INJUNCTIVE RELIEF IN THE
EMPLOYMENT RELATIONS AUTHORITY
AND EMPLOYMENT COURT

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Finally, the author argues that the Employment Relations Authority (although not the Employment Court) should not be given this power.

INTRODUCTION

On May 7 2001, the Employment Relations Authority ("the Authority") granted its first Anti Full Order. On June 19 2002, the Authority granted its first Mareva injunction. The Employment Court has granted both types of order since 1996.

Whether the Authority has jurisdiction to grant such orders is an undeniable as the claimed basis of such jurisdiction is varied. Similarly, the jurisdictional basis of the Employment Court's authority is questionnable.

This paper will first briefly outline the nature of these orders and secondly the basis upon which they have traditionally been granted, both in the United Kingdom and New Zealand. Finally, this paper will argue that the Employment Relations Act 2000 ("ERA") does not enable the Authority nor the Employment Court to make such orders. It will be shown that neither body has the requisite jurisdiction. This paper will then assess the possible avenues of redress.

Finally, this paper will argue that the Authority should not have such a power, irrespective of whether it has jurisdiction. Although this paper will not address the issue in detail, the author expresses a preference for the power being extended to the Employment Court.

[Note: Footnotes]

This paper examines the jurisdiction of both the Employment Relations Authority and Employment Court to grant Mareva injunctions and Anton Piller orders. The author argues that no sections in the Employment Relations Act 2000 empower either body to grant these orders. The author further examines the possible remedies defendants may seek if these orders have been granted ultra vires. Finally, the author argues that the Employment Relations Authority (although not the Employment Court) should not be given this power.

1 INTRODUCTION

On May 7 2001, the Employment Relations Authority (“the Authority”) granted its first Anton Piller order.1 On June 19 2002, the Authority granted its first Mareva injunction.2 The employment Court has granted both types of order since 1996.3

Whether the Authority has jurisdiction to grant such orders is as debateable as the claimed basis of such jurisdiction is varied. Similarly, the jurisdictional basis of the Employment Court’s authority is also doubtful.

This paper will first, briefly outline the nature of these orders and secondly, the basis upon which they have traditionally been granted, both in the United Kingdom and New Zealand. Thirdly, this paper will argue that the Employment Relations Act 2000 (“ERA”) empowers neither the Authority nor the Employment Court to make such orders. Presuming that neither body has the requisite jurisdiction, this paper will then assess the possible avenues of redress.

Finally, this paper will argue that the Authority should not have such a power, irrespective of whether it has jurisdiction. Although this paper will not address the issue in detail, the author expresses a preference for the power being extended to the Employment Court.

1 AB Ltd v Brown (7 March 2001 Employment Relations Authority AA41/01, Mr A Dumbleton (member)).
2 Wilson & Horton Ltd v A (19 June 2002 Employment Relations Authority Auckland AA187/02; AEAS550/02).
II MAREVA INJUNCTIONS AND ANTON PILLER ORDERS

Both the Mareva injunction and Anton Piller order are *quia timet* interlocutory orders of the court. The former is prohibitory, made *in personam*, but operating *in rem*, without creating rights *in rem*. The latter is mandatory and granted *in personam*. Both may be granted *ex parte*, without notice to the defendant or potential defendant, at any time during an action. The actions take their names from the first cases in which the English Court of Appeal considered and approved their granting.

A Mareva injunctions

The Mareva injunction temporarily freezes assets which may be required to satisfy a judgment in order to prevent their dissipation within, or removal from, the jurisdiction of the court. It gives the plaintiff no security, until judgment, over the frozen property. As the learned authors of *Mareva Injunctions: Law and Practice* note:

> [t]he purpose of a Mareva injunction is not to provide the applicant with any form of pre-trial attachment, but simply to prevent the injustice of a person removing or dissipating his [or her] assets so as to cheat the applicant of the fruits of his [or her] claim.

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6 *Attard Inc v Advanced Data Communications Ltd* [1985] 1 All ER 395; see also Nicola Burdon (ed) *McCechan on Procedure* (looseleaf, Brokers, Wellington) para HR33.1.1 (last updated September 2003).
Being equitable relief, the grant of the Anton Piller order and Mareva injunction, is discretionary.\(^\text{10}\) As Kerr LJ stated in *Ninemia Corporation v Trave GmbH*, in reference to s 37(1) of the Supreme Court Act 1981:\(^\text{11}\)

\[(t)he ultimate test for the exercise of the [Mareva] injunction is whether, in all the circumstances, the case is one in which it appears to the court "to be just and convenient" to grant the injunction ... Thus the conduct of the plaintiffs may be material, and the right of any third parties who may be affected by the grant of an injunction may often also have to be borne in mind ... Further, it must always be remembered that if, or to the extent that, the grant of the Mareva injunction inflicts hardship on the defendants, their legitimate interests must prevail over those of the plaintiffs, who seek to obtain security for a claim which may appear to be well founded but which still remains to be established at the trial ... If [the plaintiffs] apply for a Mareva injunction on the ground that they have "a good arguable" case then the balance should be weighed as we have indicated above.

An applicant must show a good arguable case that she will succeed at trial, and that refusal of an injunction would involve a real risk that an eventual judgment or arbitral award could remain unsatisfied.\(^\text{12}\) Further, the Court must consider the possible effect of the order on third parties, and thus draft it as clearly as possible.\(^\text{13}\)

The justification for granting Mareva relief is, in the words of Lord Denning, “the need to prevent a defendant snapping his [or her] fingers\(^\text{14}\) at a judgment with financial impunity, simply because she has arranged her affairs so as to leave no worthwhile assets within the reach of the plaintiff judgment creditor.\(^\text{15}\)

### B Anton Piller orders

The Anton Piller order is a form of discovery, which has been likened to a civil search warrant.\(^\text{16}\) This order entitles the plaintiff, or intended plaintiff, to search


\(^{11}\) *Ninemia Corporation v Trave GmbH* [1983] 1 WLR 1412 (CA), 1426.

\(^{12}\) *Ninemia Corporation v Trave GmbH*, above.

\(^{13}\) *Z Ltd v A-Z and AA-LL* [1982] QB 558 (CA).

\(^{14}\) *Pertamina* [1978] 1 QB 664: 661.


for articles which are the subject of litigation and evidential material which may be relevant to proceedings. Once found, the plaintiff is then entitled to inspect the items in question, and remove them to the safe keeping of her solicitor or the court, to prevent it being removed, destroyed or concealed by the defendant. However, Anton Piller orders are distinct from search warrants in that they cannot be used to obtain evidence upon which to base a later claim.

