IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 3
WRC 49/09

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	NORTHLAND DISTRICT HEALTH BOARD AND 20 OTHERS Plaintiffs
AND	NEW ZEALAND RESIDENT DOCTORS' ASSOCIATION INC Defendant

Hearing:	10 February 2010 (Heard at Wellington)
Counsel:	Hamish Kynaston and Andrea Pazin, counsel for plaintiffs Bill Manning and Anna Paton, counsel for defendant
Judgment:	20 January 2011 00:30:00
Reasons:	20 January 2011

REASONS FOR JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] These are the reasons for dismissing the plaintiffs' proceedings in an oral judgment delivered at the end of the hearing on 10 February 2010.[1] That was done on a clear view of the merits of the proceeding, to allow the parties to get on with collective bargaining at the earliest available opportunity, and because of pressure of other judicial work requiring urgent decisions. I regret the subsequent delay in the provision of these reasons.

[1] [2010] NZEmpC 8.

[2] The question of law which caused this proceeding to be removed by the Employment Relations Authority for hearing at first instance in this Court concerns how a union may sign a notice initiating bargaining under s 42 of the Employment Relations Act 2000 (the Act). In this case, the defendant's notices initiating collective bargaining with district health boards were signed by an employee of a contractor to the Union, for and on behalf of ("pp") the Union's General Secretary. The plaintiffs say that this does not meet the requirement in s 42(2)(a) of the Act that a compliant notice initiating bargaining "… is in writing and signed by the union or the employer giving the notice or its duly authorised representative …".

[3] A second issue raised by the defendant was whether, even if the plaintiff is right that the bargaining initiation notices had not been signed lawfully, these had been validated retrospectively by the Union.

[4] There was also a third issue, also raised by the defendant, in the event that the Court might decide in favour of the plaintiffs on either or both of the first two issues. This was whether, under s 219 of the Act, the Court is entitled to, and if so should, validate any informality in the notices initiating bargaining.

[5] The significance of what might be seen as esoteric questions lies in the order in which bargaining has been lawfully initiated. The plaintiffs sought to have a very different bargaining agenda from the defendant's. The statute gives unions the first opportunity to initiate bargaining and the case law[2] means that if this opportunity is taken lawfully, an employer cannot counter-initiate bargaining on its terms. So if the district health boards could have had the Union's purported initiation of bargaining declared invalid, then the employers' purported initiation of bargaining would have moved to the front of the queue and the Union would have borne the disadvantage experienced by the employers, of having the initial bargaining agenda set for it.

Facts

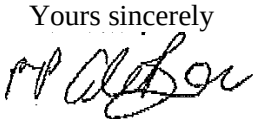
[6] Deborah Powell is the General Secretary of the defendant. Dr Powell is also the majority shareholder in and director of Contract Negotiation Services Limited

[2] *Service and Food Workers Union Nga Ringa Tota Inc v Auckland District Health Board* ERNZ 553.

(CNS). The defendant contracts with CNS for advocacy services in negotiating collective agreements, representation and advice in employment relations disputes on behalf of the Union's members, for Dr Powell's services as the Union's General Secretary, and for the administration of the Union's business. The Union has no employees or other full-time staff of its own although it does, of course, have a president and other elected officers and an elected executive. All administrative operations of the Union are carried out by CNS, one of whose employees is a solicitor, Carisse de Beer.

[7] Following ballots of its members which approved the negotiation by the defendant of a number of different collective agreements, on 16 November 2009 Dr Powell instructed her staff to prepare, check, sign, and send notices initiating collective bargaining for those agreements. Dr Powell was unable to sign the notices herself because she was absent on business in Christchurch. Accordingly, each notice was signed by Ms de Beer on Dr Powell's behalf.

[8] The notices initiating bargaining are all materially identical for the purpose of this case. They are under the letterhead of the defendant which includes its logo. The letters refer to the defendant's initiation of collective bargaining. They are signed as follows:

> Yours sincerely
>
> 
>
> Dr Deborah Powell
> General Secretary

[9] After a challenge to the validity of the execution of the notices by the plaintiff, the defendant's National Executive, at a quarterly meeting on 14 December 2009, resolved to ratify the bargaining initiation notices sent to the District Health Boards on 16 November 2009. The resolution so passed was to the following effect:

> That the notices of initiation for bargaining for a collective employment agreement as attached (being notices issued in respect of a single employer collective agreement with each Auckland DHB, Counties Manukau DHB and Waitemata DHB; and one multi-employer collective agreement with the other 18 DHBs), signed "pp" by Carisse de Beer for the General Secretary, should be ratified by the National Executive as having been signed by or on

behalf of NZRDA in accordance with section 42 of the Employment Relations Act 2000.

