IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 41
EMPC 220/2014
ARC 46/14

IN THE MATTER OF	a rehearing
AND IN THE MATTER	of an application for penalty for breach of compliance order
BETWEEN	JAMES DENYER, LABOUR INSPECTOR Plaintiff
AND	PETER REYNOLDS MECHANICAL LIMITED TRADING AS THE ITALIAN JOB SERVICE CENTRE Defendant

Hearing: 13 February 2015

Appearances: S Carr, counsel for plaintiff
I Hutcheson, counsel for defendant

Judgment: 31 March 2015

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] The plaintiff has applied for orders under s 140(6) of the Employment Relations Act 2000 (the Act) in relation to an admitted failure by the defendant to comply with an earlier compliance order made by the Employment Relations Authority (the Authority) under s 137 of the Act.[1] The matter comes before the

[1] *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2014] NZERA Auckland 43.

Court following a successful application for rehearing.[2]

[2] The plaintiff seeks orders that the defendant be fined together with an order for costs in relation to this application.

Background

[3] The background to this matter can be summarised as follows.

[4] The Labour Inspector pursued a claim in the Authority for unpaid annual holiday pay on behalf of Mr Costa, who had worked for the defendant company as a mechanic for just over three years. The Labour Inspector had earlier requested wage and time (including holiday and leave records) from the company but without success. The claim was set down for an investigation meeting. No statement in reply was filed. Mr Reynolds, the sole shareholder and director of the defendant company, nonetheless appeared at the Authority's investigation meeting of 25 June 2013 and was granted leave to be heard. The investigation meeting was then adjourned following advice from Mr Reynolds that he had wage and time records, despite these not having been made available to the Labour Inspector when they had initially been requested. The adjournment was designed to allow time for Mr Reynolds to locate the records and provide them to the Labour Inspector. At the same time the defendant was directed to file a statement in reply and witness statements in support of its position.

[5] Although the company had been directed to provide the Labour Inspector with further information and evidence in support of its position by 1 July 2013 there was a failure to do so. It was not until 9 July 2013 that Mr Reynolds took any steps in this regard. The company did not appear at the reconvened investigation meeting, although Mr Reynolds accepts that he received notice that it had been set down for 3 October 2013. He says that he was led to believe that he was not entitled to appear because he had not filed the required documentation, although he was unable to produce any supporting correspondence in this regard. It is apparent that the company failed to take any steps to comply with the Authority's other directions in

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[2] *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer* [2014] NZEmpC 166.

relation to filing a statement in reply and witness statements. The Authority subsequently concluded that full wage and time records had not been provided, the records that had been provided did not comply with the requirements of s 130 of the Act, and they had not been produced to the Labour Inspector on request or provided in accordance with the Authority's directions.

[6] The Authority determined that the claims advanced on Mr Costa's behalf had been made out. The company was ordered to pay the Labour Inspector the sum of $2,012.80 (comprising Mr Costa's outstanding annual holiday entitlements) together with interest and $71.56 as reimbursement of the filing fee.[3] The defendant was ordered to pay these amounts within 28 days of the date of the determination (namely, by 31 October 2013).

[7] The company did not make payment of the sums ordered against it. Mr Reynolds said that he did not receive a copy of the Authority's determination. The Labour Inspector applied for a compliance order and the matter came back before the Authority on 3 December 2013. Mr Reynolds said that he was unaware that this was occurring but his evidence in this regard sits uncomfortably with the documentation before the Court and which was put to him in cross-examination. In the determination of 3 December 2013 the Authority member traversed the history of the matter and stated that she was satisfied, based on the material before her, that the company had been served with the statement of problem (seeking a compliance order) and the notice of investigation meeting.[4] The Authority concluded that it was unlikely that the defendant company would pay the amounts ordered against it unless a compliance order was issued. The company was accordingly ordered to comply with the Authority's earlier determination. It was given seven days within which to do so.[5] The Authority subsequently reopened the matter on the plaintiff's application, to correct the defendant's name. The timeframe for compliance expired on 14 February 2014.[6]

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3 *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2013] NZERA Auckland 460 at [18] and [20].

