

**IN THE DISTRICT COURT
AT AUCKLAND**

**CIV 2016-004-2340
[2017] NZDC 7701**

BETWEEN	EDEN GROUP LIMITED Plaintiff
AND	TIMOTHY NIGEL JACKSON First Defendant
AND	PHILLIP ANDREW KITE Second Defendant
AND	CHRISTOPHER JOHN BLACKMAN Third Defendant
AND	NEW SPACE LIMITED Fourth Defendant

In Chambers

Judgment: 13 April 2017

**RESERVED JUDGMENT OF JUDGE M-E SHARP
[as to notice as to consequences of disobedience
of order of Court]**

Introduction

[1] On 17 January 2016 a Registrar of this Court issued a Notice of Disobedience to Daniel Frances Ayers, non-party to an Employment Court proceeding between Eden Group Limited as Plaintiff and Timothy Jackson, Phillip Kite, Christopher Blackman and New Space Limited as defendants, consequent upon non-compliance by Daniel Ayers with an order made against him on 25 November 2016. Mr Ayers was neither a party in the proceeding nor involved in any way in the hearing of an interlocutory matter giving rise to the judgment of Judge Inglis in the Employment

Court on 25 November 2016. The Order against him was made without notice to him, his knowledge or involvement, raising concern about a breach of the principles of natural justice.

[2] Because of Mr Ayers' objection to the Notice of Disobedience served on him, the matter was referred to me. After some consideration I determined it likely that the Registrar lacked the jurisdiction to have issued the Disobedience Notice and that I should consider using the inherent power of the District Court to regulate its own procedure and prevent an abuse of the process of the Court by setting the order aside. However first I gave the parties to the Employment Court proceeding the opportunity to be heard. Mr Ayers has filed no further submissions beyond those dated 9 February 2017 but counsel for the plaintiff has filed a full memorandum on the matter urging the Court to uphold the order for the reasons outlined within.

[3] In particular the plaintiff addresses the requirements of r 19.66 of the District Court Rules 2014 stating:

19.66 Judgment or order enforceable by committal

(1) this rule applies to a judgment or order that is –

(a) enforceable by committal; and

(b) made for the benefit of one party (the applicant) against another party (the respondent); and

(c) in the nature of an injunction

(2) the Registrar must issue a copy of the judgment or order endorsed with an notice in form 65 –

(a) at the time the judgment or order is drawn up; or

(b) in any other case, at the request of the applicant.

(3) the endorsed copy of the judgment or order must be served on the respondent in the manner required under r 6.11 (personal service)

[4] The plaintiff submits that the Employment Court order is enforceable by committal due to r 19.62; the Employment Court order is in the nature of an injunction. The plaintiff also accepts that Mr Ayers is not a party to the Employment

Court proceedings but notes that he was appointed by the Employment Court to carry out a search order and by doing so subjected himself to the Court's jurisdiction.

[5] The plaintiff urges the Court to treat Mr Ayers as if he were a formal party despite not being named as one because of certain analogous situations in the High Court where that has happened. The plaintiff cites two cases: *Solicitor-General v Bujak* [2013] NZHC 800 and *E-Trans International Finance Ltd v Kiwi Bank Ltd* [2015] NZHC 2481 in support of this proposition.

[6] In both those cases, the Court noted that the non-party's solicitor and BN Global were not a "party" under the definition set out in r 1.3(1) High Court Rules (which is comparable to the definition that appeared in the now-repealed District Courts Act 1947). The Courts also noted r 1.6 High Court Rules which addresses cases not provided for in the rules.

[7] Thus the plaintiff suggests that the Court should use r 1.11 District Court Rules 2014 (having a similar effect to r 1.6 High Court Rules), to confirm that the Notice of Disobedience was correctly issued, in accordance with the interests of justice and the objective at r 1.3 to "secure the just, speedy and inexpensive determination of any proceeding ...".

[8] The plaintiff also notes r 1.8(2)(b) District Court Rules, where there has been a failure to comply with the rules, allows the Court to make any amendments or order dealing with the proceeding as it thinks just.

[9] **1.8 Non-compliance with Rules**

(1) A failure to comply with the requirements of these rules—

(a) must be treated as an irregularity; and

(b) does not nullify—

(i) the proceeding; or

(ii) any step taken in the proceeding; or

(iii) any document, judgment, or order in the proceeding.