Relevant rules/law

[10] Section 42 of the Act refers to the mode of giving notice of commencement of collective bargaining as follows:

> **42 How bargaining initiated**
>
> (1) A union or employer initiates bargaining for a collective agreement by giving to the intended party or parties to the agreement a notice that complies with subsection (2).
>
> (2) A notice complies with this subsection if—
>
> (a) it is in writing and signed by the union or the employer giving the notice or its duly authorised representative; and
>
> (b) it identifies each of the intended parties to the collective agreement; and
>
> (c) it identifies the intended coverage of the collective agreement.

[11] The Union is, as all such bodies must be, an incorporated society. As such, its actions are governed by the Incorporated Societies Act 1908 and by its registered rules, as well as by relevant provisions of the Act.

[12] Rule 25.4 ("Duties and powers of the General Secretary") of the defendant's rules provides:

> It shall be the duty of the General Secretary to carry out all lawful instructions that may be given by the National Executive and Generally to perform all the duties required under the [Employment Relations] Act and usually appertaining to the offices of Secretary …

[13] Rule 46 ("**Legal Documents**") of the rules provides:

> Contracts, agreements and other instruments other than contracts and agreements made in Court shall be made in such mode as The National Executive may determine and shall be executed by the President or Secretary or in the absence of either or both of them by any two members of the Executive appointed for the purpose.

Questions for determination

[14] As the oral judgment of 10 February 2010 sets out, there are three issues for the Court. The first is whether the s 42 notices were signed lawfully in the form they were originally given.

[15] The second is that if they were not, whether the defendant nevertheless validated them retrospectively.

[16] The third, if the plaintiffs succeed in either or both of the first two issues, is whether, under s 219 of the Act, the Court is entitled to, and if so should, validate any informality of the notices initiating bargaining.

Decision – original validity

[17] The Incorporated Societies Act makes no express provision about how a society is to give statutory notices such as that required by s 42 of the Employment Relations Act. That is a matter left to the rules.

[18] The first question is whether the Union's rules dictate how bargaining initiation notices must be given and, in particular, who may sign these. Rules 25.4 and 46 set out above are the only express provisions that might possibly deal with the issue under the rules. Rule 46 is the more specific provision and is indeed that which the plaintiffs claim was both applicable to the giving of bargaining initiation notices and was breached by the defendant, making the notices invalid.

[19] The plaintiffs' case was that the notices were not signed by an employee or officer of the Union. The plaintiffs say that Ms de Beer was not empowered under the Union's rules, expressly or implicitly, to sign the notices. Rather, they say, the power to sign s 42 initiation notices rested exclusively with Dr Powell (the Union's Secretary), its President or, in their absence two members of the National Executive. The plaintiffs say that that power was not able to be delegated. It follows, in the plaintiffs' argument, that the notices could not be validated retrospectively by the

National Executive as it purported to do, and cannot and should not be validated by the Court.

[20] The plaintiffs say that r 46 of the Union's rules governs the signing of bargaining initiation notices. The Union, on the other hand, says that a s 42 notice is not a legal document covered by r 46.

[21] I deal first with whether the bargaining initiation notices can be said to have been "legal documents" as defined by r 46 of the Union's rules set out at paragraph [13] of this judgment. Most obviously, they are statutory notices required to be given to initiate the legal process of collective bargaining. They are not, and are not in the nature of, "contracts" or "agreements". They are signed and given unilaterally, unlike contracts or agreements which are bilateral or multilateral documents affecting both or all parties to a proposed event or course of action. They are notices to others commencing a statutory process.

[22] Just what is meant by in r 46 by the reference to "… other than contracts and agreements made in Court …" is enigmatic. Except for agreements to settle litigation reached in a court, which I do not consider was intended in any event, it is difficult to imagine what was meant by that phrase, certainly under the current and recent legislative regimes affecting unions. It is possible that the phrase, and indeed the whole clause, harks back to a much earlier legislative regime when awards and collective agreements were sanctioned by this Court's predecessors but even that explanation suffers from the difficulty that it is awkward to have described them as having been made "in Court". In any event, "contracts and agreements made in Court" are excluded from the requirements of r 46. The s 42 notices were not such documents.