4 *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre*, above n 1, at [6].

5 At [8].

6 *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre*, above n1, at [8].

[8] As Mr Hutcheson, counsel for the defendant, pointed out, the documentation relating to the Authority's investigation meeting of 3 December 2013 did not make it clear that a compliance order might result giving rise to potentially serious consequences. Nor did the compliance order itself draw attention to the strict nature of the obligation on the company to comply, or otherwise refer to the Court's power to fine, sequester property and imprison for non-compliance. I return to this issue below.

[9] Mr Reynolds wrote a letter to the Authority on 23 February 2014 outlining a number of concerns and frustrations about the way in which events had unfolded. The defendant took no steps to challenge the compliance order made by the Authority or seek to reopen its determination. Nor did the defendant comply with the Authority's compliance order, despite follow up enquiries from the Labour Inspector.

[10] An application in this Court was filed on 6 June 2014. That application came before Chief Judge Colgan. The defendant did not appear at the hearing. He says that although he received notice of the hearing he incorrectly recorded the time it had been set down for. The hearing proceeded in his absence. The Chief Judge was satisfied, on the basis of the information then before the Court, that a fine of $8,000 should be imposed.[7]

[11] The defendant subsequently applied for a rehearing. That application was not opposed by the plaintiff and was granted by the Chief Judge.[8] It then came back before the Court, for rehearing, on 13 February 2015. Just prior to the rehearing the defendant made payment of the amounts ordered against it. Despite this the Labour Inspector advised that he wished to proceed with his application for penalty for breach of the Authority's compliance order.

Analysis

[12] A number of issues were raised by the parties, in relation to the background to the proceedings, the defendant's conduct and the applicable approach under s 140 of the Act.

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[7] *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2014] NZEmpC 135 at [18].

[8] *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer,* above n 2, at [2].

[13] It is convenient to deal with two preliminary matters raised by Mrs Carr, who appeared on behalf of the Labour Inspector, at this point. First, she submitted that the plaintiff must establish beyond reasonable doubt the grounds relied on for the imposition of a sanction. She cited *Moxey v Westminister Pacific (NZ) Ltd*[9] as authority for that proposition, although noted that some doubt has recently been expressed in relation to this issue.[10] In the present case the point does not arise, and does not need to be determined, because the defendant frankly concedes that a breach has occurred, engaging s 140. The sole issue for the Court relates to whether a fine should be imposed in the circumstances and, if so, at what quantum.

[14] Second, Mrs Carr noted that in his original judgment in this matter, the Chief Judge questioned whether the Court had the power to order part, or whole, of a fine to be paid to a plaintiff personally.[11] She made it clear that the Labour Inspector was not seeking such an order in this case but wished to reserve the Labour Inspector's position on the point for future argument. Accordingly this issue can also be put to one side.

Legal Framework

[15] Where any party fails to comply with a compliance order made under s 137 of the Act,[12] the person affected may apply to the Court for the exercise of its powers under s 140(6).[13] Amongst other things s 140(6) empowers the Court to order the person in default to be sentenced to imprisonment for a period not exceeding three months, to be fined a sum not exceeding $40,000 and/or to order that the property of that person in default be sequestered. Prior to exercising such power, the Court must be satisfied that the person has failed to comply with the compliance order made under s 137.

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9 *Moxey v Westminister Pacific (NZ) Ltd* [2012] NZEmpC 16, at [9].

10 See *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre*, above n 7, at [8].

11 At [15].

12 Which relates to orders made by the Authority.

13 Employment Relations Act 2000, s 138(6).

[16] I approach the analysis from the starting point that the failure to comply with a compliance order made by the Authority is a serious matter.[14] It amounts to a contempt, is an affront to that institution and has the potential to bring the administration of justice into disrepute.[15]

[17] The seriousness with which Parliament views non-compliance is reflected in the suite of sanctions conferred on the Court under s 140, including imprisonment and sequestration of property. Employees found to have been underpaid or otherwise entitled to relief against their employer should not have to take enforcement action to compel satisfaction of awards made in their favour, even more so when a compliance order has been issued.

