart from their discourteous behaviour, the letter, which they clearly asked Ben Dick to write on their behalf and their failure to take steps and participate in the proceedings, would appear to breach the underlying obligations of good faith enshrined in the Employment Relations Act 2000 (the Act). Even though the employment relationship between the plaintiffs and the defendants no longer continues and while the defendants originally participated in procuring a mediated settlement, they failed in their obligations to properly cooperate with the Authority in the conduct of its subsequent investigation.

[4] The facts of this matter insofar as they are relevant to the proceedings now before the Court can be briefly set out. The plaintiffs, Mr and Mrs Lever, worked for a period of time as managers of a motel property situated at 66 Buffalo Beach Road, Whitianga. The motel's name was Baileys at the Beach. Mr and Mrs Lever were dismissed from that employment and subsequently commenced personal grievance proceedings in the Authority in respect of that dismissal.

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<sup>2</sup> Regulation 19(2)(a).

[5] The defendants are the registered proprietors of the property situated at 66 Buffalo Beach Road, Whitianga, and indeed are also the registered proprietors of the adjoining beach house property situated at 65 Buffalo Beach Road, Whitianga.

[6] The defendants were the employers of Mr and Mrs Lever. This is confirmed in the record of settlement, which followed mediation conducted as part of the proceedings before the Authority. The defendants were parties to that record of settlement in their capacities as trustees of an entity described as “Fitzgerald Trust”. Under the record of settlement, which was properly certified by a mediator pursuant to s 149 of the Act, the defendants agreed to pay the plaintiffs a sum of \$10,000. This sum was to be paid by instalments, the last of which was to be on or before 20 September 2014. In addition the defendants were to pay costs in respect of the proceedings in the Authority in the sum of \$2,500. The defendants’ agreement to make the payments procured the plaintiffs’ withdrawal of their claim before the Authority. The record of settlement contained confirmation of the employment relationship existing between the plaintiffs and the defendants by stating that the record was in full and final settlement of all matters between them arising out of their employment relationship.

[7] Reverting to the letter which Ben Dick has sent to the Court, there is an indication that the Fitzgerald Trust has been wound up and has no assets. As will become apparent from this judgment that has no relevance to the defendants’ liability. However, if that was a position which existed at the time that the defendants, Yvonne Dick and John Alexander, entered into the record of settlement, then they may have misled not only the plaintiffs but also the mediator.

[8] The defendants failed to meet their obligations under the settlement and the plaintiffs filed an application to the Authority seeking a compliance order. The determination, which is now the subject of the proceedings before the Court, indicated that the defendants (who were respondents in the application before the Authority) did not participate in the Authority’s investigation. They did not file any evidence. They acted contemptuously towards the Authority by failing to comply with its directions to provide relevant information for the purposes of the investigation meeting. They did not appear. The determination indicates that

Michael Dick, who apparently is Yvonne Dick's husband, and who represented the defendants in the mediation, sent an email to the Authority disputing that the defendants had interests in property. From evidence now before the Court, that email statement, which Mr Michael Dick made to the Authority Member, was clearly a further attempt to mislead.

[9] The determination of the Authority indicated that the record of settlement should be enforced by way of a compliance order.<sup>3</sup> It held that the defendants were personally liable to the plaintiffs. The defendants were ordered to comply with the record of settlement within 28 days of the date of the determination. In addition the defendants were ordered to pay \$500 as a contribution towards the further actual legal costs incurred by Mr and Mrs Lever and to reimburse them for the sum of \$71.56 for their filing fee. The defendants have not complied with the order, nor have they paid the costs awarded against them.

[10] The plaintiffs have now filed these proceedings asking the Court to exercise its power to order compliance with the Authority's determination and orders. In particular the plaintiffs ask the Court to exercise powers pursuant to s 140(6) of the Act. The jurisdiction of the Court to make such orders is provided in s 138(6) of the Act. Section 140(6) of the Act provides as follows:

- (6) Where any person fails to comply with a compliance order made under section 139, or where the court, on an application under section 138(6), is satisfied that any person has failed to comply with a compliance order made under section 137, the court may do 1 or more of the following things:
  - (a) if the person in default is a plaintiff, order that the proceedings be stayed or dismissed as to the whole or any part of the relief claimed by the plaintiff in the proceedings:
  - (b) if the person in default is a defendant, order that the defendant's defence be struck out and that judgment be sealed accordingly:
  - (c) order that the person in default be sentenced to imprisonment for a term not exceeding 3 months:
  - (d) order that the person in default be fined a sum not exceeding \$40,000:
  - (e) order that the property of the person in default be sequestered.

