NOTE: PURSUANT TO S 437A OF THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-1670
[2014] NZHC 2483

UNDER	the Judicature Amendment Act 1972 and the Children, Young Persons and Their Families Act 1989
IN THE MATTER	of an Interim Restraining Order made by the Family Court at North Shore
BETWEEN	W Plaintiff
AND	THE FAMILY COURT AT NORTH SHORE First Defendant
	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Second Defendant

Hearing: 1 October 2014

Appearances: Plaintiff in person
K Muller for First Defendant
A Longdill and S Jacobs for Second Defendant

Judgment: 9 October 2014

JUDGMENT OF BREWER J

This judgment was delivered by me on 9 October 2014 at 4:00 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

Introduction

[1] Mr W and his ex-wife have six children. They live with their mother. In 2012, concerns were raised about their contact with a man who was living with the mother. Mr W applied to the Family Court for a declaration that the children were in need of care or protection, and for an interim and a final restraining order against the man. Despite Mr W's best efforts, and for reasons not relevant to this case, the applications did not go to a hearing.

[2] On 2 November 2012, the second defendant ("CYFS") applied to the Family Court for a declaration that the children were in need of care or protection. An order directing CYFS to provide support and assistance was sought also. There was no application for a restraining order.

[3] On 19 November 2012, CYFS applied to the Family Court for an interim restraining order against the man. It was granted the next day.

[4] On 30 January 2013, the Family Court granted CYFS's applications for the declaration and support order.

[5] Both CYFS and the lawyer for the children thought the interim restraining order continued in force. By 2014 their view was that it was no longer needed. On 10 April 2014, CYFS told the Family Court in writing that it agreed with a recommendation by the children's lawyer that the restraining order be discharged. The documents were referred to Judge Druce for a decision on the papers. The Judge issued a Minute on 16 April 2014.[1] Since it is the genesis of this case, I will quote it in full:

> **Directions:**
>
> 1. I have reviewed this file after reading Lawyer for Child's report of 7 April 2014 and the Review of Plan report dated 7 February 2014.
>
> 2. The only Restraining Order made was an interim order made 20/11/2012. Such order only continues pending determination of the Declaration Application.

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[1] Record of Proceeding, tab 27.

3. The declaration was granted on 30/01/13. Accordingly it would appear no restraining order is in force.

4. The S.91 Support Order has lapsed.

5. Accordingly these proceedings are concluded.

[6] Mr W did not know about Judge Druce's Minute. In June 2014, he made inquiries about the interim restraining order when he learned that the man was again associating with the children. He brought this application for judicial review of Judge Druce's conclusion once he learned of it. Mr W submits that Judge Druce made an error of law and that the interim restraining order remains in force. He seeks a declaration to that effect and an order that CYFS ensure it is enforced.

[7] Mr W couples to his application grounds that his right to natural justice was breached and/or that a legitimate expectation was not given effect.

Issues

[8] The issues are:

(a) Is Judge Druce's conclusion able to be judicially reviewed?

(b) Is Judge Druce correct that the interim restraining order is no longer in force?

(c) Has there been a breach of natural justice and/or a failure of legitimate expectation?

[9] If I find in Mr W's favour, issues of remedy will have to be addressed.

Is Judge Druce's conclusion able to be judicially reviewed?

[10] CYFS concedes that Judge Druce's conclusion is amenable to judicial review. This is because of the broad definitions of "statutory power" and "statutory power of decision" in s 3 of the Judicature Amendment Act 1972 ("the JAA"). In oral argument, Ms Longdill for CYFS made a submission to the effect that although the

matter is arguable, CYFS takes the view that Mr W should not be deprived of the opportunity to have his case heard.

[11] I appreciate the submission. However, I have to be satisfied that I have jurisdiction to determine Mr W's claim. If I find in his favour, I cannot give relief without lawful power.

[12] Section 4 of the JAA gives the Court jurisdiction to grant relief "in relation to the exercise, refusal to exercise, or proposed or purported exercise, by any person of a statutory power". As Ms Longdill submits, the definitions of "statutory power" and "statutory power of decision" are framed broadly. The former includes the exercise of the latter.

[13] Here, Judge Druce was asked to exercise a statutory power of decision to discharge the interim restraining order. The statute conferring the power is the Children, Young Persons, and Their Families Act 1989 ("the Act"). Section 125(1)(e) of the Act permits application to be made for the discharge of an interim restraining order.