Although the statutory authority for granting an Anton Piller order is identical to that of the Mareva injunction, given the draconian nature of Anton Piller orders the applicant must meet a stricter threshold. In addition to the 'ultimate test' of whether in all the circumstances the case appears to the Court to be one to be one where it would be "just and convenient" to grant the injunction, the plaintiff must satisfy three essential pre-conditions set down by Ormrod LJ in the Anton Piller case:

1. There must be an extremely strong prima facie case. Secondly, the damage to the plaintiff, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made.

In practice, Ormrod LJ’s three conditions have not always been construed strictly, although the courts have tended to engage in periodic ‘crackdowns’.

C Mareva injunctions and Anton Piller orders in New Zealand

Both the Mareva injunction and Anton Piller order are established as part of New Zealand Law.

17 Anton Piller: ex parte Island Records Ltd [1978] Ch 122 at 145 – there are certain guidelines/requirements/safeguards – e.g. full and frank disclosure, a cross-undertaking in damages and an undertaking to issue a writ (usually forthwith) if necessary: see Richard N. Ough The Mareva Injunction and Anton Piller Order: Practice and Precedents (Butterworths, London, 1987), para 1.5. In the case of Mareva injunctions, such undertakings include safeguards to protect the interests of third parties: see Babanaft International Co SA v Bassatne [1990] Ch 13.
18 Hytrac Conveyors Ltd v Conveyors International Ltd [1983] FSR 63 (CA).
20 See Part II A Mareva Injunctions.
III JURISDICTION TO GRANT MAREVA INJUNCTIONS AND ANTON PILLER ORDERS

A Jurisdiction in the United Kingdom

1 Mareva injunctions

In *Mareva Compania Naviera SA v International Bulk Carriers SA*, Lord Denning referred to s 45 of the Supreme Court of Judicature (Consolidation) Act 1925 (UK), which preserves s 25(8) of the Judicature Act 1875:

[a] mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient.

Lord Denning continued:

[i]n *Beddow v Beddow* (1878) 9 Ch D 89 Sir George Jessel, the then Master of the Rolls, gave a very wide interpretation of this section. He said: “I have unlimited power to grant an injunction in any case where it would be right or just to do so”. There is only one qualification to be made. The Court will not grant an injunction to protect a person who has no legal or equitable right whatever... But, subject to that qualification, the statute gives a wide power to the Courts.

Roskill and Ormrod LLJ concurred.

The inherent authority of the Court, the basis for the grant of the Mareva injunction in the UK, is reproduced in section 37(1) of the Supreme Court Act 1981 (UK), which provides:

37. Powers of High Court with respect to injunction and receivers

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26 *Mareva Compania Naviera SA*, above, 510.
(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

2 **Anton Piller orders**

Order 29 rule 2 of the Rules of the Supreme Court (UK) empowered the High Court to authorise entry onto the property of a party, following an application *inter partes*, in order to inspect, detain or preserve property which is, or may be, the subject matter of the action. However, the Rules of the Supreme Court did not authorise the High Court to grant such an order upon *ex parte* application.

Irrespective of this, Lord Denning MR granted an equitable order on the basis of Order 29 rule 2, and “the inherent jurisdiction of the court”\(^\text{28}\). This came to be known as the Anton Piller order. The ability to grant Anton Piller orders is therefore founded on the court’s inherent jurisdiction to prevent a defendant frustrating judgment, in this case by destroying or disposing of either the evidence or the subject matter of the dispute.\(^\text{29}\)

**B The jurisdiction of the New Zealand High Court**

1 **The Court’s inherent jurisdiction**

The High Court is a court of record,\(^\text{30}\) established for the “administration of justice throughout New Zealand”\(^\text{31}\) and it is clearly a superior court.\(^\text{32}\) As such, the High Court is not required to Act within the bounds of its constitutive statute.\(^\text{33}\)

\(^{30}\) A court of record is one that can fine or imprison for contempt: see Beck. above. para 2.2.1; see also Ex P Goldsborough Mort & Co Ltd: Re Magrath (1931) 32 SR (NSW) 338. This power is not limited to superior courts: see District Courts Act 1947 s 112.
\(^{31}\) Judicature Act 1908, s 3.
\(^{32}\) This is implicit is the definition of an inferior court in s 2 of the Judicature Act: a court whose jurisdiction is inferior to the High Court: see Andrew Beck Principles of Civil Procedure (2 ed, Brookers, Wellington 2001), para 2.2.1.
\(^{33}\) Inferior courts are required to act within the bounds of their constitutive statutes: R v Chancellor of St Edmundsbury [1948] 1 KB 195, 206; Gazley v Lord Cooke of Thorndon [1999] 2 NZLR 668 (CA); A-G v Reid [2000] 2 NZLR 377 (HC).
Unless expressly abrogated by statute or common law rules, the High Court has unlimited jurisdiction.  

The inherent jurisdiction of the High Court empowers it to summarily deal with matters that arise before it to ensure “the machinery of justice is able to turn smoothly”. It is possessed by superior courts of record and exists only as part if the court’s general jurisdiction.

Inherent jurisdiction refers to the court’s power to make orders ancillary to the exercise of jurisdiction in the primary sense. The High Court has an ability to exercise its inherent jurisdiction in circumstances which cannot be sufficiently dealt with using statutorily conferred powers or the rules of the Court. In such cases, the Court will invoke the inherent jurisdiction to further the administration of justice.

Section 16 of the Judicature Act 1908 affirms the inherent jurisdiction possessed by the High Court. Section 16 provides:

[the court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all jurisdiction which may be necessary to administer the laws of New Zealand.

There are two distinct aspects to the court’s jurisdiction as provided for in s 16 – “the continuation of its historical jurisdiction and a statutory affirmation of the court’s inherent jurisdiction”. The inherent jurisdiction is “sourced in the very nature of the Court’s inherent jurisdiction. The High Court subsequently received

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37 The Court of Appeal has noted that it is both unnecessary and unwise to attempt to define the scope of the Court’s inherent jurisdiction: see R v Moke and Lawrence [1996] 1 NZLR 263 (CA). This paper will therefore not seek to define the inherent jurisdiction.  
38 Section 16 does not, however, bestow the inherent jurisdiction, and simply recognises the existence of powers originating elsewhere. See Nicola Burdon (ed) McGechan on Procedure (looseleaf, Brookers, Wellington) para J16.07 (last updated September 2003).  
39 Andrew Beck Principles of Civil Procedure (2 ed, Brookers, Wellington, 2001), para 2.2.1; see also Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union [1983] NZLR 612 (CA), 615; Gazley v Lord Cooke of Thordorn [1999] 2 NZLR 668 (CA), 674.
of the Court as a Court of law". Sir Jack Jacob has described the court's inherent jurisdiction as follows:

> [t]he essential character of a superior Court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior Court... The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.

