# IN THE EMPLOYMENT COURT
# AUCKLAND

**AC 43/06**
**ARC 79/04**

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| IN THE MATTER OF | an application by non-party for an order discharging or varying an Anton Piller order |
| BETWEEN | AXIOM ROLLE PRP VALUATIONS SERVICES LTD<br>Plaintiff |
| AND | RAHUL RAMESH KAPADIA<br>Defendant |
| AND | EQUITY REALTY (1995) LIMITED<br>Non-party Intervener |

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| Hearing: | 30 June, 1 and 25 July 2005<br>(Heard at Auckland) |
| Court: | Chief Judge GL Colgan<br>Judge BS Travis<br>Judge CM Shaw |
| Appearances: | Christopher Patterson, Counsel for Plaintiff<br>No appearance for Defendant<br>John Katz QC and John Burley, Counsel for Non-party Intervener |
| Judgment: | 4 August 2006 at 11.00 am |

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## JUDGMENT OF THE FULL COURT

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[1] The preliminary, important and unprecedented issue for decision in this case is whether the Employment Court has either original or appellate power to make an Anton Piller order for search and seizure, both generally and in relation to non-parties.

## Background

[2] Until 13 September 2004 the defendant, Rahul Kapadia, was employed by a valuation company which held the "Knight Frank" real estate franchise for New Zealand and traded as "Rolle Knight Frank". On 2 September 2004 the plaintiff ("Axiom Rolle" but then known as Axiom Advisory Limited) took steps to purchase the assets of Rolle Knight Frank although it did not purchase the benefit of the Knight Frank franchise for New Zealand. On 3 September staff, including Mr Kapadia, were introduced to Axiom Rolle's Anthony Kidd and were told of the intended purchase and of Axiom Rolle's intention to offer them employment.

[3] On 7 September 2004, however, Mr Kapadia contacted the Knight Frank franchisor in Australia seeking to retain for himself the Knight Frank real estate franchise in New Zealand. At about the same time Mr Kapadia was negotiating with Axiom Rolle about new contracts of employment for himself and other staff. Mr Kapadia continued his efforts to take up the Knight Frank franchise. On 13 September the company for which Mr Kapadia and others had been working (Rolle Knight Frank) was placed in receivership. On 14 September Mr Kapadia again corresponded with Axiom Rolle about new contracts of employment with that company. On 16 September the receivers of Rolle Knight Frank wrote to employees including Mr Kapadia, advising them of the receivership and the purchase by yet another company of that business in receivership. The plaintiff wrote on 17 September to staff including Mr Kapadia about possible new contracts of employment.

[4] On 24 September 2004 the Knight Frank franchisor in Australia warned the plaintiff that it had no right to use Knight Frank intellectual property in New Zealand and required it to cease and desist from doing so. The franchisor repeated this advice to the plaintiff on 28 and 29 September. On the following day Mr Kapadia communicated again with the Knight Frank franchisor seeking to acquire the New Zealand franchise. Axiom then wrote to Mr Kapadia advising him of the potential loss of his employment by redundancy and, although it proposed a meeting about these matters on 5 October, this was cancelled by Axiom's Mr Kidd.

[5] On 3 October Mr Kidd had found e-mails that led him to believe that Mr Kapadia had been communicating with the Knight Frank franchisor in Australia to

attempt to obtain the franchise behind Axiom's back while he was still employed by it. Among these e-mails Mr Kidd discovered business plans that referred to an intention that the real estate side of the business proposed by Mr Kapadia would be held by Equity Realty (1995) Limited ("Equity"). Axiom also obtained some evidence that Mr Kapadia had been seen in the offices of Equity Realty in a building known as SIL in central Auckland.

[6] In order to preserve potentially incriminating evidence against Mr Kapadia, Axiom applied ex parte to the Employment Relations Authority for an Anton Piller order. This application was based on allegations of breach of confidence and of duties of fidelity by Mr Kapadia. The Employment Relations Authority refused the application on its merits. The Authority must have assumed it had the power to make the order.

[7] Axiom challenged this determination in the Employment Court and, under urgency, sought orders to allow specified persons to enter premises including the 9th floor of the SIL building (the offices of Equity) to search for, examine or remove specified items. The application was heard ex parte and urgently by the Employment Court which granted the relief claimed on the same day.

[8] On 11 October 2004 the Anton Piller orders were uplifted. The attempt to execute them at the premises of Equity did not take place because the occupier of the premises (Equity) declined under legal advice to admit the orders' executioners.

[9] Equity applied subsequently to the Court to set aside or modify the orders so far as they affected it as a non-party to the litigation. Mr Kapadia took no part in resolving these issues.

[10] Equity's case was advanced on a number of grounds based on the merits, but the principal argument, and the one which must be determined first and before inquiry into the merits, is that there was no power in law to grant the orders sought. Alternatively, it was claimed that if the power did exist, it did not extend to making orders affecting non-parties.

[11] It was argued for Equity that as the Court's power (if there is one) is derivative on a challenge, the question also affects directly the ability of the Employment Relations Authority to make such an order. Not dealt with in this judgment is Axiom's claim that Equity and its managing director committed a contempt of court

by obstructing or frustrating the operation of the Anton Piller order. It is agreed that contempt proceedings can only be brought if the order was issued lawfully.

## The Authority's determination

[12] The Authority heard the application ex parte. In refusing to make the order sought, it had two particular concerns about the facts. The first related to the date on which the employment relationship between the plaintiff and the defendant had commenced. Although not his primary argument, Mr Patterson as counsel for Axiom conceded, and the Authority apparently accepted, that the employment relationship had commenced by 17 September 2004 at the latest. In these circumstances, Mr Patterson accepted that his client's concerns about Mr Kapadia's conduct before that date could not be relied on to support the ex parte application. The second matter of concern to the Authority was whether there was evidence that Mr Kapadia had confidential information the property of Axiom. This involved an allegation that Mr Kapadia had taken Axiom's backup hard drive containing the plaintiff's computer records.

## The Court's judgment[1] on the challenge

[13] The Court recorded (paragraph [12] of the judgment) that it was empowered to make Anton Piller orders although in rare cases. The Judge recognised that they are an extreme use of a court's power, warranted only if the circumstances require it, and only to the extent absolutely necessary to meet the exigencies of the case. The Court relied on the judgment of the Court of Appeal in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461, the leading authority in New Zealand on Anton Piller orders, for the general principles of such orders. As would have been expected on an ex parte application considered urgently, the Judge heard no argument about the Court's power to make the order.

## Application to set aside or modify the Court's orders

[14] The preliminary question to be determined is whether the Court is able to make Anton Piller orders, either on a challenge or when exercising an original power. We do so by three inquiries:

- into the nature of an Anton Piller order and whether it is the exercise of a power or a jurisdiction;

[1] [2004] 2 ERNZ 307.