[23] Turning to the phrase in r 46 "other instruments", I note that "instrument" is not defined in the rules and is not used in them elsewhere than in r 46. *Black's Law Dictionary*[3] provides that "instrument" means: "A written legal document that defines rights, duties, entitlements or liabilities, such as a contract, will, promissory note or share certificate." Both the New Shorter Oxford Dictionary and the Collins

[3] (8th ed, 2004) at 813.

English Dictionary include, more Generally among the definitions of "instrument", "a formal legal document". *Halsbury's Laws of England*[4] includes among the definition of "an instrument" (given under hand as opposed to seal):

> … a document in writing which either creates or affects legal or equitable rights or liabilities and which is authenticated by the signature of the author … Such documents are used in a great variety of transactions, including contracts, assignments, acknowledgements of title, and notices. The expression is not limited to documents of a formal character and it extends to any duly signed document which is intended by the author to be the means of producing a result recognised in law.

[24] Even if the notices may fall within that very General definition of "instrument", it is necessary, however, to go further than simply to apply the General legal definition to bargaining initiation notices under s 42. That is because the meaning of the word in the rule is coloured by the preceding descriptors "contracts" and "agreements". Its meaning is also affected by the subsequent words, excluding from the definition of instruments, "contracts and agreements made in Court". These qualifiers narrow the rule's definition of the word as compared to its definition in legal dictionaries.

[25] I conclude that a bargaining initiation notice under s 42 of the Act is not "a legal document" as contemplated by r 46. Although "legal" in the sense of being connected to the law, the notices are not "instruments" in the sense contemplated by the rule, that is in the nature of contracts and agreements. The Rules' reference to "execution" tends also to indicate that notices initiating bargaining were not intended to be caught by the rule. Whilst contracts and agreements are "executed", bargaining initiation notices are "signed". Section 42 notices are not required to be "executed by the President or Secretary or in the absence of either or both of them, by two members of the Executive appointed for the purpose". It follows that there was no requirement for the Union's National Executive to determine how such notices would be executed.

[26] Rule 46 does not govern the signing and giving of bargaining initiation notices. That leaves the more General r 25.4, s 42 of the Act, and any necessarily

[4] Deeds and other Instruments (online ed) at [139].

implied rule that will govern the giving of such notices and, depending upon compliance with those provisions, the notices' validity.

[27] Rule 25.4 does not assist in determining whether the notices were given lawfully. It vests in the Union's Secretary the powers and duties under the Act or otherwise as directed by the Union's executive. In this case there is no tenable suggestion that it was anyone other than the Secretary who caused the bargaining initiation notices to be given: the case turns in part on the question of delegation of the handwritten signature on those notices, a matter not dealt with by r 25.4. In these circumstances, it is necessary to go to the statute's requirements.

[28] First, the Act requires that the bargaining initiation notices were to be signed either by the Union or its duly authorised representative. The section contemplates the signing of a notice by a corporation (the Union). There is no reason in principle why the Union's duly authorised representative may not likewise be a corporation such as CNS. CNS was authorised to sign the bargaining initiation notices by the Secretary of the Union, Dr Powell. Although Dr Powell was an officer of CNS, she was, independently and importantly for the decision of this case, also the Union's Secretary. It was competent for Dr Powell to authorise herself in one capacity (as Union Secretary) to do something in another legal capacity (ie as an officer of CNS).

[29] The plaintiffs point out that neither the Industrial Relations Act 1973 nor the Employment Contracts Act 1991 provided for a specific bargaining initiation process. The Labour Relations Act 1987, however, did so. This was by a process of initiation by notice given by a union or an employer. Section 134(1) of the Labour Relations Act and reg 29 and Form 17 of the Schedule to the Labour Relations Regulations 1987 did not require that the notice be signed. Section 24 and cl 25 in Schedule 1 to the 1987 Act provided that "[d]eeds and instruments may be executed by a union or employers organisation in such manner as the rules of the Union or employers organisation prescribe." Section 37(1) and cl 25 of Schedule 1 to that Act required unions to make rules for "the execution of agreements and other legal documents". I was not assisted by predecessor legislation to determine what the current Act requires. Section 42 of the current Act is new.

[30] As Mr Kynaston for the plaintiffs pointed out, the Employment Relations Bill 2000 originally included a provision that an initiation notice would not be invalid because of technical defects. Clause 49(5) of the Bill proposed:

> A technical defect in a notice [initiating bargaining] does not make the notice invalid but the union or employer responsible for the defect must, as soon as practicable after becoming aware of the defect, advise the other and, if requested, remedy the defect.

[31] The removal of this provision was recommended by the Select Committee considering the Bill and although its report did not include reasons for its recommendation, this may have been attributable to the Department of Labour's report to the Select Committee in June 2000.