[18] In my view there are a range of factors that will be relevant to determining the sanction to be imposed in a particular case. They include (but are not limited to):

- The level of culpability involved (including the nature, scope and duration of any default);
- The need for deterrence and denunciation (both in relation to the particular defendant but also more generally);
- Whether the defendant has committed similar previous breaches;
- The attitude of the defendant;
- Whether the defendant has taken any steps to address its non-compliance;
- The defendant's circumstances (including financial);
- The desirability of a degree of consistency in comparable cases.

[19] Any fine imposed ought not to be disproportionate to the gravity of the defendant's default. I pause to note that there has been some suggestion that proportionality between the amount at issue and any sanction imposed is relevant.[16] While not discounting this as a factor that may have some relevance in a particular case, it is clear from a perusal of the cases that many involve what are described as

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14 See *Ingham (Labour Inspector) v August Models and Talent Ltd* [2010] NZEmpC 157 at [9].

15 *Ryan Security & Consultancy (Otago) Ltd v Bolton* [2008] ERNZ 428 (EmpC) at [16]-[17], *Coventry v Singh* [2012] NZEmpC 34 at [15].

16 See, for example, *Denyer v Les Griffen Ltd* EmpC Auckland AC43A/08, 14 November 2008, at [11] and *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre*, above n 7, at [16].

modest sums of money (although I note that they may not be regarded as modest by the person who remains out of pocket). By the time the matter comes before the Court, the plaintiff (usually an employee) will have had to undertake a number of (potentially expensive) steps to seek payment of the amount they are due, including pursuing an application for a compliance order in the Authority and then applying to the Court for orders in relation to the non-compliance with any orders made. The defendant (usually an employer) will have had multiple occasions to meet their obligations during the course of this often lengthy process. Depending on the circumstances, the employer's stance may reflect nothing more than a perverse determination to erect as many barriers as possible in the hope that the employee will eventually give up. Alternatively, it may reflect simple apathy and/or prioritisation of the defendant's financial resources.[17] Imposition of a low level fine in such a case, on the basis that the amount at issue is similarly low, may not adequately address other important considerations, such as deterrence and denunciation.

[20] Mr Hutcheson submitted that the Court ought to encourage compliance rather than adopting a punitive approach under s 140. He cited *Edwards v Wright t/a United Industries*[18] and *Myatt v Community Medical Centre Ltd*[19] in support of this proposition. I understood this submission to be that the defendant has now met its obligations as a result of the process wending its way to the Court and accordingly compliance has been achieved and there is now no need for a punitive response. I am not drawn to this submission.

[21] It may be desirable, depending on the circumstances of the particular case, to adjourn an application under s 140 to provide a defendant with a further opportunity to meet its liabilities.[20] However it seems to me that deterrence and denunciation are likely to have particular relevance in many cases coming before the Court. That is because of the desirability of reinforcing the importance of complying with orders of an institution such as the Authority, ensuring that employees receive what is due to them without undue delay or difficulty, and addressing the inherent imbalance of power between the parties to an employment relationships. Encouraging defendants

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17 See *Coventry v Singh*, above n 15 at [21].
18 *Edwards v Wright t/a United Industries* EmpC Auckland A201/94, 25 September 1995.
19 *Myatt v Community Medical Centre Ltd* [2014] NZEmpC 149.
20 See s 140(5) of the Employment Relations Act 2000.

to sit on their hands until they are on the doorstep of the Court does little to address these broader objectives.

[22] It is well established that a defendant's financial circumstances are relevant to the quantum of fine.[21] A defendant who wishes to have their financial position taken into account can be expected to put forward evidence in support of their assertions.

[23] While at first blush it might appear that the sanctions in s 140 are listed progressively, it is clear, when read in context, that any one, or a combination of them, is available to the Court as appropriate. That means that there is an ability to tailor an appropriate sanction to adequately mark out the breach, having regard to all relevant factors, including the defendant's particular circumstances. For example, there may be some instances in which imprisonment, rather than a fine, is the appropriate option having regard to the overall circumstances of the case; and where an employer has limited cash reserves but machinery and equipment of value it may be that an order for sequestration of property is the preferable sanction.