- by examination of the statute and case law, whether the Employment Relations Authority is able to issue Anton Piller orders;
- if the Authority cannot make Anton Piller orders, by considering whether the Employment Court nevertheless has original power to do so.

## What is an Anton Piller order?

[15] In the United Kingdom "Anton Piller" orders are now referred to and known as "search and seizure" orders and "Mareva" injunctions are "freezing orders". "Search and seizure" does not encapsulate precisely the nature of an Anton Piller order. It is not a judicial warrant to legitimise what would otherwise be an unlawful entry onto premises (if necessary by force) and to there seize and retain nominated property, again if necessary by force. An Anton Piller order is "in personam" rather than "in rem". It is directed to persons, requiring them to do certain things, rather than to the property the subject of the order or the premises in which it may be located. An Anton Piller order directs the person or persons named in the order to permit the executioners of it to search for, detain and take away property named in it. But the executioners cannot do more than require and encourage the recipient to comply with the order. If an executioner is refused entry to the premises, the executioner cannot insist upon doing so, whether by force or otherwise. Similarly, the person the subject of the order cannot be compelled to surrender the property named in the order, whether forcibly or otherwise. At the point of non-co-operation and refusal, the executioner's remedy is in proceedings for contempt.

[16] Along with Mareva orders, Anton Piller orders have been described as *"the law's two "nuclear" weapons"*[2]. The scope of an ex parte Anton Piller order is wider than ordinary document discovery and arguably more invasive than the statutory preservation orders provided for in r331 of the High Court Rules 1985. Such orders require recipients to permit entry into premises and the removal of property. As Biscoe[3] notes at p241:

> *The ex parte order lies close to the extremity of the court's powers. It tests the limits of what a civil court can achieve. It potentially involves significant inroads into principles of civil liberty such as the presumption of innocence, the right not to be condemned unheard, protection against arbitrary searches and seizures and even the sanctity of the home. It invades the privacy of the respondent who has no opportunity to put his or her side of the case. A*

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[2] *Bank Mellat v Nikpour* [1985] FSR 87 (CA) at 92 per Donaldson LJ.
[3] Peter Biscoe, *Mareva and Anton Piller Orders: Freezing and Search Orders* (2005).

*search of premises may involve public humiliation and, where it involves a respondent's home, personal and family distress. All this without any hearing at which the respondent can put his or her case. Moreover, typically, at least in copyright infringement cases, applicants are of big standing and deep pockets with the best legal support and are ranged against small people.*

[17] In *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55; [1976] 1 All ER 779, the English Court of Appeal confirmed the making of an ex parte order to search the premises of the respondent's business competitors to preserve evidence which was in danger of destruction, consumement or removal from the jurisdiction in order to defeat the applicant's claim. The order is an extreme form of discovery to preserve evidence for trial.

[18] In *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461, 477, the New Zealand Court of Appeal described the order made by the High Court under its inherent powers as being in three parts procedurally:

*… The first … has as its main object the preservation of property. That purpose is expressly authorised by R 478 [now R 331] in New Zealand. The distinctive feature of this part of the order is the requirement that the defendant permit entry upon and search of his premises. The second part … relates to discovery of documents and the names and addresses of other tortfeasors. The third … is an interlocutory order restraining certain activities by the defendant.*

[19] Such orders have been developed as much to protect the High Court's process from abuse as to protect and defend the interests of the potential judgment creditor. This point was made in Canada in *Grenzservice Speditions GmbH v Jans* (1995) 129 15 DLR (4th) 733, 755 where Huddart J observed:

*The Mareva and Anton Piller orders were conceived not so much to protect plaintiffs as to protect the Court's jurisdiction against defendants bent on dissipating or secreting their assets or evidence in order to render inconsequential the judicial processes against them.*

[20] In *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380; 162 ALR 294 at para [111] the High Court of Australia spoke of the need for statutory courts not to stray from their statutory mandate but equally not to adopt rigid rules as such rigidities could prevent the proper exercise of the Court's powers. This is to be done by identifying broad established principles which can be expanded to develop when the interests of justice require so that the proper exercise of the courts' powers are not prevented.

## Anton Piller: "jurisdiction" or "power"

[21] The word "jurisdiction" means different things in different contexts. But in this case, the word has been used to describe the legal ability or entitlement of a court or tribunal to do certain things. In argument, the question was posed: does this Court or the Authority have the jurisdiction to make Anton Piller orders? The boundary between "jurisdiction" and "powers" is often indistinct. A preliminary question is whether granting a Anton Piller order is the exercise of a "jurisdiction" or of a "power" within jurisdiction.

[22] The Employment Relations Act 2000 makes provision for the *"jurisdiction"* of the Authority at s161 and for the *"jurisdiction"* of the Court at s187. These sections define the sorts of cases the bodies may decide. Given that they are each creatures of statute, proceedings or causes of action which are not so expressly defined are not within the *"jurisdictions"* of the Employment Relations Authority or the Employment Court. They may not hear and decide them.

[23] The *"powers"* of the Court and the Authority are dealt with separately by the legislation. These are expressed much more generally than are the institutions' *"jurisdictions"*. They are also spread throughout a number of different sections in, and schedules to, the Act.

[24] In following the distinctions in the Act between *"jurisdiction"* and *"powers"*, we conclude that, in the present context, *"jurisdiction"* is the entitlement in law of a body to hear and decide a cause or causes of action. A *"power"* is an entitlement in law to use a procedural tool to investigate and determine an employment relationship problem (in the Authority) or to hear and decide a cause of action (in the Court) within jurisdiction.

[25] What is in issue in this case is essentially not a *"jurisdiction"* as statutorily defined but the exercise of a power or process able to be employed by the parties or, in the case of the investigative Employment Relations Authority, the Authority itself. An Anton Piller order is the exercise of a power, a tool for the performance of the work by the Authority or the Court rather than the legal entitlement to take on the work.

[26] Although, for convenience, it can be said that the making of an Anton Piller order is the exercise by the High Court of its inherent powers, that is not strictly true.

The inherent powers are those of the Judges of the High Court. That is because Associate Judges of the High Court who hear and determine much of its interlocutory work are prohibited by statute from granting Anton Piller orders: see s26J(4) of the Judicature Act 1908. So too are District Court Judges: see s42(3) of the District Courts Act 1947. In theory, also, the Court of Appeal and the Supreme Court that are both statutory courts, do not themselves possess the power to grant Anton Piller orders although, in the very rare event that either might be asked to do so, the status of the Judges of those Courts as High Court Judges would permit the exercise of the power.