In *Hunt v BP Exploration Co (Libya) Ltd*, the Supreme Court decided that it had the jurisdiction to grant a Mareva injunction. Barker J stated that he did not accept the view that this decision intruded into an area reserved for legislation. The Court’s inherent jurisdiction was the basis upon which Barker J concluded he had jurisdiction to grant Mareva injunctions.

The power of the Court to grant a Mareva injunctions is now confirmed by r 236B HCR, which gives express jurisdiction to grant orders over assets held in New Zealand. However, orders made under the inherent jurisdiction are still required to freeze assets held outside New Zealand. The District Court can grant Mareva injunctions, however, it may do so only in respect of property situated in New Zealand.

The jurisdiction of the High Court to grant Anton Piller orders was recognised by the Court of Appeal in *Busby v Thorn EMI Video Programmes Ltd* on the basis of the High Court’s inherent jurisdiction. The High Court subsequently received legislative acknowledgement of this power.

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41 Sir Jack Jacob "The Inherent Jurisdiction of the Court" (1970) CLP 23, 27.
42 *Hunt v BP Exploration Co (Libya) Ltd* [1980] 1 NZLR 104 (HC).
43 *Hunt v BP Exploration Co (Libya) Ltd*, above.
45 District Courts Act 1947, s 42(2).
46 *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 (CA).
47 Judicature Act 1908, s 263(4); District Courts Act 1947, s 42(3).
IV DOES THE AUTHORITY HAVE JURISDICTION?

The starting point of this analysis must be that the Authority is purely a creature of statute. Unlike the High Court, the Authority is not a court of inherent jurisdiction, and unlike the Employment Court, it is not a court of record. As such, the Authority must act within the bounds of its constitutive statute, in this case, the ERA.

Determinations of the authority have pointed to various sections in the ERA as providing jurisdiction to grant such orders. The validity of each of these claims is assessed below. The somewhat varied basis upon which the Authority believes jurisdiction is founded demonstrates the strained nature of its analysis.

A Duty to consider mediation

As the Learned Authors of Brookers Employment Law note, “at first glance it might be thought that the prospect of the Authority or [Employment] Court making an Anton Piller order [or Mareva injunction] does not sit easily with the duty to consider mediation under ss 159 and 188”. However, subs (2)(b)(iii) of each of these provisions allows the Authority and Employment Court to avoid mediation if it would “undermine the urgent or interim nature of the proceedings”. Given that, in any situation where a Mareva injunction or Anton Piller order is necessary, the applicant

48 Employment Relations Act 2000, s 156.
49 Employment Relations Act 2000, s 186(1).
51 The Authority has granted Mareva injunctions in the following cases: Wilson & Horton Ltd v A (19 June 2002 Employment Relations Authority Auckland AA187/02; AEA550/02); Bell v Delta Construction and Development Ltd (16 August 2002 Employment Relations Authority Auckland AA239/02; AEA765/02; Mr A Dumbleton (member)); Dobby v NZ Media Group Ltd (30 October 2002 Employment Relations Authority Christchurch CA110/02; CEA393/02; Mr P Cheyne (member)); McAlister & Anor v Cayan Holdings Ltd (5 December 2002 Employment Relations Authority Auckland AA 352/02; AEA 1176/02; Mr A Dumbleton (member)). The Authority has granted Anton Piller orders in the following cases: AB Ltd v Brown (7 March 2001 Employment Relations Authority AA41/01, Mr A Dumbleton (member)); Strait Path Trust v Brett (13 November 2001 Employment Relations Authority Auckland AA185/01, AEA847/01); Pacific Pharmaceuticals Ltd v Kamarajan (27 August 2002 Employment Relations Authority Auckland AA257/02; AEA602/02); Kelly Services (New Zealand) Ltd v Kemp (2 May 2003 Employment Relations Authority Christchurch CA44/03; CEA133/03); Advanced Hair Studio Ltd v Barry (5 June 2003 Employment Relations Authority Auckland AA165/03, AEA379/03).
will have had to prove urgency, the duty of the Authority/Employment Court to consider mediation is not necessarily fatal to a finding that either body has the requisite jurisdiction.

B Sections 157(3) and 160(1)(f) of the ERA?

In McAlister v Cayman Holdings Ltd, the Authority held that it had jurisdiction to grant Mareva injunctions, and relied upon ss 157(3) and s 160(1)(f) of the Employment Relations Act 2000 as the source of this power.

Section 157 of the ERA provides:

157 Role of Authority

(1) The Authority is 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.

(2) The Authority must, in carrying out its role, —

(a) comply with the principles of natural justice; and
(b) aim to promote good faith behaviour; and
(c) support successful employment relationships; and
(d) generally further the object of this Act.

[(2A) Subsection (2)(a) does not require the Authority to allow the cross-examination of a party or person, but the Authority may, in its absolute discretion, permit such cross-examination.]

(3) 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 160 of the ERA provides:

53 McAlister & Anor v Cayman Holdings Ltd (5 December 2002 Employment Relations Authority Auckland AA 352/02; AEA 1176/02, Mr A Dumbleton (member)).
160 Powers of Authority

(1) The Authority may, in investigating any matter,—

(a) call for evidence and information from the parties or from any other person:

(b) require the parties or any other person to attend an investigation meeting to give evidence:

(c) interview any of the parties or any person at any time before an investigation meeting:

(d) in the course of an investigation meeting, fully examine any witness:

(e) decide that an investigation meeting should not be in public or should not be open to certain persons:

(f) follow whatever procedure the Authority considers appropriate.

(2) The Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

(3) The Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described.

In relation to s 157(3) and s 160(1)(f), the Authority stated that:54

[i]t seems implicit from these provisions that, like other courts, the Authority should not stand by when there is a likelihood that the object of its jurisdiction will be defeated if a party is able to out-manoeuvre another party who may become entitled to recover money or other remedies, by formal execution or enforcement if necessary.

Neither s 157, s 160, nor a combination of the two, provide the Authority with the requisite jurisdiction. Section 157 sets out the role of the Authority, in particular, its investigative role. Section 157(3) emphasises the ability of the authority to drive the case in a flexible way. Section 157(3) does not, however, concern the Authority’s remedial jurisdiction.