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<sup>3</sup> Pursuant to s 137(1)(a)(iii).

[11] The plaintiffs in their statement of claim particularly seek the following orders of the Court:

- (a) An Inquiry as to the assets beneficially owned by the defendants.
- (b) Orders in respect of the sequestration of assets owned by the defendants to the extent that it is necessary to satisfy payment of monies owed to the plaintiffs. (Section 140(6)d of the Employment Relations Act 2000).
- (c) The payment of an appropriate fine by the defendants (Section 140(6)d of the Employment Relations Act 2000).
- (d) An order for imprisonment of the defendants pursuant to Section 140 subsection 6(c) of the Employment Relations Act 2000.
- (e) A compliance order in the sum of \$571.56 being costs awarded by the Authority.
- (f) Costs of and incidental to the proceeding in the Employment Court.

[12] As perhaps could have been anticipated, the defendants did not appear upon the date set for the hearing of the plaintiffs' proceedings even though they were notified of that date. In any event they would have had to seek leave to defend the proceedings had they appeared for that purpose.<sup>4</sup> Their failure to appear would also indicate that they were not interested in disclosing to the Court details of their current financial position for the purposes of assisting the Court in the matter. It is apparent from the letter received from Ben Dick and as indicated earlier in this judgment that the defendants are under a misunderstanding as to their legal obligations and their legal liabilities. The letter from Ben Dick indicates that the defendants, as trustees of the Fitzgerald Trust, have not acted in any way in this matter to alter the fact that they are not liable for any loss or liability sustained by the Trust and are entitled to be indemnified by and out of the Trusts funds. It goes on to state that the defendants' liability as trustees of the Fitzgerald Trust is limited to the assets of the Fitzgerald Trust. Those statements represent a gross misunderstanding

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<sup>4</sup> Regulation 19(4).

by Mr Dick, and apparently the defendants themselves, of their legal liability as former employers of Mr and Mrs Lever.<sup>5</sup>

[13] Mr Reid, as advocate for the plaintiffs, provided brief but well prepared and argued submissions on their behalf. In those submissions he pointed out that the defendants have incurred personal liability for the sums owed under the settlement agreement. On the basis of authority, which he cited, he made the submission that the propositions of law relevant to the issue are well settled, although commonly misunderstood. He submitted that it is a popular misconception that the liability of trustees who incur obligations to third parties are limited to the assets of the Trust. The principles have been well settled, and for a recent authority on the point, Mr Reid referred to *Ellison v Scott*.<sup>6</sup> Mr Reid also helpfully referred to the New Zealand Law Commission's fifth Issues Paper in the Law Commission's review of the Trustee Act 1956 and the law of trusts.<sup>7</sup> The following statements from the Law Commission's Issues Paper may be of assistance to the defendants in re-considering their liability in this matter:<sup>8</sup>

#### **Liability of a trustee**

7.16 A trust is not a legal entity; the trustee is the legal owner of the trust property. Therefore, a trustee is personally liable for all liabilities incurred in performing the trust, including debts to third parties. This personal liability subsists unless there is a clause in the contract with the third party limiting the personal liability of the trustee; liability can be limited to the trust assets. Clear and unambiguous words are needed for the court to accept that a trustee's personal liability has been excluded. Limitation of liability through the trustee's contract with a third party is distinguishable from any clause in the trust deed that limits the trustee's liability to the trust assets, as the clause in the trust deed only applies between the trustee and the beneficiaries, not between the trustee and third parties. However, any clause in the trust deed still has implications for creditors looking to recover their debt by way of subrogation to the trustee's right of indemnity.