[27] The significance of this analysis is that certain specified judicial officers are prevented statutorily from issuing Anton Piller orders and that the inherent power to do so resides in the Judges of the High Court. Although it might be argued that because Parliament has not enacted prohibitions upon Employment Relations Authority Members or Employment Court Judges from issuing Anton Piller orders, this is an indication of the existence of the power in them, we find that cannot be correct. Rather, it is probably the result of a failure of the Legislature to consider the question in the same way that it has in respect of Associate Judges of the High Court and District Court Judges. The prohibitions upon Associate and District Court judges are a powerful argument for the absence of the power, at least in the Employment Relations Authority.

## The legislative scheme

[28] It is common ground that the Employment Relations Act 2000 (“the Act”) does not provide expressly for either the Authority or the Court to make Anton Piller orders (or indeed Mareva orders). It is incontrovertible that Anton Piller orders are the exercise of an inherent power of High Court Judges. It is necessary now to analyse the Act governing employment litigation to determine whether Parliament intended the Authority and/or this Court to have such a power. This includes an examination of the scheme of the current legislation, as well as particular provisions. We begin with a consideration of the statutory background using the usual tools of interpretation.

[29] In addition to s5 of the Interpretation Act 1999 requiring the Court, when interpreting particular provisions of a statute, to have regard to the text in light of the enactment’s purpose, the New Zealand Bill of Rights Act 1990 (the NZBORA) is

also relevant[4]. That is because the exercise of a power permitting document search and seizure, even in civil proceedings, is invasive of persons, both natural and corporate[5]. Section 21 of the NZBORA provides that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property or correspondence or otherwise. Section 6 of the NZBORA provides:

> ***6. Interpretation consistent with Bill of Rights to be preferred—***
>
> *Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.*

[30] So s6 calls for the Act's provisions, affecting the existence of powers in this case, to be interpreted in a way that is consistent with s21. Put another way, unless Parliament can be said confidently to have allowed what might otherwise be constrained by the application of s21, the Court should be disinclined to find the existence of a power of search or seizure even although on occasion its exercise might be said to be reasonable. Section 5 (*"Justified limitations"*) causes s21 rights to be subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. However, it would be difficult to argue that the erosion of the freedoms permitted impliedly by the existence of the Anton Piller remedy in the High Court, should thereby affect the interpretation of the Employment Relations Act to permit extension of the power to the Employment Relations Authority and/or the Employment Court.

[31] When Parliament enacted the Labour Relations Act in 1987 it transferred expressly a slice of the High Court's former jurisdiction to the Labour Court. This was the jurisdiction to hear and determine common law actions in certain specified torts generally relating to strikes and lockouts. In the same connection, Parliament gave the Labour Court specified powers to grant injunctive relief.

[32] The enactment of the Employment Contracts Act 1991 represented, in many respects, a radical departure from previous employment law regimes. Parliament retained specialist institutions to deal with litigation about employment issues but also emphasised that the common law of contract was to be applied to such litigation where that did not conflict with express specialist provisions, for example affecting

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[4] The NZBORA is engaged because, under s3, acts of the judicial branch of government are in issue.

questions of lawful strike and lockout or the statutory requirement for dismissals to be justifiable.

[33] Relevant statutory provisions in the 1991 Act included s104 (*"Jurisdiction of the Court"*). Section 104(1) contained a mix of jurisdictions and powers including:

> *(g) To hear and determine any action founded on an employment contract:*
>
> *(h) Subject to subsection (2) of this section, to make in any proceedings founded on or relating to an employment contract any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts:*
>
> …

[34] Relevant sections of the Employment Relations Act 2000 in force at the time of the making of the orders in the present case include the following. The *"object"* of the Act is said by s3 to be to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship including:

> *(v) by promoting mediation as the primary problem-solving mechanism; and*
>
> *(vi) by reducing the need for judicial intervention;…*

[35] Section 99 provides expressly that the Employment Court is to have full and exclusive jurisdiction to hear and determine proceedings founded on tort in connection with a strike or lockout, threatened, occurring, or past, and also in respect of picketing relating to a strike or lockout. In that regard, s100 grants to the Court a similarly full and exclusive power in such proceedings to grant relief by way of injunction.

[36] Part 9 (*"Personal grievances, disputes and enforcement"*) has its own object section, s101. Subsection (a) provides that Part 9 is *"to recognise that, in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures"*.

[37] Part 10 (*"Institutions"*) also has its own object section. Section 143 provides that Part 10 is to establish procedures and institutions that:

> *(a) support successful employment relationships and the good faith obligations that underpin them; and*
>
> *(b) recognise that employment relationships are more likely to be successful if problems in those relationships are resolved promptly by the parties themselves; and*

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[5] Section 29 extends the rights under the Act to *"all legal persons"*, i.e. the intervener company.

> *(c) recognise that, if problems in employment relationships are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available at short notice to the parties to those relationships; and*
> *(d) recognise that the procedures for problem-solving need to be flexible; and*
> *(da) recognise that the person who provides mediation services can manage any mediation process actively; and*
> *(e) recognise that there will always be some cases that require judicial intervention; and*
> *(f) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and*
> *(fa) ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations; and*
> *(i) recognise that difficult issues of law will need to be determined by higher courts.*

## Jurisdiction and powers of the Employment Relations Authority

[38] Section 127 empowers the Employment Relations Authority to make orders for interim reinstatement in employment pending determinations of personal grievances for unjustified dismissal. Under the predecessor legislative regime that was a power exercisable by the Employment Court at common law by interlocutory injunction, approved by the Court of Appeal in *Board of Trustees of Timaru Girls' High School v Hobday* [1993] 2 ERNZ 161 (CA) (discussed subsequently). Section 127(4) now provides that: *"When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of this Act."* Subsection (7) preserves expressly the Court's former common law power under the previous statutory regime to grant *"an interim injunction reinstating an employee if the Court is seized of the proceedings dealing with the personal grievance."*

[39] The role of the Employment Relations Authority under s157 is to be *"an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities."* The Authority must comply with the principles of natural justice, aim to promote good faith behaviour, support successful employment relationships and generally further the object of the Act. Section 157(3) provides that: *"The Authority must act as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with this Act or with*

*the relevant employment agreement."* Section 159 emphasises the paramountcy of mediation as a first dispute resolution mechanism.

[40] The Authority's powers provided in s160 enable it, in its investigation of any *"matter"*, to call for evidence and information from parties or any other persons, to require parties or any other persons to attend an investigation meeting to give evidence, to interview any parties or any persons at any time before an investigation meeting, and to "*follow whatever procedure the Authority considers appropriate*." Section 160(2) enables the Authority to *"take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not."*

[41] Section 161 categorises the Employment Relations Authority's jurisdiction. To make determinations about employment relationship problems generally, the Authority has *"exclusive jurisdiction"* including, under subs (1)(r), in respect of *"any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort)"*.