54 McAlister & Anor v Cayman Holdings Ltd (5 December 2002 Employment Relations Authority Auckland AA 352/02; AEA 1176/02, Mr A Dumbleton (member)).
Section 160(1) confers on the authority several powers to enable it to carry out its investigatory role. Section 160(1)(f) provides the Authority with discretion as to the procedure it may follow. While evidence that could properly be the subject matter of an Anton Piller order may be relevant to the Authority’s investigation, s 160 is procedural in nature, and does not confer on the Authority any power to grant injunctive relief.

1 The Parliamentary debates

Recourse to Hansard is not particularly helpful in determining the proper scope of ss 157 and 161, particularly their scope, if any, in combination. Other than a comment by Owen Jennings\(^5\) to the effect that the government had not, as yet, provided a definition of “good faith” in clause 169 of the Bill,\(^56\) Richard Worth\(^57\) did note that clauses 169, 172 and 173,\(^58\) when read together, might have potential legal implications. This statement does not, however, lend support to the Authority’s contention that ss 157 and 161, in combination, empower it to grant Mareva relief.

C Section 162 of the ERA?

In *AB Ltd v Brown*,\(^59\) the first case in which Anton Piller order was granted under the ERA, the Authority held that it had jurisdiction on the basis of s 162 of the ERA. As s 162 also applies to the Employment Court, this part of the paper also concerns the scope of the Court’s injunctive jurisdiction.

Section 162 provides:

162 Application of law relating to contracts

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\(^5\) O Jennings (9 August 2000) 589 NZPD 4499
\(^56\) Clause 169 is the equivalent of s 157 in the ERA.
\(^57\) R Worth (9 August 2000) 589 NZPD 4488.
\(^58\) Sections 157, 161 and 162 of the ERA.
\(^59\) *AB Ltd v Brown* (7 March 2001 Employment Relations Authority AA41/01, Mr A Dumbleton (member)).
Subject to sections 163 and 164, 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 —

(a) the Contracts (Privity) Act 1982:
(b) the Contractual Mistakes Act 1977:
(c) the Contractual Remedies Act 1979:
(d) the Fair Trading Act 1986:
(e) the Frustrated Contracts Act 1944:
(f) the Minors’ Contracts Act 1969.

In McAlister & Anor v Cayman Holdings Ltd,\textsuperscript{60} the Authority, in determining it had jurisdiction to grant Mareva injunctions, made reference to the Employment Court’s decision in McNaught v Predict (NZ) Ltd,\textsuperscript{61} which concerned s 104(1)(h) of the Employment Contracts Act 1991 (“ECA”). As the Authority stated:

“[u]nder [the Employment Contracts] Act it seems Mareva injunctions were granted by the Court on the basis that they were an order that the High Court could make under any enactment or rule or law relating to contracts. This was the jurisdiction of the Employment Court found under s 104(1)(h) of the 1991 Act. In this respect the wording of s 162 of the Employment Relations Act 2000 is identical and has the effect of extending the jurisdiction of the Authority considerably.

Similarly, in Advanced Hair Studio Ltd v Barry,\textsuperscript{62} the Authority referred to s 104(1)(h) as providing the Employment Court jurisdiction to grant Anton Piller orders, and, by analogy to s 162, providing the Authority jurisdiction. The Authority stated:\textsuperscript{63}

[In the contract law, particularly in relation to employment, Anton Piller orders were made by the Employment Court from time to time under the Employment Contracts Act 1991. The Court had jurisdiction under s 104(1)(h) in any proceedings founded on

\textsuperscript{60} McAlister & Anor v Cayman Holdings Ltd (5 December 2002 Employment Relations Authority Auckland AA 352/02; AEA 1176/02, Mr A Dumbleton (member)).
\textsuperscript{61} McNaught v Predict (NZ) Ltd [1996] 2 ERNZ 546.
\textsuperscript{62} Advanced Hair Studio Ltd v Barry (5 June 2003 Employment Relations Authority Auckland AA165/03; AEA379/03).
\textsuperscript{63} Advanced Hair Studio Ltd, above, paras 8-9.
or relating to an employment contract to make any order that the High Court could make under any enactment or rule of law relating to contract. This, presumably, was the particular jurisdiction relied on by the Court in *NZ Food Industries Limited v Suckling* unreported, 29 August 1986, A128/96, when granting an Anton Piller order in that case.

Currently, s 162 of the Employment Relations Act 2000 confers similar jurisdiction on the Authority to that given by the 1991 Act to the Court under s 104(1)(h).

Section 104(1)(h) of the Employment Contracts Act 1991

Section 104(1)(h) of the ECA provides:

104 Jurisdiction

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:

Although s 104(1)(h) is substantially similar to s 162, s 162 does not provide either the Authority or the Employment Court the power to grant Mareva injunctions or Anton Piller orders. First, decisions by the Employment Court under the ECA relying on s 104(1)(h) as a basis for granting Mareva injunctions or Anton Piller orders were wrongly decided. Secondly, there are relevant difference between s 104(1)(h) and s 162 which make the arguments relating to the ECA less relevant.

2 Pre-ERA Jurisprudence

In *McNaught v Predict (NZ) Ltd*, the Employment Court granted its first Mareva injunction. In this case, the plaintiffs claimed arrears of wages and holiday pay. As the plaintiffs were concerned that the money in the defendant’s bank account would be dispersed to pay unsecured debts of the company, they sought to obtain a
Mareva injunction from the Employment Court preventing the defendant from doing so.

Having noted s 104(1)(h), Judge Travis then made reference to r 236(b) HCR (the statutory equivalent of the Mareva injunction), holding that Mareva injunctions are orders the High Court can make, and, in this case, the plaintiff’s claims were based on employment contracts. Section 104(1)(h) was therefore satisfied, and the Employment Court was empowered to grant a Mareva injunction.