[24] As Mrs Carr pointed out, it is difficult to draw much assistance from the cases in terms of consistency in level of fine imposed. She drew particular attention to three judgments that were said to reflect a wide range of orders: *Ingham (Labour Inspector) v August Models and Talent Ltd*[22] ($10,000 fine); *Moxey*[23] ($8,000 fine), and *Broeks v Ross*[24] ($1,000 fine). I agree that it is desirable for there to be a degree of consistency in the quantum of penalty imposed, although such an approach ought not to be slavishly applied, ignoring the individual facts of the case before the Court.

[25] Research suggests that only nine cases have been decided under s 140 of the current Act. They reinforce Mrs Carr's point as to the level of fines imposed and can conveniently be summarised as follows:

- *Finlayson v Arvin Kumar t/a Gerald's Cleaning Services*,[25] the employer had taken no steps to comply, no explanation given, no issues of ability to

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21 *NZ Timber Industry Employees IUW v Waimate Timber Co Ltd* EmpC Christchurch CLC79/90, 7 November 1990 at [4].
22 *Ingham (Labour Inspector) v August Models and Talent Ltd*, above n 14.
23 *Moxey v Westminister Pacific (NZ) Ltd*, above n 9.
24 *Broeks v Ross* EmpC Auckland AC36A/09, 11 November 2009.
25 *Finlayson v Arvin Kumar t/a Gerald's Cleaning Services* EmpC Auckland AC44/03, 3 July 2003.

pay. Fine/imprisonment not sought. The Court found that the plaintiff (Labour Inspector) was entitled to an order for sequestration which was adjourned; costs of $300 and $300 filing fee awarded. The amount at issue was around $1,000.

- *Denyer v Les Griffen Ltd*,[26] a fine of $1,500; order of sequestration adjourned (and not later pursued). The employer had taken no steps to comply, no issues of ability to pay. The amount at issue was $1,049.
- *Broeks v Ross*,[27] a fine of $1,000; no costs. The employer had taken no steps to comply and was found to have acted in "flagrant disregard" of the processes of the Court and Authority.[28] The amount at issue $9,406.27.
- *Ingham (Labour Inspector) v August Models and Talent Ltd*,[29] a fine of $10,000; costs of $1,000. Application for orders of sequestration adjourned (and not later pursued). The employer had taken no steps to comply, there was no evidence of impecuniosity and no previous breaches. The amount at issue was $258.
- *Moxey v Westminister Pacific (NZ) Ltd*, [30] a fine of $8,000; costs of $800. The employer had taken no steps to comply, apparent financial difficulties and no previous breaches. The amount at issue was approximately $44,000.
- *Coventry v Singh*,[31] a fine of $3,000; costs of $2,000. The employer had taken no steps to comply, some health issues, issues of ability to pay. Amount at issue around $14,000.
- *Dell v ABC01 Ltd (Formerly Primary Heart Care Ltd) and Hinchcliff*,[32] a fine of $10,000. Employer had taken no steps to comply, found to be "contumacious".[33] The amount at issue was $186,738.22.

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26 *Denyer v Les Griffen Ltd*, above n 16.
27 *Broeks v Ross*, above n 24.
28 At [8].
29 *Ingham (Labour Inspector) v August Models and Talent Ltd*, above n 14.
30 *Moxey v Westminster Pacific (NZ) Ltd*, above n 9.
31 *Coventry v Singh*, above n 15.
32 *ABC01 Ltd (Formerly Primary Heart Care Ltd) and Hinchcliff v Dell (No 2)* [2012] NZEmpC 198.
33 At [13].

- *Christiansen v Sevans Group NZ (Ltd*),[34] a "modest" fine of $2,500.[35] The employer had taken no steps to comply; some explanation as to failure to meet obligations offered; issues of financial capacity. Order for sequestration of property adjourned (and later not pursued). The amount at issue was around $26,000.
- *Lin v Zhou,*[36] a fine of $3,000. Employer had taken no steps to comply, issues of ability to pay fine. The amount at issue was around $12,000.