[42] Section 162 is at the heart of the issues in this case. It provides that with certain exceptions that are irrelevant to this case, the Authority may, in any matter related to an employment agreement, make any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts, including the Contracts (Privity) Act 1982, the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979, the Fair Trading Act 1986, the Frustrated Contracts Act 1944, the Illegal Contracts Act 1970, and the Minors' Contracts Act 1969.

[43] Section 165 provides that Schedule 2 to the Act applies in relation to the Authority *"and matters within its jurisdiction"*. Powers in Schedule 2 include to summons witnesses to an Authority investigation meeting and to take evidence both at a distance and on oath. Clause 17 of Schedule 2 provides that any person may apply to the Authority to accord urgency to an investigation and, if satisfied that it is necessary and just to do so, it must order that the investigation take place as soon as practicable.

[44] There are no statutory qualifications for appointment as a member of the Employment Relations Authority exercising its jurisdiction. Some members have

qualified and practised as lawyers: others have not. Cases are allocated apparently randomly among members, that is without regard to matching skills, experience or qualifications to particular types of cases or issues in them. We agree with the High Court's conclusion in *BDM Grange Ltd v Parker* [2006] 1 NZLR 353, 380 that it is a *"lay authority"* in the sense that it is not presided over by judicial officers. It is important to our decision that the Authority is not a court.

[45] Section 173 addresses the Authority's procedure. It is required to comply with the principles of natural justice and must also act in a manner that is *"reasonable having regard to its investigative role"*. Under s174 the Authority's *"determinations"* must contain certain specified minimum information but also need not contain other specified information *"for the purpose of delivering speedy, informal, and practical justice to the parties"*. Section 178 permits matters to be removed from the Authority to the Employment Court if the Authority is satisfied that one or more statutory conditions under subs (2) exist[6].

## The High Court's judgment in the *BDM Grange* case[7]

[46] In the course of the hearing before us, a full Court (Baragwanath and Courtney JJ) of the High Court issued its judgment in *BDM Grange*. Although this did not address precisely the same issues as are before us, it has, nevertheless, assisted us to determine this case.

[47] In *BDM Grange*, a former employer issued proceedings in the High Court and subsequently in the Employment Relations Authority in respect of a number of causes of action against its former employee, his new trading entity and that entity's parent company. The former employer had sought and obtained Anton Piller orders from the High Court. The former employee asserted that jurisdiction to deal with all matters between the parties lay with the Employment Relations Authority and sought to strike out the former employer's proceedings in the High Court. There was no challenge as such about the respective powers of the High Court and the Employment Relations Authority to issue Anton Piller orders. Rather, the case turned on whether causes of action in equity, tort and for breach of statutory

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[6] For a more detailed discussion of the exercise of these powers of removal, see the judgment of this Court in *Auckland District Health Board v X (No 2)* [2005] 1 ERNZ 551.
[7] *BDM Grange Ltd v Parker* [2006] 1 NZLR 353 already referred to at paragraph [44].

obligations were properly within the Employment Relations Authority's exclusive jurisdiction.

[48] The parts of the full Court's judgment addressing issues for decision in this case before us are in the nature of comments so that although they are not binding on us, they nevertheless command respect and are certainly influential. That is particularly so in respect of the remarks that the High Court made about the Employment Court's jurisdiction because that was not at all for decision in the case. In some respects, also, the High Court appears not to have appreciated the distinctions between the Employment Relations Authority and the Employment Court. For example, the Employment Court's jurisdiction in tort in respect of strikes and lockouts was attributed erroneously to the Employment Relations Authority[8]. We have assumed these slips for the purposes of our recourse to the judgment so far as the argument for an originating power of the Court is concerned.

[49] The first important statement made by the High Court so far as this case is concerned, and with which we respectfully agree, is at paragraph [18] stating that the Employment Relations Authority and the Employment Court do not possess inherent jurisdiction. The jurisdictions of all courts and tribunals, except the High Court, must come from statute. The power of the High Court to issue Anton Piller orders comes from its inherent jurisdiction. It is not a codified power. So it follows that unless Parliament has given the Employment Relations Authority and/or the Employment Court the statutory power otherwise enjoyed inherently by the High Court, Anton Piller orders cannot issue other than out of the High Court. Next, the judgment of the full Court confirms that the Employment Relations Authority does not enjoy a jurisdiction in tort. Although at one point the judgment attributes a limited tort jurisdiction to the Authority at paragraph [37], that must be erroneous: the tort jurisdiction referred to as contained in s100 is that reposed in the Employment Court. Nor does the Authority have a jurisdiction in causes of action other than arising out of, or related to, employment agreements.

[50] At paragraph [91] and following of its judgment the High Court addresses Anton Piller orders. At paragraph [93] the judgment confirms that the order in that case was made in the exercise of the High Court's inherent jurisdiction. That

[8] Para [37] of *BDM Grange.*

paragraph records that there is nothing in the Employment Relations Act 2000 expressly conferring such jurisdiction on the Authority.

[51] The High Court confirmed that s221 of the Employment Relations Act (joinder, waiver, and extension of time) does not accord Anton Piller jurisdiction. The stronger argument that s161(1)(r) does so was also rejected.

## Decision on powers of Authority

[52] We respectfully agree with the High Court's conclusion that the Employment Relations Authority is not empowered to make Anton Piller orders for the reasons set out in its judgment. The High Court did not find, or offer an opinion on the question now before us, whether this Court can make such orders independently.

[53] As the High Court found in *BDM Grange*, and we agree, s221 relating to joinder, waiver, and extension of time, does not confer on the Authority powers to order search and seizure. Nor does s161(1)(r). That addresses the sorts of problems or matters the Authority is entitled to determine, not its powers exercisable within that jurisdiction or class of cases. As a matter of statutory interpretation we conclude that the phrase in s161(1)(r) *"any other action … arising from or related to the employment relationship"* does not afford the Authority a power to make orders for search and seizure.

[54] The same applies to *"Powers"* expressly given to the Authority by s160. Again as a matter of statutory interpretation we conclude that the power of the Authority in investigating any matter to *"call for evidence and information from the parties or from any other person"* does not extend to making Anton Piller orders as in this case. Nor does the catch-all power under s160(1)(f) to *"follow whatever procedure the Authority considers appropriate"*.

[55] Section 162 does not give the Authority this power. The High Court's power to issue Anton Piller orders is not to make an order that it may make *"under any enactment or rule of law relating to contracts"*. Anton Piller orders are not an interlocutory tool derived from a rule of law relating to contracts. Although such orders can be made by the High Court in contract cases, they originated from and include other causes of action including, for example, copyright. As *BDM Grange* confirms, the scheme of the Employment Relations Act 2000 is not such as to give

the Employment Relations Authority jurisdiction in causes of action other than (employment) contract and, in a limited sense in relation to the Court, in tort.