[32] I do not consider that it follows that Parliament intended thereby to impose the stricter regime contended for by the plaintiffs for the formality of bargaining initiation notices including their signing. Indeed, the signing issue raised by this case is very arguably not "a technical defect in a notice" as the Bill's original clause contemplated. It would be unsafe to assume the Legislature's intention to impose strict constraints upon the signing of bargaining notices by reference only to this change from Bill to Act.

[33] Also, as Mr Kynaston pointed out, the s 42 phrase "duly authorised representative" is, while not defined in the Act, nevertheless used as such not only in s 42 but also in s 52. This provides, in the absence of a date specified, for a collective agreement to come to force on the date on which the last party or its "duly authorised representative" signs the agreement. Counsel submitted in these circumstances the signing of a s 42 notice was considered by Parliament to have the same import as the signing of a collective agreement. Even if this is so, however, it does not assist in deciding what must constitute due authorisation. Rather, the statute simply allows persons to sign or execute documents by a duly authorised representative in two specified situations. Due authorisation is required in each case. This means that a union must authorise the initiation of collective bargaining (or the execution of a collective agreement). A lone rogue delegate, for example, cannot commit the Union lawfully to the collective bargaining process.

[34] The "due" authorisation required by s 42 in the case of a notice initiating bargaining is the membership balloting process, which both allows a union to commence collective bargaining and indeed also imposes a duty upon it to do so. In the case of the signing of a collective agreement under s 52, the "due" authorisation is the completion of the statutory ratification by union members of the terms of a collective agreement reached in collective bargaining. Likewise in this latter case, ratification of an agreement not only permits execution of it by a union but requires that formality to take place.

[35] It is correct, as Mr Kynaston pointed out, that the single word "representative" is used elsewhere in the Act. The requirement for a representative to be "duly authorised" must add a degree of procedural formality in such cases including the signing of s 42 notices. I accept, also, that bargaining initiation under s 42 creates important legal consequences, both rights and obligations, which depend upon a validly given notice.

[36] Although these relate to significant steps in bargaining, an initiation notice sets an initial but not immutable agenda for the bargaining. It does not dictate the outcome of the bargaining as initiated. Put another way, it permits a process which may lead to a binding substantive outcome in the form of a collective agreement or agreements, but this outcome is not dictated by the content of a lawfully signed bargaining initiation notice.

[37] The plaintiffs submit (correctly) that Ms de Beer is neither an employee nor officer of the Union and contend therefore that the notices cannot be said to have been signed by the Union. I do not agree with the second proposition. That is because of the manner in which the signature was expressed which is set out at paragraph [8] of this judgment. It can be said that the notice was signed by Dr Powell, the Union's General Secretary, although the physical handwritten signature applied by Ms de Beer was for and on behalf of Dr Powell. Counsel for the plaintiffs submitted that "signing" is a personal act of adding one's signature or, more formally and in the case of a corporation, by applying a seal to a document. The plaintiffs rely on the judgment of the English Court of Appeal in *London County*

Council v Vitamins, Ltd; London County Council v Agricultural Food Products, Ltd[5] where Lord Denning described the use of signatures and "pp" as follows:

> In the ordinary way, when a formal document is required to be "signed" by a person, it can only be done by that person himself writing his own name on it, or affixing his own signature on it, with his own hand (see *Goodman v J Eban Ltd*). But there are some cases where a man is allowed to sign by the hand of another who writes his name for him. Such a signature is called a signature by procuration, by proxy, "per pro", or more shortly "p.p.". All of these expressions are derived from the Latin per procurationem, which means by the action of another. A simple illustration is when a man has broken his arm and cannot write his own name. In that case he can get someone else to write his name for him: but the one who does the writing should add the letters "p.p." to show that it is done by proxy, followed by his initials so as to indicate who he is.

[38] On this authority, however, it might well be said that Ms de Beer's signature as Dr Powell's proxy was an appropriate use of the process of circumstances described by Lord Denning. Doctor Powell was absent from the Union's office and so could not write her own name on the notices but, instead, got someone else to do it for her and it was done with the appropriate notation that it was by proxy.