In coming to this conclusion, Judge Travis made reference to the decision of the Court of Appeal in *Hobday v Timaru Girls’ High School Board of Trustees*,65 affirming the decision of the Employment Court in *X v Y Ltd and NZ Stock Exchange*.66 His honour does not, however, analyse the applicability of those decisions in the case of Mareva injunctions, simply stating that the “same line of reasoning would apply to injunctions to preserve assets”.67 It is important to re-examine the validity of *McNaught v Predict (NZ) Ltd*, as almost all decisions of both the Authority and Employment Court granting Mareva injunctions or Anton Piller orders rely upon the decision as authority.68

In *X v Y Ltd and NZ Stock Exchange*, the full Court of the Employment Court held, on the basis of s 104(1)(h) ECA, that it was able to grant interim reinstatement. In this case, the Court had to consider whether s 104(1)(h) allowed the Employment Court to grant injunctive relief or, as counsel for the defendant submitted, whether “the phrase ‘rule of law’ means a substantive rule of common law such as may be

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65 *Hobday v Timaru Girls’ High School Board of Trustees* [1993] 2 ERNZ 146 (CA).
67 *McNaught v Predict (NZ) Ltd*, above, 548.
68 Employment Court: Attorney-General on Behalf of The Department of Labour v Sivoravong (11 November 1999 Employment Court Auckland AC89/99; AEC162/99, Judge Colgan); *Emerson v Woodward* (17 March 1999 Employment Court Auckland AC18/99; AEC29/99, Judge Colgan); *Kerrigan v Fun Station Kindergarten Ltd* (5 March 1999 Employment Court Auckland AC14/99; AEC22/9, Judge Colgan); *Neilson v Bestline Industries Ltd* (5 February 1998 Employment Court Auckland AEC/98; A13/98, Judge Colgan); *Westley v Triangle Cables (NZ) Ltd* (13 November 1997 Employment Court Auckland AEC133/97; A16/97, Judge Travis). Authority: *Wilson & Horton Ltd v A* (19 June 2002 Employment Relations Authority Auckland AA187/02; AEA550/02); *Bell v Delta Construction and Development Ltd* (16 August 2002 Employment Relations Authority Auckland AA239/02; AEA765/02, Mr A Dumbleton (member)); *Dobby v NZ Media Group Ltd* (30 October 2002 Employment Relations Authority Christchurch CA110/02; CEA393/02, Mr P Cheyne (member)); *McAlister & Anor v Cayman Holdings Ltd* (5 December 2002 Employment Relations Authority Auckland AA 352/02; AEA 1176/02, Mr A Dumbleton (member)).
applied to the merits of an application for injunction but only once the Court has jurisdiction to entertain that. The Court rejected this decision, and held that the plain words of the section could not be said to limit the Court’s jurisdiction in this way. As Judge Colgan stated:

[w]e 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... 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.

In Hobday v Timaru Girls’ High School Board of Trustees, the Court of Appeal approved of the reasoning of the Employment Court in X v Y Ltd. The Court cited with approval the above passage, and further noted:

[w]e 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.

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70 X v Y Ltd and NZ Stock Exchange, above, 871.
71 Hobday v Timaru Girls’ High School Board of Trustees [1993] 2 ERNZ 146 (CA), 162-163.
Importantly, the Court held 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...”  

3 Was McNaught correctly decided?

The author contends that s the wording of s 104(1)(h) and s 162 does not permit the Authority or Employment Court to grant any order it wishes, as long as the order is related to a contract. Indeed, it is difficult to imagine a dispute coming before either tribunal that would not concern a contract of employment. The interpretation presently favoured by both the Authority and Employment Court is so expansive that there appears to be very little limit on what remedies the bodies can provide. This can not have been the intention of Parliament. A better interpretation is that the Authority/Employment Court are authorised to make orders of a contractual nature only, for example, variation or cancellation.

Judge Travis’ reliance on Hobday and X v Y Ltd in concluding that the Court did have the requisite jurisdiction is, with respect, fundamentally flawed. Both Courts were simply considering whether the words “any enactment or rule of law relating to contract” permitted the Employment Court to grant interim injunctions. The conclusion reached in these cases is hardly controversial. Indeed, Judge Colgan put it well in Jerram v Franklin Veterinary Services (1977) Ltd, where he said:

I found the following argument put forward by Mr Grace to be more persuasive. He said that because each of the seven listed statutes in s 162 permits the Authority, in a substantive matter before it, to grant relief in various ways including by injunction, it must follow by necessary implication that the Authority also possesses the power to preserve or alter the rights and obligations of the parties pending its determination of a claim to substantive relief under these statutes. In the case of the Illegal Contracts Act 1970, for example, s 7 empowers the Authority to grant relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or in part, and this may be done by application seeking either a declaration or injunction. Similar powers are contained in, for example, s 7(3) Contractual Mistakes Act 1977, ss 9(2)

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72 Hobday, above, 163.
73 Jerram v Franklin Veterinary Services (1977) Ltd [2001] 1 ERNZ 157 (EC), 165-166. This was the first case to challenge the power of the Authority to exercise powers not expressly provided for in the ERA.
and (3) and 15 Contractual Remedies Act 1979, s 7 Contracts (Privity) Act 1982, ss 27 and 41 Fair Trading Act 1986, and so on. It was said that what the Authority may do substantively, it must also necessarily be able to do on an interim basis. That was the reasoning applied by the Court of Appeal in the Timaru Girls High School case leading to its conclusion that the Employment Court did have the power to order interim reinstatement in employment by injunction.

Neither the Court of Appeal nor the Employment Court heard argument on whether s 104(1)(h) allows the Employment Court to grant interim injunctions which are not of a contractual nature, but simply relate to an employment contract. Indeed, there is a suggestion in X v Y Ltd, cited by the Court of Appeal in Hobday, that the order, interim or otherwise, must still be a contractual remedy. The Employment Court noted the decision of the Court of Appeal in NZ Banking Trades IUOW v General Foods Corporation (NZ) [1985] 2 NZLR 110, where Cooke P held that “[i]njunctions – interim or final – are a standard remedy for actionable interference with contractual rights”. 75

Interim reinstatement is an order of a contractual nature. The purpose of an order for interim reinstatement is to “preserve the position of an employee complaining of unjustified dismissal”. 76 In this respect, interim reinstatement simply gives effect to an employee’s contractual rights. Given this, the Court in both X v Y and Hobday were acting within the clear words of s 104(1)(h). 77

4 The purpose of section 162

Under the ECA, concern was occasionally expressed that the Employment Tribunal’s (“the Tribunal”) ability to adequately resolve employment disputes was limited by its inability to grant remedies under any of the primary contractual statutes. As Judge Colgan noted: 78

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74 NZ Banking Trades IUOW v General Foods Corporation (NZ) [1985] 2 NZLR 110 (CA).
75 NZ Banking Trades IUOW, above, 118.
76 Hobday v Timaru Girls’ High School Board of Trustees [1993] 2 ERNZ 146 (CA), 163.
77 See generally Peter Agnew (ed) Mazengarb’s Employment Law (looseleaf, Butterworths, Wellington) para ER127.3 (last updated September 2003).
The next matter upon which I propose to comment briefly is the difficulty that the Tribunal, the Court and parties may have in cases such as this as a result of the restrictions upon the ability of the Employment Tribunal to apply important contractual statutory provisions to its consideration of cases and for the Court to do so on appeals. I understand that Tribunal members see themselves without jurisdiction to apply the provisions of the Contractual Remedies Act, the Contractual Mistakes Act and the Contracts (Privyty) Act as the result of the absence in the Tribunal's jurisdiction section (s 79) of an equivalent to s 104(1)(h). If that is so, and there is apparently as yet no authoritative ruling on the question, then it may be that parties to proceedings in the Employment Tribunal are precluded from having access to the range of remedial statutes which Parliament has determined should modify the common law of contract in appropriate cases and which is open to litigants in the non-specialist Courts and in this Court.