[56] Although not in effect when this case was before the Authority, we do not consider that the new s173(2C) that confirms that the Authority is not precluded from making ex parte orders, now allows it to make Anton Piller orders. There are many express powers that the Authority can exercise in the absence of one party, but confirming its ability to do so is not the expression of legislative intention to empower it to grant Anton Piller orders. Section 173(2B)(b) makes this clear in any event.

[57] Finally, it is a powerful argument against the availability of the power in the Employment Relations Authority that Parliament has enacted such strict privative provisions on review of the Authority's processes that it is extremely difficult, if not impossible, to challenge even significant and draconian orders or directions that the Authority makes in the course of its investigation of employment relationship problems. Provisions such as ss177(4), 178(6), 179(5) and 184(1A) (especially) all purport to give the Authority forensic carte blanche to conduct and complete its statutory role of solving employment relationship problems even to the extent that orders made or directions given by it along the way that may be significant and irreversible in their effect, are unchallengeable by appeal or review. Under such a statutorily exclusive regime it would be wrong to impute to the Authority what are draconian implied powers.

[58] There being no express statutory power, we have concluded that the Employment Relations Authority is not able to make Anton Piller orders.

## Employment Court's jurisdiction and powers (derivative and original)

[59] The Court has the same powers as the Employment Relations Authority when considering a challenge. For the reasons just given, it must follow that the Court was not entitled in law to make an Anton Piller order on a challenge derivatively.

[60] The next question is whether the Court has a power independent of derivative power to make Anton Piller orders on originating applications in respect of proceedings otherwise in the Authority of the Court. If the Court had such a power, it may justifiably have treated Axiom's application as one for an originating order.

[61] Section 186 establishes the Employment Court as a court of record *"which, in addition to the jurisdiction and powers specially conferred on it by this Act or any other Act, has all the powers inherent in a court of record."* Subsection (2) declares the Court so created to be the same Court as the Employment Court under the Employment Contracts Act 1991.

[62] Section 187 categorises the Court's (exclusive) jurisdiction. Included is the jurisdiction to hear challenges under s179 from the Authority in respect of those matters in which jurisdiction was conferred on the Authority. Section 187(1)(h) provides the jurisdiction to hear and determine proceedings founded on tort and resulting from or related to a strike or lockout, and subsection (1)(i) grants jurisdiction to hear and determine applications for injunctions of a type specified in s100. Section 187(1)(m) provides a catch-all (perhaps more correctly a "catch some more") *"to exercise such other functions and powers as are conferred on it by this or any other Act."* The Authority's powers or jurisdiction under s162 set out earlier in this judgment are extended to the Court by s190(1). Other powers are provided by Schedule 3 to the Act including, under clause 13, powers to order non-party discovery of documents pursuant to ss56A and 56B of the District Courts Act 1947.

[63] Section 193(1) provides that except on the ground of lack of jurisdiction or otherwise in ways not relevant to this case, no decision, order or proceeding of the Employment Court is removable to any other court by certiorari or otherwise, or liable to be challenged, appealed against, reviewed, quashed, or called into question in any court. That *"lack of jurisdiction"* is defined in subs (2) to exist only where, in the narrow and original sense of the term, the Court has no entitlement to enter upon the inquiry in question or the decision or order is outside the classes of decisions or orders which the Court is authorised to make, or the Court acts in bad faith.

[64] Section 196 gives the Court jurisdiction to deal with cases of contempt in the face of the Court or in the face of the Employment Relations Authority.

[65] Essential qualifications for judicial appointment to the Employment Court are the same as those for appointment to the District and High Courts (s200) and s203 provides that the Judges of the Employment Court have all the immunities of a Judge of the High Court.

[66] Section 212 permits the Court to make rules, although not inconsistent with the Act (or any regulations made under it), *"for the purpose of regulating the practice and procedure of the Court and the proceedings of parties."* In respect of proceedings in relation to torts under s99, injunctions under s100, and to judicial review under s194, and to the extent that the Court has not made rules, such proceedings are to be regulated by the rules applicable to proceedings founded on tort, injunctions and judicial review in the High Court, so far as they are applicable and with all necessary modifications. No such rules have been made by the Employment Court.

[67] Section 221 of the Act, already referred to in our discussion of the *BDM Grange* case, gives powers to the Court in original proceedings as it does to the Authority. For the same reasons that the High Court found this section did not empower the Authority to grant Anton Piller orders, we conclude likewise in respect of this Court. Because s190(1) provides that the Court has the powers conferred on the Authority by s162, it is necessary for us to consider also whether this supports the existence of an independent originating power. For the same reasons that we agreed with the High Court in *BDM Grange* on its findings on s162 in relation to the Authority, we conclude that the section does not empower the Court to make Anton Piller orders.

[68] Section 237 of the Act empowers the making of regulations by Order in Council. Such regulations may prescribe *"any act or thing necessary to supplement or render more effectual the provisions of this Act as to the conduct of proceedings before … the Court"***,** may prescribe *"the procedure in relation to the conduct of matters before the … Court"*, and, finally, may provide for *"such matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration."*: s237(c), (d) and (g).

[69] The Employment Court Regulations 2000 were made under the authority of s237. Regulation 6 that, significantly for the purposes of this decision, has no counterpart in either the provisions of the Act dealing with the Employment Relations Authority or in regulations affecting its procedure[9], provides:

[9] The Employment Relations Authority Regulations 2000.

***6 Procedure***

*(1) Every matter that comes before the Court must be disposed of as nearly as may be in accordance with these regulations.*

*(2) If any case arises for which no form of procedure has been provided by the Act or these regulations or any rules made under section 212(1) of the Act, the Court must, subject to section 212(2) of the Act, dispose of the case—*

*(a) as nearly as may be practicable in accordance with—*

*(i) the provisions of the Act or the regulations or rules affecting any similar case; or*

*(ii) the provisions of the High Court Rules affecting any similar case; or*

*(b) if there are no such provisions, then in such manner as the Court considers will best promote the object of the Act and the ends of justice.*

(our emphasis)

[70] This is the power that allows the Court to grant injunctions restraining persons from breaching employment agreements or employment laws. Although not expressly provided for as in cases of strikes and lockouts, reg 6 permits recourse in appropriate cases to r238 of the High Court Rules 1985, the High Court's broad power to issue injunctions. The Employment Relations Authority has no power to prevent a breach of, or otherwise require compliance with, an employment agreement or employment law except by a statutory compliance order. The Authority is, however, required to investigate that employment relationship problem and determine a breach before it can issue a compliance order. Especially in circumstances of great urgency, that investigative process may not be swift enough to restrain what would otherwise be irreparable harm. It is a principle of long standing that there is no such remedy as an interim compliance order. Where urgent injunctive relief is appropriate in the employment field, it is the Court that is empowered, not the Authority.