[14] Judge Druce did not make a decision to either discharge the interim restraining order or to decline to discharge it. Instead, he expressed his view to the effect that the order had lapsed when the declaration was granted, and so there was nothing left for him to decide on the application. The Judge held, in effect, that he did not have jurisdiction to make an order under s 125(1)(e) of the Act as there was no interim restraining order to discharge.

[15] The Family Court is created by the Family Courts Act 1980. It has no inherent jurisdiction. However, the Court does possess inherent powers, being those powers necessary to enable it to give effect to its substantive jurisdiction. These inherent powers include the power to determine whether the Court has jurisdiction to determine any matter before it. As the Court of Appeal held in *McMenamin v Attorney-General*:[2]

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2 *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA) at 276.

> An inferior Court has the right to do what is necessary to enable it to exercise the functions, powers and duties conferred on it by statute. This is implied as a matter of statutory construction.

[16] It follows that the Judge's decision that he lacked jurisdiction to discharge the order (it having lapsed) necessarily involved the exercise of a statutory power of decision and is therefore reviewable under the Judicature Amendment Act 1972.

Is the interim restraining order no longer in force?

[17] The Act provides for the State to intervene in the lives of children when that is necessary to prevent them suffering harm. CYFS (among others) may apply to the Family Court for a declaration that a child is in need of care or protection.[3] If a declaration is made then protective measures following from that can be taken by the Court to provide for the welfare of the child.

[18] Often, the welfare of the child requires more immediate intervention. The power to make one such intervention, an interim restraining order, is at the heart of Mr W's case:

> **88 Interim restraining orders**
>
> Where an application is made to the Court for a declaration under section 67 of this Act in relation to a child or young person, the Court may, on application by the applicant, or a barrister or solicitor representing the child or young person, or of its own motion, make such an order as it is empowered to make under section 87 of this Act pending the determination of the application.

[19] Section 87 provides for the making of restraining orders. A restraining order under s 87 can be made only if a s 67 declaration has been made. It restrains the person named in the order from doing specific things to or in relation to the child.

[20] It is evident from the heading to s 88 ("Interim restraining orders"), and the existence of an application for a s 67 declaration being a condition precedent to an order, that the power to make an interim restraining order is a power to fill the gap between the making of an application for a direction and its determination.

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[3] Children, Young Persons, and Their Families Act 1989, s 67.

[21] Mr W, however, argues that there is actually no such thing as an interim restraining order. Not in the sense that it is a temporary order. In his submission, s 88 simply permits a restraining order to be made before an application for a declaration is determined. The phrase in s 88, "pending the determination of the application", is only a temporal marker, not a statement of temporary life. In other words, "pending the determination of the application" does not mean "which will last until the determination of the application". Instead, it means "before the determination of the application".

[22] Mr W submits that the purpose and structure of the Act do not provide for the "concept of lapsing or automatic self-extinguishing" restraining orders. He points to s 90 of the Act which provides:

> **90 When restraining order shall cease to have effect**
>
> Where the Court makes an order under section 87 or section 88 of this Act in relation to a child or young person, that order shall cease to have effect when that child or young person attains the age of 20 years or sooner marries or enters into a civil union.

[23] In Mr W's submission, s 90 self-evidently makes no distinction between an interim restraining order and a restraining order. Unless the Court orders otherwise, both last to protect the person until he or she has attained an age or status that implies independence.

[24] There is, Mr W points out, a power to vary or discharge a restraining order. It is found in s 125 of the Act. The power relates specifically to:[4]

> … any restraining order or interim restraining order made under section 87 or section 88 of this Act.

[25] In Mr W's submission, s 125 is further evidence that the Act treats interim restraining orders and restraining orders equally. The only distinction is that the former may be granted before a declaration is made. Similarly, s 127 of the Act, which sets out the extent of the power to vary or discharge, makes no distinction between interim restraining orders and restraining orders.

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4 Section 125(1)(e).

[26] In my view, it is clear that an interim restraining order is just that : interim. Its purpose is to secure a child's safety until a proper examination of the child's situation can take place. That examination is the hearing of the application for a declaration. It is why an interim restraining order cannot be applied for or given unless there is also an application for a declaration.

[27] If the Court makes a declaration it can also make a restraining order. The terms of a restraining order will fall out of the material before the Court for the declaration hearing.

[28] The natural meaning of "pending the determination of the application" in s 88 is that the interim period ends with the determination and the interim restraining order lapses.

[29] In support of this interpretation are the differences between how an interim restraining order and a restraining order can be obtained. An interim restraining order under s 88 of the Act can be made on an ex parte basis, unlike a restraining order under s 87 of the Act. Section 87 of the Act forbids the Court from making an order restraining any person unless that person has been informed by the court of the proposal to make the order and has been given an opportunity to make representations to the Court.[5] Restraining orders and interim restraining orders can both be made by application to the Court but, unlike a restraining order, interim restraining orders can also be made on the Court's own motion.