Although the Tribunal could make orders under the contractual enactments, it was permitted to do so “only if satisfied beyond a reasonable doubt that such an order should be made and that any other remedy would be inappropriate or inadequate”. The Court often criticised this provision.

By not replicating s 104(2), “Parliament has gone some distance towards acknowledging the force of each of the pending concerns”.

5 The scope of section 162

The focus of s 162 is on contractual remedies only. As the learned authors of Brookers Employment Law note, “when dealing with employment agreements, the Authority may make any order that the High Court or District Courts may make under any statutes relating to contracts”. Although this description may be somewhat limited, in that the power of the Authority/Employment Court under s 162 extends to the rules of law as well as enactments and, therefore, presumably the common law,

79 Employment Contracts Act 1991, s 104(2).
80 See for example Radio Horowhenua Ltd v Bradley [1993] 2 ERNZ 1085 (EC), 1097.
81 Although note that the power of the Authority to cancel or vary an employment agreement is similarly limited: Employment Relations Act 2000, s 164(d).
83 Jason Bull (ed) Brookers Employment Law, above, para ER162.02.
the tenor of this statement is correct. Section 162 is concerned with orders of a contractual nature, such as variation, suspension or cancellation of an employment agreement. Simply put, the order must relate to contract law, rather than the case in question being about a contract.

This interpretation is supported by the inclusion of the primary contractual statutes in New Zealand, which were not explicitly referred to in s 104(1)(h). Indeed, Parliament rejected an amendment, proposed by Gerry Brownlee, that the statutory references in subclause (1)(b)-(g) be removed. In light of the express inclusion of these provisions, albeit not exclusive, Parliament cannot have intended that s 162 empower the Authority/Employment Court to grant orders that were not of a contractual nature.

This analysis is further supported by reference to ss 162 and 163 of the ERA, which limit the Authority’s power to vary or cancel both collective and individual employment agreements. Further, it should be noted that, in s 127, Parliament has specifically provided the Authority the power to grant interim reinstatement, the power in question in both X v Y and Hobday. If, as the Authority claimed in McAlister & Anor v Cayman Holdings Ltd, Parliament must have been aware of the way in which the Employment Court used s 104(1)(h) when enacting s 162, then Parliament’s intention was clearly to alter that scope – irrespective of whether the pre-ERA position is conceptually defensible.

Against this backdrop, Parliament clearly envisioned that s 162 would authorise the order of contractual remedies, whether interim or otherwise. However, it cannot be said that s 162 extends any further than this – such an interpretation is manifestly at odds with both the clear words of Parliament and the surrounding statutory scheme. Further, the ostensibly supporting case law, namely McNaught, is based upon a flawed reading of previous authority and should not be considered good law.

84 Hon G Braybrooke (9 August 2000) 589 NZPD 4523. Note, however, that the all amendments proposed by the opposition were rejected, and too much cannot, therefore, be read into this.
85 Employment Relations Act 2000, s 127.
86 Section 127(7) affirms the Employment Court’s ability to grant interim reinstatement.
87 McAlister & Anor v Cayman Holdings Ltd (5 December 2002 Employment Relations Authority Auckland AA 352/02; AEA 1176/02, Mr A Dumbleton (member)).
Reference to Hansard is, unfortunately, not overly elucidating. Only two, opposition, members made any reference of substance to s 162, and their comments do little other than reflect the underlying debate. The Honourable Bill English noted that cl 173 of the Bill empowered Authority members to make orders the High Court may make under contractual statutes. Simon Power, however, claimed that cl 173 would authorise members to make “any order that a High Court or District Court could make”. Although, as observed earlier, Bills English’s comments may be somewhat narrow, they are generally reflective of the scope of the clause. The reader should not place too much weight upon the comments of Simon Power, which were made to try to discredit a Government Bill, and are exaggerated.

Further, the Explanatory Note to the Employment Relations Bill 2000 is of limited assistance, as it simply repeats the content of s 162 without explanation.

7 Are Mareva injunctions and Anton Piller orders “related to contract”?

If, however, s 162 is not limited to orders of a contractual nature, and simply requires the order to relate to an employment agreement, Mareva relief and Anton Piller orders will not fall within this definition. In *Mercedes-Benz v Leiduck*, the House of Lords discussed, at length, the nature of the Mareva injunction. As Lord Mustill observed:

[when ruled upon it decides no rights, and calls into existence no process by which the rights will be decided. The decision will take place in the framework of a distinct procedure, the outcome and course of which will be quite unaffected by whether or not Mareva relief has been granted. Again, if the application succeeds the relief granted bears no resemblance to an orthodox interlocutory injunction which in a provisional and temporary way does seek to enforce rights, or to the kind of interim procedural measure which aims to make more effective the conduct of the action or matter in which the substantive rights of the plaintiff are ascertained. Nor does the Mareva

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88 Hon B English (9 August 2000) 589 NZPD 4491.
89 S Power (9 August 2000) 589 NZPD 4479.
90 Employment Relations Bill 2000, no 8-1, cl 25.
91 *Mercedes-Benz AG v Leiduck* [1995] 3 All ER 929 (HL), 941.
injunction enforce the plaintiff's rights even when a judgment has ascertained that they exist, for it merely ensures that once the mechanisms of enforcement are set in motion, there is something physically available upon which they can work.