[39] Mr Kynaston also relied on the more recent judgment of the New Zealand Court of Appeal in *Parkin v Williams.*[6] There the Court distinguished cases where an agent purports to pass to a delegate the exercise of a discretion vested in the agent by the principal in cases where an agent does no more than authorise the execution by another as a purely ministerial act. The Court held:

> While 42 Halsbury's Laws of England (4th ed) para 42 states that an agent cannot without the consent of his principal delegate his authority to sign a memorandum. We do not read any of the cases cited as going so far as to preclude the agent from having the purely ministerial act of signing the memorandum completed by a nominee. No exercise of judgment is required at all. Certainly if there is an element of discretion or confidence involved the signing will not be a mechanical or ministerial act and other considerations will apply. But if the skill and discretion reposed in the agent has been exercised it is immaterial who performs the necessary mechanical acts needed to implement the agent's decision.

[40] Counsel for the plaintiffs said that Dr Powell did not direct Ms de Beer to sign the notices in their draft form on her behalf. Rather, counsel submitted, Dr Powell delegated the discretion to sign the notices upon Ms de Beer being satisfied

[5] [1955] 2 All ER 229, 231.
[6] [1986] 1 NZLR 294.

that they had been checked and that they met with her approval. So, the plaintiffs say, it was not a case of the Union (or Dr Powell) signing "by the hand of another", or Ms de Beer signing by "ministerial act".

[41] I conclude, however, that the principle stated by the Court of Appeal does not assist the plaintiffs in this case. The notices had been prepared by Dr Powell. Irrespective of her ability to sign them herself, she asked the solicitor, Ms de Beer, to check their accuracy. Had Dr Powell been available to do so, she would doubtless then have signed them herself after checking. In her absence, however, she directed Ms de Beer to sign the notices. This was independent of the solicitor's function of checking them. In that sense, Ms de Beer signed notices that had been prepared by Dr Powell and checked by Ms de Beer, rather than notices that Dr Powell had delegated to Ms de Beer to prepare, finalise and sign. In this sense, therefore, Ms de Beer's "pp" signature was a mechanical or ministerial act on behalf of Dr Powell.

[42] Section 42(2) specifies that a bargaining initiation notice shall be signed by the Union or its duly authorised representative. Even if the notices were not signed by Dr Powell, I am satisfied that CNS was the Union's duly authorised representative for matters related to collective bargaining including its initiation. It is not to the point that Ms de Beer may not have been "duly authorised" by the Union to sign the s 42 notice. The "duly authorised" representative contemplated by the statute was CNS. Ms de Beer was a solicitor employed by CNS. She signed on behalf of Dr Powell who was both a director of CNS and General Secretary of the Union.

[43] Next, although the plaintiffs do not argue that Dr Powell did not authorise Ms de Beer to sign the notices, they say that the latter was not "duly authorised". That is because Dr Powell did not have power under the Union's rules to delegate the signing of s 42 notices to another, whether on her behalf or in that other person's own right. The plaintiffs say that there being no express power in the rules, the question for the Court is whether one can be implied. The plaintiffs say there cannot be such an implied power. In the absence of any express power in the Union's rules as to the power or duty in relation to the signing of s 42 notices, consideration must be given to whether such is implicit in the rules.

[44] I conclude that there must be an implied power to execute s 42 notices. Doing so is at the heart of the Union's core business, collective bargaining. The nature and extent of this power must take account of the reality of the Union's day to day operations. As already set out earlier in this judgment, the Union has no administrative staff although it does have elected officers. Its day to day administrative functioning is contracted out to CNS. Dr Powell is the elected General Secretary of the Union as well as being a principal in CNS. She is the public face of the Union including in its dealings with employers on employment related matters.

[45] Building on my earlier conclusion that a ballot of union members in favour of collective bargaining both permits and requires the Union to initiate the process, in the absence of an express power to do so in the rules, there must be an implied power to this effect. It is the nature and detail of that power which must be determined to decide, in turn, whether it was exercised in this case.

[46] The Union has members spread throughout New Zealand and it is both necessary and logical that the primary power to sign such notices not only resides with the President or General Secretary of the Union but must also be delegatable to and within the organisation responsible for its administration and collective bargaining, in particular, CNS. I consider such a delegation extends to an appropriate employee of CNS such as a solicitor on its staff.

[47] An apparently tenable argument for the plaintiffs on the question of implied powers is contained in r 17.4 which provides: "Branch Officers and Executives shall have only those powers conferred on them by these Rules or by the National Executive." The "executives" include the Secretary so that it is arguable for the employers that r 17.4 precludes any implied power of delegation by the Secretary to sign a s 42 notice. Rule 17.4 applies, however, to branch officers and executives. These were national notices issued by the Union and its General Secretary and not by a branch or branches or their officials. Rule 17.4 does not exclude an implied power as contended for in this case.