[26] The level of fines in cases decided under the Employment Contracts Act 1991 is of little assistance. That is because the maximum fine under the previous legislation was $10,000.[37] It seems that fines of around $1,000 were routinely imposed.[38] Under the current Act, the maximum level of fine for non-compliance increased four-fold, to $40,000.[39] As I have already observed, this can be taken as a clear legislative indication that more substantial fines can be expected in these sorts of cases.[40]

The present case

[27] With these general principles in mind, I turn to consider the present application. The Labour Inspector acknowledges that the defendant has now made payment of the amounts owing to Mr Costa but submits that a fine is appropriate having regard to the circumstances, including the ongoing failures of the defendant to engage with the Labour Inspector and to take steps to meet its obligations over a lengthy period of time.

[28] Mr Hutcheson responsibly accepted that the defendant could have done much better in relation to its handling of events but submitted that when the case is viewed in context an order of costs, together with reimbursement of the filing fee, would be the appropriate outcome. I have already dealt with his submission that the focus of

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34 *Christiansen v Sevans Group NZ (Ltd)* [2013] NZEmpC 11.
35 At [12].
36 *Lin v Zhou* [2013] NZEmpC 159.
37 Employment Contracts Act 1991, s 56(6)(d).
38 *Denyer v Les Griffen Ltd*, above n 16, at [10].
39 Employment Relations Act 2000, s 140(6)(d).
40 As the Chief Judge observed in *Finlayson v Arvin Kumar t/a Gerald's Cleaning Services*, above n 25, at [3].

the Court should be on compliance rather than on a punitive outcome.

[29] As I have said, the Authority's compliance order did not draw attention to the strict nature of the obligation on the company to comply or otherwise refer to the Court's power to fine, sequester property and imprison for non-compliance. Mr Hutcheson submitted that had these matters been expressly referred to and drawn to Mr Reynolds' attention at an early stage, it may have brought home the seriousness of the situation and he might have approached things differently. While it is true that the notice of investigation meeting set down for 3 December 2013 did not specifically refer to the possible consequences of a compliance order being made, it was clear that if the company did not attend the Authority could proceed to make a determination without hearing from it. Having read the Authority's subsequent determination, it must have been abundantly plain that matters had progressed to a serious stage. And any residual doubt that Mr Reynolds was labouring under ought to have been dispelled by the content of the statement of claim, which fully set out the statutory provisions relied on and the relief that was sought. I pause to note that no statement of defence was filed to the statement of claim. Nor did Mr Reynolds take any steps to communicate with the Labour Inspector after having received the Authority's compliance order, despite having engaged in earlier communications with him (including by way of email).

[30] It is clear that the Labour Inspector made ongoing attempts to engage with Mr Reynolds, on behalf of the company. It is equally clear that these attempts met with little success. Although Mr Reynolds did provide some material to the Labour Inspector over time and did have some level of engagement with him, it was insufficient and information was not provided in a timely manner. Mr Reynolds said that he had sought some legal advice in relation to his obligations prior to the 3 October 2013 investigation meeting, but it seems that this was from a customer who happened to be a lawyer and no formal advice was ever sought or given.

[31] Mr Reynolds gave evidence that he did not think that he had received the Authority's determination of 3 December 2013 and that he had found the 7 February 2014 determination in an envelope blowing about on the pavement outside the neighbouring premises. I was not drawn to Mr Reynolds' evidence in relation to

receiving notice of the 3 December 2013 investigation meeting. But even accepting his evidence, it does not adequately explain the subsequent lack of substantive action.

[32] Mr Reynolds said that he believed that there were outstanding issues relating to money Mr Costa is said to owe the company, but that does not provide an excuse for the failure to take adequate steps to meet the company's obligations over an extensive period of time. The position adopted by the defendant over time has meant that the Labour Inspector has been obliged to seek compliance orders from the Authority and then take additional steps in this Court. Mr Reynolds wrote to the Authority after he received the compliance determination of 7 February 2014 but otherwise took no further steps in relation to it. The company's actions fell well short.