[30] If the interpretation were otherwise, and the determination of an application for a declaration is that it not be made – i.e. the child is **not** in need of care or protection – then the interim restraining order would nevertheless remain in force. It would need to be the subject of a specific application for discharge or it would remain in force until either of the prerequisites to independence of the child was fulfilled. It cannot be the case that Parliament intended that where the Family Court has made a declaration under s 67 that a child or young person is not in need of care or protection, that an interim order restraining a person interacting with those

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5 Section 87(2).

children will continue to remain in force unless an application for a discharge is made or the children meet the prerequisites for independence.

[31] There is no mystery that ss 90, 125 and 127 apply to interim restraining orders. The time lag between the filing of an application for a declaration and its determination can be considerable. Sections 90, 125 and 127 necessarily apply to interim restraining orders to allow for circumstances in which a child reaches independence before a declaration is made, or where an interim restraining order is no longer needed and the Court has not yet determined the application.

[32] Judge Druce made no error of law. He applied the Act correctly. He was right to conclude that when the Court made its declaration under s 67 of the Act the interim order under s 88 lapsed. I consider the phrase "pending the determination" in s 88 has its ordinary meaning. In the s 88 context it can be expressed to mean, "to last until the determination".

Natural justice and legitimate expectation

[33] I also dismiss Mr W's alternative claims under the judicial review grounds of natural justice and legitimate expectation. I do not see how a breach of natural justice could have occurred since Judge Druce simply made a procedural determination on the papers that he could not discharge the interim restraining order because it had lapsed. Judge Druce correctly determined that he did not have jurisdiction to discharge the interim restraining order and no submissions by either party could have affected the fact that the order had lapsed and therefore could not be discharged. Even if Mr W's right to natural justice had been breached, the Courts will not set aside a decision and order a rehearing where the decision does not affect the applicant's substantive rights.[6] The decision does not affect Mr W's rights. The restraining order had already lapsed, Judge Druce's decision was merely declaratory of an existing state of affairs.

[34] Mr W argues he had a legitimate expectation that the safety and general welfare of his children would be maintained. The doctrine of legitimate expectation

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6 *Hirstich v Family Court at Manukau* [2014] NZCA 305 at [32].

in New Zealand applies only to legitimate expectations of a procedural nature. It is possible to have a legitimate expectation as to a procedure a decision maker will follow but not as to a substantive outcome it will reach. An expectation that the safety and welfare of Mr W's children will be maintained is an expectation of a substantive outcome. The decision of Wild J in *Air New Zealand v Wellington International Airport Ltd* is instructive in this regard:[7]

> [52] That leads me to a further difficulty with this ground for review. I have referred to "outcomes". New Zealand Courts will give effect to a legitimate expectation of a fair, or of a particular, process or procedure. But they will not enforce a legitimate expectation of any particular substantive outcome or result…
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> [61] As to the latter, in the example I gave, the party does not have a legitimate expectation of a particular outcome e.g. that its property will not be affected. It does have a legitimate expectation that, upon altering its roading plans, the public body will consult the party before proceeding further.
>
> [62] Thus, the Court enforces a fair process, but stops short of enforcing a particular outcome. That is obviously a softer position than that adopted in *Coughlan* and *Begbie* for the United Kingdom, but is in line with the position outlined, in my view correctly, by Randerson J in *The New Zealand Association for Migration and Investments Incorporated v Attorney General* [2006] NZAR 45.

[35] In any event, the raising of legitimate expectation in this case is misconceived. CYFS' applications for a declaration and an order to provide support led to a hearing which addressed the safety and welfare needs of Mr W's children. The interim restraining order lapsed and no restraining order was sought or made. Judge Druce's decision recognising that the interim order had lapsed had no legal connection with any expectation as to how CYFS might act.

Decision

[36] Mr W's application for judicial review is unsuccessful. Judge Druce made no error of law and there was no breach of natural justice or a breach of the doctrine of legitimate expectation. The application is dismissed.

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[7] *Air New Zealand v Wellington International Airport Ltd* [2009] NZAR 138 (HC) at [52] and [61]-[62].

[37] The defendants are entitled to costs. I award them on a 2B basis and they may be fixed by the Registrar.

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Brewer J

Solicitors: Crown Law (Wellington) for First Defendant
Meredith Connell (Auckland) for Second Defendant

Copy to: Plaintiff in person