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<sup>5</sup> See *Lally v Edgcombe* (1883) 1 NZLR 364 (SC) where Gillies J held that a trustee is personally liable on his contract, unless that contract expressly provides to the contrary.

<sup>6</sup> *Ellison v Scott* HC Tauranga CIV-2009-470-1153, 19 August 2010. (See also *NZHB Holdings Ltd v Bartells* (2005) 5 NZCPR 506 at [34] and *AMP General Insurance Ltd v Macalister Todd Phillips Bodkin* [2006] NZSC 105, [2007] 1 NZLR 485 at [42].)

<sup>7</sup> Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* (NZLC IP28, 2011).

<sup>8</sup> At 81 and 83 (footnotes omitted).

### **Subrogation of creditors to trustee's right of indemnity**

7.21 Unsecured creditors of a trustee do not have a direct claim against the trust assets, unlike secured creditors who have a claim through their security. It is the trustee that is personally liable for debts properly incurred in the administration of the trust. Therefore the primary claim for creditors is against the trustee personally, not the trust assets. Creditors may recover from the trustee directly if the trustee has sufficient assets, other than assets that are held on trust. However, if the trustee has few or no assets of its own that are available to satisfy the creditor's debts, then the creditor must look to the trust property through subrogation. ...

[14] Those passages were perhaps put in a way more succinct and comprehensible to a layman by Potter J in *Ellison* when she stated:<sup>9</sup>

A number of consequences flow from the nature of a trust, some of which were referred to in the District Court judgment:

- A trustee is personally liable on his or her contract unless the contract expressly provides otherwise.
- Knowledge by those who deal with a trustee that he is contracting in his capacity as a trustee is immaterial.
- The trustee has personal liability and a description of the capacity in which he or she contracts does not change that.
- An express statement that liability is limited is needed to avoid exposure to personal risk.
- Since a trust is not a person the trust itself cannot hold property.
- The trustees hold the trust property in their own names subject to the rights of the beneficiaries.
- A person signing a contract "as trustee" is personally liable under the contract.
- The presumption can only be displaced by express words in the contract which limit the trustee's liability to the other contracting party.

[15] In the present case the issue of subrogation may not arise because Mrs Lever in her evidence set out the results of her investigation into substantial personal assets owned by the defendants and in particular the properties in Buffalo Beach Road, Whitianga. It assumes of course that those assets are not still owned by the trust as Ben Dick has confirmed in his letter. A creditor would only seek to be subrogated for the rights of the trustee under the trust deed to pursue the indemnity if the trustee held no substantial assets or was bankrupt or insolvent. That does not appear to be

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<sup>9</sup> *Ellison*, above n 6 at [22] (footnotes omitted).

the position here. The indemnity which Mr Dick has confirmed in his letter to the Court, would, however, entitle the defendants, having met their obligations to the plaintiffs to pursue the indemnity themselves against the settlor or beneficiaries of the Fitzgerald Trust if that is what they chose to do.

[16] Hopefully an understanding of their correct legal position will lead the defendants to now meet their obligations to the plaintiffs including the costs which Mr and Mrs Lever have had to incur in bringing these proceedings.

[17] Following Mr Reid presenting these helpful submissions, which in turn followed Mrs Lever giving evidence in support of the present application to the Court, I adjourned the proceedings for a further hearing. In view of the fact that a sequestration order is sought, it is important for the Court to have accurate evidence from the defendants confirming the extent of the assets which they own and which could then be the subject of such a sequestration order. It is important for the Court to ascertain that information, because, for instance, even though on the face of the evidence provided by Mrs Lever there are substantial assets, there is also evidence that securities have been registered against them and the extent of the defendants' equity in the properties will be relevant. While it is the task of the sequestrator appointed by the Court to investigate the assets position of the defendants and report to the Court as well as seize the assets it is important also to identify such assets as far as is possible for the sequestrator.