[33] Albeit belatedly, the company has now paid the full amounts owing.

[34] Mr Reynolds gave evidence that he accepts personal responsibility for not handling the situation better and that he has learnt an "expensive lesson", although I was unable to detect any real remorse for the situation Mr Costa has been placed in. I accept that Mr Reynolds now has a more complete understanding of the company's obligations, regrets the situation that his actions have given rise to and is unlikely to appear before the Court again for non-compliance. As he says, the whole process has cost him dearly in terms of time and money.

[35] The defendant is a small, sole operator, company. Mr Reynolds gave evidence that it is in a parlous financial state, struggling to keep afloat. He says that a fine will have a serious impact on the company, although he did not provide any details of why that was said to be so.

[36] There is nothing to suggest that the company has previously breached a compliance order of the Authority.

[37] While Mr Hutcheson urged me to step back from imposing a fine I do not consider that to be the appropriate course. It is very clear that the company failed to

comply with the Authority's compliance order. While there have been a number of excuses proffered in relation to particular aspects of the process (such as non delivery of documents and misunderstandings as to process) there has been no adequate explanation for the ongoing nature of the default. I am satisfied on the basis of the evidence before the Court that little effort has been expended in substantively addressing the company's obligations to its previous employee, over a considerable period of time. It is necessary to mark out the company's conduct, including to send a message to others.

[38] In the circumstances, and having regard to the mitigating factors in this case including the company's apparent financial position, I consider that a fine of $5,500 is appropriate.

[39] The defendant is accordingly ordered to pay a fine of $5,500. Payment is to be made within 28 days of the date of this judgment to the Registrar of this Court for payment to the Crown Bank account.

Post-script: alternative options for non-compliance?

[40] This case graphically illustrates the difficulties that can be encountered by employees in securing awards made in their favour by the Authority. Mr Costa left his employment in October 2012 and only received the money he was owed just prior to the rehearing, well over two years later.

[41] Where there has been a failure by an employer to satisfy a financial order of the Authority (absent a stay), a range of options is available to secure payment. One option is to apply for a compliance order from the Authority and, if there is non-compliance with that, an order from the Court that the employer be fined, imprisoned and/or its property sequestrated. That is the course that has been adopted in this case by the Labour Inspector on behalf of the disaffected employee. While the spectre of sanction under s 140 may prompt compliance, neither a fine nor a sentence of imprisonment results in direct payment to the employee, unless the Court directs (as it has done in some cases) that the whole or part of a fine be paid to the employee. As I have said, some doubt has been expressed about whether the statute permits

this. Sequestration is a relatively complex and potentially time consuming process but does result in the seizure and sale of property, which can then be applied to meeting the employer's obligations to the employee.

[42] An alternative procedure arises under s 141 of the Act, enabling an employee to by-pass the compliance process by obtaining a certificate of determination from the Authority and filing it in the District Court so that it can be enforced using the remedies available under the District Courts Act 1947 and District Courts Rules 2014. As Judge Perkins has previously pointed out: "Those remedies are more diverse and more effective than remedies which may be available in this Court."[41]

[43] The Authority's process is not a matter for this Court, but it may be considered desirable to draw the parties' attention to the potential consequences of a failure to comply at the time a compliance order is made.

Result

[44] The defendant is ordered to pay a fine of $5,500 to the Registrar of the Employment Court, for payment into the Crown bank account, within a period of 28 days from today's date.

[45] It appears that the defendant has paid the filing fee to the plaintiff. Accordingly no formal order in this regard is required.

[46] The parties are invited to agree costs. If they cannot otherwise agree, memoranda and supporting material may be filed, with the plaintiff filing and serving any such documentation within 21 days of today's date and the defendant filing and serving anything in response within a further 14 days.

Christina Inglis
Judge

Judgment signed at 2.15 pm on 31 March 2015

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41 *Broeks v Ross*, above n 24, at [5].