[48] I would conclude that an implied power to delegate the signing of a s 42 notice is necessary for the business efficacy of the Union's operations in its particular circumstances. So, too, I consider that it is so obvious that it should go without saying that if the Secretary is unavailable, another person ought to be able to do so instead if so delegated by the Union or its General Secretary.

[49] For the foregoing reasons I concluded that the bargaining initiation notices were lawfully signed in terms of s 42(2) of the Act. The notices were in fact signed by the Union's General Secretary, Dr Powell, by her proxy, Ms de Beer. Even if not so signed, they were signed by a responsible representative (solicitor) of CNS which was duly authorised by the Union to sign the notices on its behalf.

[50] In case this is an erroneous conclusion, and out of respect to the parties' alternative arguments, I have considered the position if the plaintiffs are correct that the notices were not signed lawfully before they were given to the plaintiffs.

Subsequent ratification

[51] As already noted, the National Executive of the defendant subsequently resolved to ratify the signings of the notices initiating bargaining in accordance with the Union's rules. Could it do so lawfully with retrospective effect? The plaintiffs say not so.

[52] The plaintiffs' three grounds for challenging subsequent ratification are:

- The Union could not ratify an act which it had no power itself to authorise under its rules.

- It would be contrary to the express words of s 42 to ratify an act that was not duly authorised at the time.

- Even if the Union was capable of ratifying the defective notices, it lost the opportunity and ability to do so in law when the plaintiffs initiated collective bargaining on their terms before ratification.

[53] Even assuming that neither the National Executive nor the Union's General Secretary was empowered to delegate the signing of the notices, I do not agree that this impotence extends in law to an inability of the National Executive of the Union to ratify them. On the plaintiffs' argument, the notices could have been given by the Secretary or the President or two members of the National Executive. Ratification would not have been limited to the re-making correctly of a decision under a delegatable power. Ratification, if necessary, would have been of an action a delegate was not empowered to have taken. Ratification would have been the correction of an error by the body entitled to have performed the act.

[54] That is not to cut across the principle stated and accepted by this Court in *McCain Foods (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc*[7] that "if a body with limited powers makes a decision which it has no power to make, the decision is void and of no legal effect." Although not in issue in the *McCain* case, such a decision can be subsequently validated by ratification in appropriate cases. The judgment of the High Court relied on by the plaintiffs, *Hamilton City Council v Green*,[8] is distinguishable. In that case the chief executive of a local authority instituted an appeal on its behalf but did not have delegated power to do so. The High Court upheld the Council's subsequent ratification of the chief executive's act because the power of delegation was available but not used properly. The judgment which dismissed the Council's case turns on the fact that the validation was not undertaken within the statutory appeal period so that there was no effective appeal. The decision focuses, therefore, on the timeliness of the appeal rather than the lawfulness of the validation by subsequent ratification. No issue of statutory timeliness compliance arises in this case.

[55] The High Court in *Green* identified four principles of the doctrine of ratification. The first three emanate from the old judgment in *Firth v Staines.*[9] It was stated in that case by Wright J as follows:[10]

> To constitute a valid ratification three conditions must be satisfied: first, the agent whose act is sought to be ratified must have purported to act for the

[7] [2008] ERNZ 260.
[8] [2002] NZAR 327.
[9] [1897] 2 QB 70.
[10] At 75.

> principal; secondly, at the time the act was done the agent must have had a competent principal; and thirdly, at the time of the ratification the principal must be legally capable of doing the act himself. …

[56] Baragwanath J (then of the High Court) in *Green* added the fourth condition:[11] "[T]hat the ratification must not be inconsistent with the empowering legislation." The plaintiff's case is that even if the first three principles identifiable above are applicable in this case, the defendant fails on the fourth condition because to permit ratification would be to circumvent the statute's requirement under s 42(2) that the notice was given by a "duly authorised representative".

[57] Not only are the first three ratification criteria met in this case but, as regards the fourth, the plaintiffs' case ignores the alternative under s 42(2) that a notice may be signed by the Union. The defendant is the principal notice giver. It must be authorised in law to ratify a notice given invalidly where it is the person primarily entitled to give the notice itself or to delegate that task.

[58] *Walker v Mt Victoria Residents Assn Inc*[12] was also a case about an arguably invalid notice of appeal signed by the secretary of a residents' association, an incorporated society. The Association's executive committee subsequently ratified the secretary's act. This was held to have validated it because the Association was entitled to instruct its secretary to file an appeal on its behalf even although it may not have done so before later ratifying the secretary's initial informal act. This case supports the defendants' position.