[18] No formal procedure is prescribed in either the Act or the Regulations as to how the Court's power to order sequestration can be put into effect. Pursuant to reg 6 of the Regulations, the Court may dispose of the matter "as nearly as may be practicable in accordance with the provisions of the High Court Rules affecting any similar case".<sup>10</sup> Rules 17.86 and 17.87 in combination with Rules 7.61 to 7.67 of the High Court Rules provide the procedure which will need to be adopted in the present case. During the course of the adjournment Mr Reid is to investigate the appointment of a sequestrator before the next hearing of this matter and will provide a memorandum setting out the steps to be appropriately taken should a sequestration order be necessary. These will include written acceptance and confirmation of the

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<sup>10</sup> Regulation 6(2)(a)(ii).



proposed sequestrator's appointment, how the sequestrator's costs of the sequestration will be met, how and when the sequestrator will report to the Court and other pertinent machinery matters.

[19] In order that the Court has the benefit of evidence from Yvonne Dick and John Alexander as to their true asset position, a witness summons will be issued against each of them requiring them to appear at the next hearing. The Court has power of its own volition to issue a summons requiring them to appear at Court and give evidence (cl 6(1), sch 3 of the Act). Should they fail to attend in answer to that summons then the Court has powers under s 195 of the Act to enter a conviction and impose a substantial fine. It is hoped that such a procedure will not be necessary. In order that both Yvonne Dick and John Alexander have sufficient conduct money tendered to them at the time of the service of the witness summons upon each of them, they are each to be paid the sum of \$30.<sup>11</sup> This will cover their travel expenses in travelling by private motor car from their homes in Auckland to the Court. If either of them claims further expenses their claims will be considered on the day set for hearing. As the Court will be arranging the service of the witness summonses, the plaintiffs are to pay to the Registrar the sum of \$60 to cover the sums needing to be tendered. Reimbursement of that amount to the plaintiffs by the defendants will be considered along with the plaintiffs' other claims for costs under the application for compliance. In addition to attending Court, Yvonne Dick and John Alexander are to produce before the Court all books, papers, documents and records under their control in any way relating to the proceedings but in particular disclosing information as to the nett assets owned by them. They may be required to answer questions on oath or affirmation about their assets in Court and are entitled to be legally represented in that exercise.

[20] In view of the fact that the default of the defendants has now been proved beyond reasonable doubt, and indeed is not denied by the defendants, the Court will need to give consideration at the resumed hearing to the remedies sought by the plaintiffs for the imposition of a fine or imprisonment of the defendants. The Court would be extremely reluctant to take such steps but will need to do so if the defendants choose to continue to act in default of their obligations under the

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<sup>11</sup> Pursuant to reg 35.

Authority's determination and orders. In view of that, when the hearing resumes the Court will need to sit in a courtroom where custody facilities are available and there is attendance of a police officer or court security officer to enable the defendants to be taken into custody should the Court so order.

[21] To enable this matter to now progress to the next stage the following directions are given:

- a) A copy of this judgment is to be served on the defendants even though they have not participated to date in the proceedings.
- b) The Registrar is to set a suitable date for the matter to be heard and in a courtroom where custody facilities are available. The Registrar is also to arrange for a police officer or court security officer to be present. The parties are to be notified of the date and place of the hearing;
- c) Mr Reid, on behalf of the plaintiffs, is to file witness summonses containing the requirements as to documents previously mentioned against Yvonne Dick and John Alexander, requiring them to attend Court as witnesses on the adjourned date set. The conduct money previously mentioned is to be paid by the plaintiffs to the Registrar of the Court in the interim to enable the sum specified to be tendered to each of the witnesses;
- d) Before the next hearing date, Mr Reid is to file a memorandum setting out the proposals as to how a sequestration order is to be put into effect should the Court on the resumed date make such an order. Any requirement that the sequestrator lodge security is waived. In his memorandum Mr Reid is to set out the plaintiffs' proposals as to payment of the sequestrator. Again reimbursement to the plaintiffs of any fees paid to the sequestrator will be considered in any final costs award.

[22] At this stage costs are reserved. However, so that the Court at the resumed hearing can reach a final decision on the costs claimed by the plaintiffs, it would be

helpful if Mr Reid in his memorandum could set out those claims. It would be helpful to have some estimate of the likely fees to be charged by the sequestrator.

M E Perkins  
Judge

Judgment signed at 3.45pm on 20 July 2015