## Case law

[71] We deal first with analogous cases in which this Court's injunctive powers have been examined. In *X v Y Ltd and NZ Stock Exchange* [1992] 1 ERNZ 863 an employee who had been dismissed asked for an order that he be reinstated in employment pending the hearing and decision of his personal grievance in the Employment Tribunal. The former employer acknowledged that in cases of urgency, it was open to the Employment Court to grant relief by way of interim reinstatement

but not by injunction. The full Court of the Employment Court addressed the jurisdictional issues at pp871-872 as follows:

> *We agree that s 104(1)(h) cannot be read in isolation nor can certain words in this subsection be minutely and technically examined when consideration is given to such a fundamental issue as jurisdiction. It was the plain intention of Parliament by enacting ss 3 and 4 of the Act as well as s 104(1)(g) and (h) to transfer the whole of the jurisdiction of the ordinary Courts in relation to contracts of employment to the Employment Court. This Court's task is to make the new regime work. For it to be able to do so the Court needs and was intended to have at its command all the tools previously possessed by the Courts of ordinary jurisdiction. We emphasise that we are solely concerned with the jurisdiction of this Court and such conclusions as we make are not intended to relate to the jurisdictions of other Courts. If Mr Gray is right in his submission for the first defendant it would be necessary for a plaintiff such as X to go to the High Court for such interim relief as is sought in these proceedings and to thereafter go to the Employment Tribunal or the Employment Court for substantive relief. We do not think that that is what Parliament can have intended in its enactment of the Employment Contracts Act 1991 and its use of such phrases as "exclusive jurisdiction to hear and determine any proceedings founded on an employment contract" in s 3. We agree that the words of s 104(1)(h) give effect in plain language to that legislative intention and we do not accept Mr Gray's argument that mention of injunctions in some parts of the Act should be taken to exclude that remedy from other parts. Such an argument fails to address the purposes of the Act, including the promotion of an effective labour market and the vesting of all powers in one set of specialist institutions. Although under another legislative regime, we note that in* NZ Baking Trades IUOW v General Foods Corporation (NZ) *[1985] 2 NZLR 110, 118, Cooke P held: "Injunctions – interim or final – are a standard remedy for actionable interference with contractual rights."*
>
> …
>
> *We conclude that this Court has the jurisdiction to make the orders sought by the plaintiff for the foregoing reasons. …*
>
> *The effect of this finding is that we are unable to uphold the submission of counsel for the first defendant that in bestowing on this Court jurisdiction to grant injunctions in cases of economic torts (ss 73 and 74 of the Act), the legislature expressly denied the Court jurisdiction to grant other injunctions in actions arising out of Employment Contracts such as the present one.*

[72] The Employment Court concluded that s104(1)(h) of the Employment Contracts Act 1991 empowered it to order interim reinstatements in employment by injunction (although not restricted to common law cases) including in personal grievance cases that were thereafter to be heard and determined at first instance by the Employment Tribunal.

[73] The Court of Appeal considered the existence of this power in a later case, *Board of Trustees of Timaru Girls' High School v Hobday* (reported as *Hobday v Timaru Girls' High Trustees*) [1993] 2 ERNZ 161 where the Employment Court's

power to order interim reinstatement pursuant to s104(1)(h) was challenged. Casey J, delivering the judgment of the Court of Appeal and after setting out the foregoing passage in *X v Y*, held:

> *We entirely agree with the reasoning and conclusion reached there by the Court, which were relied on by Judge Palmer in the present case; and we are not persuaded otherwise by Mr Couch's painstaking analysis of the Act, including the adoption of arguments which were so effectively rejected in* X v Y. *Indeed, it would be an extraordinary situation if something so fundamental as the preservation of the position of an employee complaining of unjustified dismissal could not be preserved pending resolution of his or her personal grievance, when the Act provides for reinstatement as a remedy. Because it is virtually impossible to have immediate adjudication by Courts or tribunals, protection of the status quo is generally available in other areas of litigation or dispute resolution. It cannot have been the intention of the Legislature to deny this remedy to employees involved with the new procedures under the Employment Contracts Act; to do so would be quite inconsistent with its emphasis on mediation and settlement.*
>
> *We agree with the Employment Court that the wording of s 104(1)(h) is wide enough to encompass the High Court's powers to make interim injunctions relating to contracts, and the jurisdiction to do so accords with the wording of s 76(d) quoted above, which includes among the objects of the Employment Court that of overseeing the role of the Tribunal, and a recognition that the parties to employment contracts may require its assistance from time to time.* (pp162, 163)

[74] Although not so articulated, the order for interim reinstatement in employment was in the nature of an interim injunction for specific performance of an employment contract and therefore met the description in s104(1)(h) *"… any order that the High Court or a District Court may make under any … rule of law relating to contracts"*.

[75] For the balance of the life of the Employment Contracts Act 1991, the Employment Court exercised this interim reinstatement jurisdiction from time to time. It also decided other applications for injunction without challenge as to jurisdiction. Included among these were applications for injunctions to enforce restraints upon economic activity contained in employment contracts and, pending permanent orders, interlocutory injunctions to the same effect.

[76] During the same legislative regime the Employment Court also from time to time applied by analogy the rules of the High Court in dealing, within its jurisdiction, with common law claims for breach of contract and in those claims in tort specifically allocated to the Employment Court. Several cases arose in which the jurisdiction of the Court to do so was in sharp focus. One of those concerned whether the Employment Court could order a medical examination of a party

pursuant to s100 of the Judicature Act 1908, a power given to the High Court expressly[10]. Because the power to do so was in the Act and not the High Court Rules, the Employment Court declined to accept its availability.

[77] Under the 2000 Act, the Court has continued from time to time to exercise powers in reliance on the High Court Rules including, for example, applications for security for costs (*Koia v Attorney-General in respect of the Chief Executive of the Ministry Of Justice* [2004] 1 ERNZ 116), correction of an accidental slip or omission (*Vaughan v Canterbury Spinners Ltd* unreported, Goddard CJ, 18 March 2004, CC 5/04) and to require answers to interrogatories (*Bowport Ltd v Turnbull* [2004] 2 ERNZ 201.

[78] In no case, however, has this Court examined the basis in law of a power to make Anton Piller orders, and certainly not with the microscopic detail that the arguments in this case have provided. Precedent does not assist us greatly in deciding this case.