[59] The judgment of the Court of Appeal in *Walker* is authority for the proposition of law that an incorporated society can ratify subsequently and lawfully an earlier action undertaken informally by its agent. Delivering the Court's judgment, Richardson J held:[13]

> … the next question is whether its purported confirmation of the act of the secretary in lodging the notice of appeal was an effective ratification. The General principles are clear. An act done for another by a person not assuming to act for himself but for such other person though without any precedent authority, become the act of the principal if subsequently ratified

[11] At [19].
[12] [1991] 2 NZLR 520 (CA).
[13] At 523.

> by him. The effect of ratification is to put all the parties concerned in the same position as that in which they would have been if the act ratified had been previously authorised; Chitty on Contracts (25th ed 1983) vol 2, paras 2220 and 2225; Bowstead on Agency (15th ed 1985) articles 13 to 19 at pp 51-81.
>
> Thus it is well settled that a company may ratify the institution and conduct of litigation commenced in its name without proper authority (Danish Mercantile Co Ltd v Beaumont [1951] Ch 680; Alexander Ward & Co Ltd v Samyang Navigation Co Ltd [1975] 2 All ER 424); and that principle is of General application to other classes of litigants (Chitty at para 2225). And the issue of a notice convening an extraordinary General meeting of a company sent out by the secretary without authority may be ratified by the directors so as to make it a good and valid notice (Hooper v Kerr, Stuart & Co Ltd (1900) 83 LT 729). In such a case, and in this case, the secretary purports to act as agent, here for the association. He does so under an ostensible authority. Ratification, which I consider must be treated as an exercise by the executive committee of their responsibilities under rr 5(a) and 7(a), relates back to the performance of that act, the signing and lodging of the notice of appeal by the secretary.

[60] As Richardson J noted, the Court reached its decision on the assumption that the arguably more rigid principles affecting the powers of the acts of companies apply equally to incorporated societies. His Honour continued:

> The Incorporated Societies Act 1908 itself does not provide clear guidance though it is perhaps arguable that the breadth of ss 4 and 10 and the unique provisions of s 19 contemplating operations beyond the scope of the objects of the societies as defined in the rules, when contrasted with the prohibition in s 20 may require or allow a broader approach historically and in the wider public interest. It was no doubt considerations of those kinds that led Cooke J in Finnigan v New Zealand Rugby Football Union [1985] 2 NZLR 159, 178, to observe that:
>
> > "The doctrine of ultra vires in company law was evolved mainly to protect investors and creditors. The same considerations are not easily transportable to cases where the raison d'etre of an organisation is not to make profits but to promote a certain activity."
>
> Compare Automobile Association (Wellington) Inc v Daysh [1955] NZLR 520. And here the association had status to object and then to appeal only because it was a body representing some relevant aspect of the public interest (s 2(3)(d)). It may be arguable then that a broader approach is required in the public interest to any assessment of a claimed warrant of authority to bring such proceedings than if it were a simple matter of a corporate body pursuing its private interests.

[61] The plaintiffs rely upon the timing of the bargaining initiation notices and the principle that if a union which has a prior right to initiate fails to do so for any reason, an employer's timely initiation will be that which starts the bargaining

process and sets its agenda. The DHB's statutory right to initiate bargaining arose on 21 November. They purported to initiate bargaining on 27 November 2009. The Union did not ratify the original bargaining notices until 14 December 2009 by which time the plaintiffs say it was too late to do so.

[62] The plaintiffs rely on the judgment in *Harrison v Hayman*[14] which adopted the statement in *Halsbury's Laws of England*[15] about the timing of ratification as follows:

> As to the time within which a ratification may take place, the rule is that it must be either within a time fixed by the nature of the case, or within a reasonable time, after which an act cannot be ratified to the prejudice of a third person.

[63] This argument does not avail the plaintiffs. There is no relevant time limit on the giving of bargaining initiation notice. If the time within which the defendant had the exclusive right to initiate bargaining had expired, and the plaintiffs had thereafter initiated bargaining themselves when they were entitled to do so, the Union could not have purported retrospectively to have initiated bargaining. But that is not the position here. Rather, even if the plaintiffs are correct that bargaining was initiated informally, the informality was a technicality which could not have induced the plaintiffs to consider reasonably that the Union had not intended to initiate collective bargaining or even that it had done so.

[64] The purpose of requiring a notice initiating bargaining to be given by a union or its duly authorised representative is to ensure that it is the appropriate union, and not an interloper or busybody, which initiates bargaining. It is also to ensure that an employer or employers receiving such notices can be confident that they are properly given before committing resources to the bargaining process as is required by the statute on receipt of a notice initiating bargaining.