Applying this reasoning, Mareva injunctions cannot be said to relate to the law of contract. Mareva relief does not give effect to contractual rights – it simply ensures that, if the court deems the defendant to have breached the plaintiff’s contractual rights, and orders judgment in the plaintiff’s favour, the “mechanisms of enforcement” are not frustrated by the actions of the defendant. In this way, s 162 cannot be said to provide jurisdiction. Equally, the same could be said of Anton Piller orders. Such orders do not enforce contractual rights. Anton Piller orders simply ensure that property, to which the plaintiff may have a claim, or which might be useful in resolving issues before the Court, is not destroyed.\(^2\)

\(D\) \textbf{Section 221 of the ERA?}

In \textit{Advanced Hair Studio v Barry}, the Authority observed that s 221 of the ERA might form the basis of its jurisdiction to grant Anton Piller orders. Section 221 provides:\(^3\)

\begin{verbatim}
221 Joinder, waiver, and extension of time

In order to enable the Court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order, —

(a) direct parties to be joined or struck out; and
(b) amend or waive any error or defect in the proceedings; and
(c) subject to section 114(4), extend the time within which anything is to or may be done; and
(d) generally give such directions as are necessary or expedient in the circumstances.
\end{verbatim}


\(^3\) Section 221 also applies to the Employment Court.
In *Brookers Employment Law* it is suggested that the Employment Court’s (and, by analogy, the Authority’s) jurisdiction to grant Mareva relief may lie in the Court’s wide powers under s 221(d). The learned authors argue that:

A Mareva injunction may “enable the Court... to more effectually to [sic] dispose of any matter before it according to the substantial merits of the case” (s 221(d)) by preserving assets which might otherwise be dissipated or removed from the Court’s jurisdiction, thereby depriving a successful plaintiff of the fruits of a favourable judgment. On this basis it would follow that the Employment Relations Authority, to which s 221 equally applies, could also issue a Mareva Injunction. This ability would seem consistent with the Authority’s general role as the first instance decision-maker and conversely the Employment Court’s very narrowly defined role as a Court of first instance (particularly in comparison with the position under the ECA).

Section 221, as stated, is concerned with “[joinder[s], waiver[s] and extension[s] of time”. On this basis, the section empowers the Employment Court and the Authority to join or remove parties from the proceedings, amend or waive defects in the proceedings, or extend any time limits in relation to the proceedings. The section is procedural in nature, and s 221(d) is coloured by this. Further, s 221(d) authorises the Authority/Employment Court to give “directions”, not “orders”, the latter term being used in s 162. While the term “order” is wide enough to potentially encompass Mareva injunctions and Anton Piller orders, “direction”, is not. On these bases, s 221(d) cannot be said to empower either the Employment Court or the Authority to grant Mareva injunctions or issue Anton Piller orders.

1 What did Parliament intend?

No reference was made to cl 231 during the passage of the ERA through the House. Nor was there any comment on the clause in the Explanatory note to the Bill.

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95 Employment Relations Act 2000, s 221(a).
96 Employment Relations Act 2000, s 221(b).
V JURISDICTION OF THE EMPLOYMENT COURT

The Employment Court has claimed jurisdiction to grant Mareva injunctions and Anton Piller orders on two bases: s 103 ECA (now s 186(1) ERA); and 104(1)(h) ECA. The jurisdiction of the Employment Court under s 104(1)(h) has been discussed in part IV C of this paper, and as such, this part will focus only on s 186 ERA. It should be noted that s 221 ERA applies to both the Authority and Employment Court, and the discussion in part IV D of this paper is therefore also relevant.

Section 186 ERA provides:

186 Employment Court

(1) This section establishes a court of record, called the Employment Court, 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.

(2) The Court established by subsection (1) is declared to be the same Court as the Employment Court established by section 103 of the Employment Contracts Act 1991.

In Clentworth v Technic New Zealand Ltd., Chief Judge Goddard held that, either on the basis of s 103, or s 104(1)(h), the Employment Court had jurisdiction to grant Mareva injunctions. The preponderance of his honour's discussion, however, is focused on s 103. As his honour stated:

[c]onceptually, as it seems to me, the Court's power to take these steps [grant Mareva injunctions] derives from its status as a Court of record with all the powers inherent in such a Court: Employment Contracts Act 1991, s 103. One of the most important of those powers is the power to control its procedure and to protect its process from abuse, whether the abuse is by plaintiffs or by defendants. There are many instances of the application of that power. I have only this week exercised that power against a plaintiff on the defendant's application.

97 Clentworth v Technic New Zealand Ltd [1998] 3 ERNZ 1121.
98 Clentworth v Technic New Zealand Ltd, above, 1125.
Section 103 ECA (or s 186 ERA) cannot be relied upon in granting Mareva injunctions or Anton Piller orders. Primarily, this is because the power to grant these orders derives from the inherent jurisdiction of the High Court. The Employment Court does not possess this inherent jurisdiction, and the powers bestowed upon it by dint of its being a court of record do not afford it this power.

A Superior and inferior courts

As noted above, the High Court is a superior court. This is implicit in the definition of an inferior court in s 2 of the Judicature Act 1908, as any court “of inferior jurisdiction to the High Court”. The Employment Court is an inferior court. The High Court is a court of inherent jurisdiction, this being affirmed by s 16 of the Judicature Act 1908. The Employment Court, however, is not. Prima facie, nothing is within the jurisdiction of an inferior court unless it is expressly shown “on the face of the proceedings that the particular matter is within the cognisance of the particular court”.

The Employment Court, as a specialist Court of record, does have specific statutory powers that resemble powers from the inherent jurisdiction, for example, the power to fine in respect of contempt of court. However, the learned authors of McGechan on Procedure contend that the Court does not possess a full inherent jurisdiction in its own right.

In A-G v Benge, the Court of Appeal stated, in obiter:

In general terms, the Employment Contracts Act removed a right of access to the “ordinary courts” and in particular the High Court. The Employment Court is thus a creature of statute. It does not have the inherent jurisdiction of the High Court. The

99 See part III B 1 The Court’s inherent jurisdiction.
assumption of jurisdiction by the Employment Court must therefore always be referable to a given statutory provision.

In *A-G v Reid*, the full Court of the High Court held that the Employment Court was an inferior court.

### B Does the Employment Court's status as a court of record empower it to make these orders?

The distinction between courts of record and not courts of record was historically important, affecting both the jurisdiction to fine or imprison and the conclusiveness of the Court’s record. Today, the distinction is of little importance, as all courts in New Zealand, other than the Authority and the Coronial Courts, are expressly declared by statute to be courts of record. Essentially, courts of record are empowered to control their own procedure, and protect their process from abuse. In particular, a court of record may fine or imprison for contempt of court.