(2) Subject to subclauses (3) and (4), the court may, on the ground that there has been a failure to which subclause (1) applies, and on any terms as to costs or otherwise that it thinks just,—

(a) set aside, either wholly or in part,—

(i) the proceeding in which the failure occurred; or

(ii) any step taken in the proceeding in which the failure occurred; or

(iii) any document, judgment, or order in the proceeding in which the failure occurred; or

(b) exercise its powers under these rules to allow any amendments to be made and to make any order dealing with the proceeding generally as it thinks just.

(3) The court must not wholly set aside any proceeding or the originating process by which the proceeding was begun on the ground that the proceeding was required by the rules to be begun by an originating process other than the one employed.

(4) The court must not set aside any proceeding or any step taken in a proceeding or any document, judgment, or order in any proceeding on the ground of a failure to which subclause (1) applies on the application of a party unless the application is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

[10] The plaintiff also notes that while “party” was defined in the District Courts Act 1947, it is not defined in the District Court Act 2016. However, the transitional provisions of clause 5 of schedule 3 to the current District Court Act 2016 state that the former Act continues to apply to proceedings that were in progress before the new Act came into force.

Determination

[11] While both the cases cited by the Plaintiff are examples of orders being made by a Court against a non-party, these orders were made in quite different circumstances. Both were costs orders which are inherently discretionary. Both decisions follow the usual principle that costs follow the event. Conversely, in this case, the order made by the Employment Court is in the nature of an injunction.

[12] More importantly, it is clear from reading both *SG v Bujak* and *E-Trans v Kiwibank*, that the non-parties took an active part in the hearing. In both cases, the

non-parties made applications and proffered submissions on the costs issue. However, in the Employment Court proceeding a consent judgment was made without the knowledge or consent of Mr Ayers. The application was heard on the papers following a joint memorandum from the parties.

[13] The criteria at r 19.66 have not been complied with. Mr Ayers was not a party to the proceedings and should not be treated as one.

[14] Whilst the District Court Rules provide wide ranging power to make orders where the Rules have not been complied with, which would allow me to validate the Notice of Disobedience, I do not consider that this is an appropriate case particularly where the order was made in circumstances suggesting a breach of the rules of natural justice.

[15] Lastly, I am concerned the Employment Court may not have the power to make a judgment affecting a non-party to a proceeding. It has the power to join a party to a proceeding but that did not happen in this case. In addition, can it order the transfer of items from one party to another? In the case of *Mason Engineers (NZ) Ltd v Hodgson* [2011] NZEmpC 147 Chief Judge Colgan noted:

[33] The Act and regulations do not provide either an enforcement regime for Employment Court Judges, as I have already set out, nor the power to determine ownership of items and direct their return, even as parties to an employment relationship.

[16] Whilst the District Court does not have the jurisdiction to determine whether Employment Court orders were correctly made before enforcing them, nor to review a Registrar's decision in respect of an affected non-party to a proceeding, rule 2,12 (Review of Registrar's decision) allows an affected party to a proceeding to apply to a Judge by interlocutory application for a review of a Registrar's exercise of jurisdiction. But that does not encompass the present situation since Mr Ayers is not a party.

[17] However, as noted in *Attorney-General v District Court at Otahuhu* [2001] 3NZLR 740 at para [16]:

As a statutory court of limited jurisdiction the District Court does not have an inherent jurisdiction to make any order necessary to enable it to act effectively as does the High Court. It is well settled, however, that as ancillary to its particular jurisdiction it has the powers necessary to enable it to act effectively within that jurisdiction. The most important of these inherent powers are the power of a court, subject to the rules of court and to statute, to regulate its own procedure, to ensure fairness in investigative and trial procedures, and to prevent an abuse of its process (Laws NZ Courts para 11).

[18] Enforcing a judgment is part of the procedure of the Court but in this case I consider that enforcement steps were undertaken where they should not have been: - I believe the Registrar lacked jurisdiction to issue the Notice of Disobedience to Mr Ayers.

[19] Accordingly, in reliance on the inherent power of the District Court to regulate its own procedure and to prevent an abuse of its process, I now set aside the notice of disobedience against Mr Ayers.

M-E Sharp
District Court Judge