[65] When Carisse de Beer, as an employee of CNS that was contracted to the defendant to do such things, signed the notices initiating bargaining, I find that she and her employer, CNS, were acting as the defendant's agents. It follows, on the

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[14] [1922] NZLR 545.
[15] (1st ed, 1907) vol 1 at [384].

authority of *Walker*, that even if the notices initiating bargaining were signed informally, the defendant subsequently ratified and thereby legitimised the giving of those notices.

Curial validation

[66] Although, because of my conclusions in favour of the defendant on the first two issues, it is unnecessary to consider this third question, I do so nevertheless in deference to the parties' submissions at the hearing through counsel. I do so also because I consider that the defendant has a very strong case for validation under s 219.

[67] Section 219 of the Act is materially as follows:

> **219 Validation of informal proceedings, etc**
>
> (1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the Court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.

[68] The plaintiffs' opposition to validation by recourse to s 219 was on the following grounds. They say that the signing was not an act informally done, but an act outside the powers of the Union and contrary to s 42. I do not accept that very narrow interpretation of the phrase "informally done". The plaintiffs' case is also contrary to the interpretation and application of the section by this Court in *Air Nelson Ltd v New Zealand Air Line Pilots' Association IUOW Inc*.[16]

[69] The plaintiffs' fall back position is if the notices were signed and therefore given informally and the Court has a discretion to validate them, that should not be exercised. The plaintiffs say that the Court should expect unions such as the defendant to comply strictly with s 42. They say that the cases reveal that s 219 has been exercised where informalities have been minor and procedural errors inconsequential, whereas what it submits was the Union's failure to comply with s

[16] [2008] ERNZ 327.

42, and the purported exercise of powers beyond its rules, are neither minor nor inconsequential.

[70] That the power may have been exercised in cases of minor technical informality does not mean that s 219 should be interpreted as applicable only to such cases. It is a broad discretionary power and the Court must look at all of the interests of the respective parties and of justice to determine whether it should be exercised.

[71] Finally, the plaintiffs say that despite having drawn the issue to the Union's attention on 19 November 2009, the defendant did not respond and it was only eight days after that advice and six days after the plaintiffs were able lawfully to initiate bargaining, that they did so. The plaintiffs say that the Union had ample time in that period to reissue notices that complied with s 42 but chose not to do so. They say that in these circumstances the Union is not deserving of the exercise of the Court's discretion under s 219.

[72] The giving of a proper notice initiating bargaining is "anything which is required or authorised to be done by this Act" and, if the plaintiffs had been right, was "done informally", that is not according to form. To validate "the thing so informally done" would have been a matter in the Court's discretion. The section provides no express guidance as to the factors to be taken into account in the exercise of that discretion. In these circumstances it must be in the interests of justice overall as between the parties.

[73] Even if the signing of the notice initiating bargaining had contravened the statutory requirements, this would have been an eminently appropriate case in which to validate that informality under s 219. Any default would have been technical. Ms de Beer was authorised and indeed instructed to sign the notice on behalf of Dr Powell. The error for which the plaintiff contended informality did not affect the substance of the notice initiating bargaining. Its contents were clear and the plaintiffs could not have been misled in any respect about that process. The signature point appears to have been raised belatedly and with a view to attempting, on a technicality, to knock out the defendant's notice and thereby take the high ground in setting the bargaining agenda.

[74] Had it been necessary, this would have been an appropriate case in which to have validated any error by applying s 219 of the Act.

[75] For the foregoing reasons I dismissed the plaintiffs' claims challenging the lawfulness of the defendant's initiation of collective bargaining.

Postscript

[76] That the Union's rules do not appear to have been revised (at least comprehensively) to take account of the current Act, is illustrated by r 47 which provides that "[t]he Association may be represented before the Employment Relations Service in mediation or the Employment Court …" Had the rules been reviewed and revised to comply with the now 10 year old legislative environment, I would have expected to have seen reference to the Employment Relations Authority between "mediation" and "the Court". In regard to the issues raised by this case, the Union may wish to consider a revision of its rules to avoid potential difficulties illustrated by this litigation and otherwise to accommodate recent legislative changes.

Costs

[77] Costs are reserved and if they cannot be resolved between the parties directly, the defendant may have the period of two calendar months in which to apply by memorandum for an order, with the plaintiffs having a further month to respond.

GL Colgan
Chief Judge

Judgment signed at 12.30 pm on Thursday 20 January 2011