## A power inherent in a court of record?

[79] Is a court of record empowered by reason of that status to make Anton Piller orders? Section 186(1) provides that the Employment Court is a court of record with all inherent powers of such courts. That is not a categorisation enjoyed by the Employment Relations Authority which is not a court[11]. Although under s257 of the Legislature Act 1908 *"Court of record"* means the Court of Appeal, the High Court and every District Court, that definition has been necessarily supplemented by s186 of the Employment Relations Act 2000 to include the Employment Court.

[80] What is a court of record and what are its powers? It is one, literally, that creates and maintains a record of its proceedings. It is also a court that is empowered to deal with contempt in its face, that is with contemptuous conduct exhibited to the Court while it is sitting. As already noted, the Employment Court has this power expressly in any event under s196 of the Employment Relations Act 2000. It is noticeable that under s196(2)(b) it is the Court alone that has power to punish for contempt in the face of the Authority.

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[10] *A Ltd v B* [1998] 3 ERNZ 1191; *Woolf v Kelston Girls' High School Board of Trustees.* unreported, Colgan J, 19 April 2000, AC 28/00; *Lloyd v Museum of New Zealand Te Papa Tongarewa* [2002] 1 ERNZ 744.

[81] Mozley & Whitely's Law Dictionary (12th ed, 2001) includes among its definitions of *"Court of record"*:

> *A court whose acts and judicial proceedings are enrolled for a perpetual memorial and testimony; whose rolls are the* records *of the courts. All courts of records are the Queen's courts, and no other court has authority to fine and imprison. The very establishment of a new jurisdiction with the power of fine or imprisonment makes it instantly a court of record. … A court not of record, says Blackstone, is the court of a private man, whom the law will not entrust with any discretionary power over the fortune or liberty of his fellow-subjects.*

[82] The relevant passage in the Laws of New Zealand (Courts) para 5 states:

> *Courts may be classified as Courts of record or Courts not of record. The distinction was once important, affecting both the jurisdiction to fine or imprison and the conclusiveness of the Court's record. Today, the distinction is of little more than historical interest, for in New Zealand all the Courts, other than the Employment Relations Authority*[12] *and Coroners, are expressly declared by statute to be Courts of record. …*

[83] Addressing *"Superior and inferior Courts"* at para 6 the reference immediately following states:

> *Courts may be divided into superior and inferior Courts. An inferior Court is defined as any Court of judicature within New Zealand of inferior jurisdiction to the High Court. The superior Courts are therefore the High Court, the Court of Appeal, the Supreme Court, and the Courts Martial Appeal Court. The term "inferior" may also be used in different senses, as referring to a Court that is subject to appeal to or jurisdictional control by the High Court, or as referring to the requirement that in its proceedings and in particular in its judgments it must appear that an inferior Court is acting within its jurisdiction. Both senses of the term apply in New Zealand. A superior Court will be presumed to have jurisdiction unless the contrary is shown; while the jurisdiction of an inferior Court must be established on the face of the proceedings or in some other way. A superior Court, while bound to observe the limits of its own jurisdiction, has authority to determine judicially and authoritatively what those limits are; but an inferior Court does not have that authority. A jurisdictional error by an inferior Court is liable to correction by the High Court in the exercise of its general supervisory jurisdiction, even if there is no right of appeal. The unreversed judgment of a superior Court, therefore, is conclusive as to all matters decided by it; but the judgment of an inferior Court involving a question of jurisdiction is not final.*

[84] The Australian equivalent, Halsbury's Laws of Australia (Courts and the Judicial System) at paragraph [125-30] defines a court of record as follows:

> *Where a court is declared a court of record by statute it only has such powers as are conferred by the legislature and can enforce those powers only by*

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[11] *Claydon v Attorney-General* [2002] 1 NZLR 130 (HC); [2002] 1 ERNZ 281; [2004] NZAR 16 (CA) and *BDM Grange.*

[12] We would go further. As we have found earlier, the Employment Relations Authority is not even a court, let alone one of record.

*means conferred by statute.* [Re O'Callaghan *(1899) 24 VLR 957 sub nom* R v Candler; Ex rel Dillon *(1899) 5 ALR 163; 21 ALT 7, SC(VIC), Full Court.*]

[85] Finally, the Privy Council addressed the nature and consequences of a court of record in *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2004] UKPC 26; [2005] 1 AC 190; [2004] 3 WLR 611; [2005] 1 All ER 499 ( PC). The Board doubted whether the early case of *R v Clement* (1821) 4B & Ald 218; 106 ER 918 was still good law and was, in any event, too insecure a foundation on which to rest the exercise of an inherent power in a Court of Record to make orders regulating its proceedings. The Board concluded that if the Court was to have the power to make orders against the public at large (about what the press might publish concerning proceedings in open court), such power must be conferred by legislation.

[86] In none of the research material about courts of record is it suggested that this status alone allows for the existence of inherent or implied powers to grant relief in the nature of Anton Piller orders. We have concluded that the *"implied powers"* of a court of record do not, alone, extend to making Anton Piller orders in the course of proceedings within a court's jurisdiction. Although a court of record is not precluded from exercising implied powers, there must be something more to justify the existence of this power.

## Other inherent jurisdiction/inherent powers?

[87] In an article by MS Dockray *The Inherent Jurisdiction to Regulate Civil Proceedings* (1997) 113 LQR 120, 120 the following passages appear:

> *The phrase "inherent jurisdiction of the court" is in constant use today. It found its way into the judgments in over 40 reported cases in 1995. Clearly this is an important idea, and not just in terms of frequency of use. It is the foundation for a whole armoury of judicial powers, many of which are significant and some of which are quite extraordinary and are matters of constitutional weight. They include power to deny a litigant a full hearing* [Anton Piller KG v Manufacturing Processes Ltd *[1976] Ch 55 (inherent jurisdiction to dispense with notice and make an ex parte order for inspection of property)*] *…*
> *…*
> *For a concept in common currency, and one which is doing important work, "inherent jurisdiction" is a difficult idea to pin down. There is no clear agreement on what it is, where it comes from, which courts and tribunals have it and what it can be used for. The law reports are full of apparently contradictory statements on these questions. In this area, there is little which can be said with complete confidence; the uncertainty of the law is almost the only thing which is never in doubt.*

[88] The Employment Court, under the current and two predecessor statutory regimes, has considered and/or referred to inherent/implied jurisdiction/powers on a number of occasions. Because none of the judgments in these cases addresses directly the Employment Court's powers to grant Anton Piller orders but deal with other implied or inherent powers, we refer to them only briefly to note the sorts of powers that have been determined to exist. They include powers:

- to direct parties to mediation[13];
- to supervise representation of parties in court proceedings[14];
- to authorise service of proceedings overseas[15];
- to punish for contempt other than in the face of the Court[16].

[89] We summarise the rationale for finding and invoking the inherent powers as the Court did on these occasions as being to enable it to act effectually within its jurisdiction, for the necessary expedition of the administration of justice and to avoid abuse of the Court's process. The Court did not have the benefit of comprehensive argument about Anton Piller orders in any of these cases. It is a significant step to conclude that the use of inherent powers to enable the Court to act effectually, to expedite the administration of justice and to avoid abuse of process, means that an implied or inherent power should also be claimed to make Anton Piller orders.

## An original power of the Court?

[90] Having determined that there is no derivative power on a challenge, the second question is whether there is a statutory provision that gives the Employment Court an independent power to make search and seizure orders on an originating application. If there is such a power, the Court may justifiably have treated Axiom's application as one for the exercise of an original power and not a challenge. We have concluded, however, that the Court is not so empowered.

[91] There is no express statutory power that would enable the Employment Court to exercise the High Court's inherent power to make Anton Piller orders. Regulation 6(2)(a)(ii) of the Employment Court Regulations 2000 allows the Employment Court to dispose of a case for which no form of procedure has been provided by the

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[13] *Bamber v Air New Zealand Ltd* unreported, Goddard CJ, 13 July 1995, AEC 32G/95.
[14] *Owen v McAlpine Industries Ltd* [1999] 1 ERNZ 870.
[15] *White v Fellow Travel Inc* [2004] 2 ERNZ 32.

Employment Relations Act, as nearly as may be practicable in accordance with the provisions of the High Court Rules affecting any similar case. Although Mareva injunctions are so covered, Anton Piller orders are not because of their inherent nature. Nor do we consider that reg 6(2)(b) can be used in the absence of a statutory power underpinning Anton Piller orders.

[92] Although not argued by Mr Patterson in support of the existence of the power, there is a further consideration that we have addressed. Access to the High Court Rules via reg 6(2)(a)(ii) includes, in theory at least, access to r9. That addresses, for the High Court, *"Cases not provided for"* and, in particular:

> *If any case arises for which no form of procedure is prescribed by any Act or rule or regulation or by these rules, the Court shall dispose of the case as nearly as may be practicable in accordance with the provisions of these rules affecting any similar case, or, if there are no such rules, in such manner as the Court thinks best calculated to promote the ends of justice.*

[93] Just as we have concluded that reg 6(2)(b) of the Employment Court Regulations 2000 does not save the position for the plaintiff, so too does the catch-all r9 not provide a sufficient foundation for the existence of the power to make Anton Piller orders. All the commentaries agree that this power comes from the High Court's inherent powers and not from r9 or similar rules in other jurisdictions.

[94] In support of the Authority having the power to make Anton Piller orders, the plaintiff referred to the problem of seeking interlocutory relief in a forum where the substantive dispute will not be heard and decided. That is an argument of practicality and expediency rather than one based on rules of law but we consider it briefly.

[95] Although undoubtedly inconvenient, the necessity to seek forms of interlocutory relief elsewhere than in the institution where the substantive case will be heard, is not without precedent, either generally or even in the field of employment law. As has been noted already, employees whose cases were otherwise for decision by the Employment Tribunal, had to apply for interim reinstatement by a discrete application for injunction made to the Employment Court. Although, in 2000, Parliament invested expressly that power in the Employment Relations Authority, the previous position worked tolerably well for many years.

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[16] *NZ Railways Corporation v NZ Seamen's IUOW and Evans (No 2)* [1989] 2 NZILR 613.

[96] A similar situation prevails in respect of Mareva injunctions in the field of relationship property. The Family Court is precluded expressly from making such orders that are nevertheless appropriate from time to time. There is now no originating jurisdiction in the High Court in respect of relationship property matters. A party wishing to preserve relationship property by Mareva injunction must file a pro forma application to the Family Court together with an ex parte application for removal of the proceeding to the High Court whereupon an ex parte application can be made to the High Court for a Mareva injunction.

[97] Although no doubt inconvenient, an originating application made to the High Court in respect of a case that will otherwise be for the Employment Relations Authority or the Employment Court at first instance, is neither unprecedented nor particularly problematic. The desire for procedural expediency cannot trump the absence of a power in law on such a fundamental question affecting the rights and liberties of persons.

## Implications in practice of judgment

[98] Parties seeking Anton Piller orders in proceedings or intended proceedings that are within the exclusive jurisdiction of the Employment Relations Authority or the Employment Court will have to apply to the High Court for such relief. Whether this was intended by the drafters of the Employment Relations Act 2000 is not for us to say. As in all such matters, Parliament and the Executive, through statute and regulation, have it in their power to rectify the position if they consider the consequence of our decision undesirable in practice. In this regard we note that if the recommendations of the Rules Committee are adopted, Anton Piller orders may in future be governed by the High Court Rules, in which case reg 6 of the Employment Court Regulations 2000 will extend such powers to this Court in appropriate cases and as is now the case for Mareva injunctions. However, this will not confer the power on the Authority.

[99] The other matter that we mention for the assistance of the parties and others is that the High Court Rules 1985 contain other procedures that, although not identical to Anton Piller orders, may in appropriate cases be effective substitutes for them and available in this Court, although not in the Authority. These include the power to order the inspection, sampling and observation of any property under r322. This power includes the authorisation of persons to enter land or to do anything for the

purpose of getting access to such property. The second power, whether or not used in combination with r322, is to make an order under r331 for the detention, custody or preservation of any property with similar powers to authorise entry onto land or doing other things for the purpose of giving effect to such an order. Applications for such orders may be heard ex parte in appropriate cases. For many litigants these may provide be a real choice of remedy and therefore of venue but Anton Piller orders can, in our conclusion, only be sought in the High Court.

## Summary of judgment

[100] The power to make Anton Piller orders is one possessed inherently only by High Court Judges. For other courts or tribunals to have such an invasive and coercive power, it must be given expressly by statute. The Employment Court and the Employment Relations Authority are creatures of statute, the Employment Relations Act 2000 and associated regulations. The Court's powers, especially when dealing with challenges as this was, are derivative of those of the Authority. Because the Authority does not have the power the Court cannot derive it from that source. We have also concluded that the power has not been given to the Court alone to exercise at first instance.

[101] The Anton Piller order made in this Court on 8 October 2004 is set aside as having been made in the absence of a power in law to do so. In view of this conclusion, it is unnecessary to address the many and comprehensive fall-back submissions made on behalf of Equity on the merits of the case and the legal argument about the power to grant relief against non-parties.

## Costs

[102] These are reserved. We note clause 19 of Schedule 3 to the Act that costs may be awarded to *"any party"*. The intervener (Equity) is probably not a party to the proceeding, at least at present. Any questions of costs may henceforth be dealt with by a single Judge.

GL Colgan
Chief Judge
for the full Court

Judgment signed at 11 am on Friday 4 August 2006

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