The view that Mareva injunctions prevent abuse of the Court’s process is supported by the majority of the High Court of Australia in *Patrick Stevedores Operations (No 2) Pty Ltd v Maritime Union of Australia*, who observed that the Mareva injunction is “the paradigm example of an order to prevent the frustration of the Court’s process”.

In *Owen v McAlpine Industries Ltd*, the Employment Court considered whether it had authority to control the appearance of counsel where a potential conflict of interest was imminent. The Court concluded, having made reference to *Clentworth*, that the Employment Court may have “inherent powers which do not derive from specific statutory powers”.

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106 See Andrew Beck *Principles of Civil Procedure* (2 ed, Brookers, Wellington, 2001), para 2.2.1; see also *Ex P Goldsborough Mort & Co Ltd: Re Magrath* (1931) 32 SR (NSW) 338.
107 Brennan CJ and McHugh, Gummow, Kirby and Hayne JJ.
109 *Owen v McAlpine Industries Ltd* (1999) 1 ERNZ 870 (EC).
In light of clear authority to the contrary, namely *A-G v Benge* and *A-G v Reid*, it is difficult to accept the above proposition. However, even if *Owen* was correctly decided, this does not necessarily mean the Employment Court has jurisdiction to grant Mareva injunctions. In *Owen*, the Employment Court sought only to restrain the actions of a barrister who intended to appear before it. In this sense, *Owen* can be distinguished from the decision of the Doogue J in *Sutherland v Sutherland*.\(^\text{110}\) In this case, his honour held that the Family Court was not a court of inherent jurisdiction. As an inferior Court, the Family Court only has the power to control actions or omissions that impact on its own processes in respect of proceedings before it. As such, the Family Court was said to be unable to generally supervise the legal profession.

As discussed above,\(^\text{111}\) the power to grant Mareva injunctions and Anton Piller orders is derived from the inherent jurisdiction of the High Court. This was acknowledged both in the United Kingdom,\(^\text{112}\) and New Zealand.\(^\text{113}\) Indeed, the ability of the High Court to grant such orders derives from its ability to administer the general laws of the land.\(^\text{114}\) One of the primary reasons for this is the pervasive nature of both Mareva injunctions and Anton Piller orders. Both orders may be granted against persons who are not yet parties to proceedings.\(^\text{115}\) Indeed, such orders may be made by one Court in favour of proceedings in another.\(^\text{116}\) Further, such orders, particularly Mareva injunctions, may have a significant impact on third parties.\(^\text{117}\)

The decision of Doogue J in *Sutherland*, is more instructive in this regard. It is one thing, as the Employment Court did in *Owen*, to claim control over a barrister who seeks to appear before the Court. It is quite another, as was the case in

\(^{110}\) *Sutherland v Sutherland* (2001) 21 FRNZ 529 (HC), 536.

\(^{111}\) See part III B The Court’s inherent jurisdiction.

\(^{112}\) *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd’s Rep 509 (CA); *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 (CA).

\(^{113}\) *Hunt v BP Exploration Co (Libya) Ltd* [1980] 1 NZLR 104 (SC); *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461(CA).

\(^{114}\) See *Prior v Parsley 45 Ltd (in rec)* [2000] 1 NZLR 385, 389 (CA).

\(^{115}\) *Mareva Compania Naviera SA*, above; *Anton Piller KG v Manufacturing Processes Ltd*, above.

\(^{116}\) *Palmer v Lees Power Sed Ltd* [1996] 1 ERNZ 165 (HC); *BFS Marketing Ltd v Field* [1992] 2 ERNZ 1105 (HC).

Sutherland, to claim control over the profession generally. Equally, Mareva injunctions and Anton Piller orders do not simply affect those before the Court. Indeed, both the Employment Court and Authority have granted orders over persons not yet involved in proceedings.\(^\text{118}\)

Indeed, even the decision of the High Court of Australia in *Patrick Stevedores Operations (No 2) Pty Ltd*, which ostensibly supports the position adopted by Chief Judge Goddard in *Clentworth*, draws this basic distinction. The majority noted that:\(^\text{119}\)

> [t]he general principle which informs the exercise of the power to grant interlocutory relief is that the Court may make such orders, at least against the parties to the proceedings against whom final relief might be granted, as are needed to ensure the effective exercise of the Jurisdiction invoked. The Federal Court had jurisdiction to make interlocutory orders to prevent frustration of its process in the present proceeding.\(^\text{[emphasis added]}\)

For this reason, the Court of Appeal held, in *Prior v Parshelf 45 Ltd (in rec)*,\(^\text{120}\) that, pending an appeal to the Privy Council, it does not have jurisdiction to grant Mareva relief. As Blanchard J stated:\(^\text{121}\)

> [t]hese statements may provide guidance when an application is made pending determination of an appeal to this Court but it does not follow that there exists a corresponding inherent jurisdiction when there is to be a further appeal to the Privy Council. As was observed in *Staples*, the English Court of Appeal is a branch of the Supreme Court. It therefore possesses an inherent jurisdiction which supplements the powers given to it by statute and by rules. This Court is not in a similar position. It is constituted under Part II of the Judicature Act (s 57(1)). Its jurisdiction derives from statute and, in relation to appeals to the Judicial Committee, from the Privy Council Rules. Unlike the High Court, it does not have “all judicial jurisdiction which may be necessary to administer the laws of New Zealand” (s 16).

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\(^{118}\) See, for example, *Wilson & Horton Ltd v A* (19 June 2002 Employment Relations Authority Auckland AA187/02; AEAS50/02); see, for example, *Clentworth v Technic New Zealand Ltd* [1998] 3 ERNZ 1121 (EC).


\(^{120}\) *Prior v Parshelf 45 Ltd (in rec)* [2000] 1 NZLR 385 (CA).

\(^{121}\) *Prior v Parshelf 45 Ltd (in rec)*, above, 391.
While, in a broad sense, Mareva injunctions and Anton Piller orders may prevent abuse of the Court’s process, they are far more pervasive, and indeed, invasive, than that. Given the potentially wide ranging impact such orders may have, not only parties to a proceeding, but on parties who may be part of some future proceedings, and unrelated third parties, the ability to grant these orders derives, therefore, from the High Court’s inherent jurisdiction only.

Although the District Court can grant Mareva injunctions, it may do so only in respect of property situated in New Zealand. Further, by enacting s 42(2) of the District Courts Act 1947, Parliament has explicitly provided the District Court with authority to do so. If Parliament had intended to grant the Employment Court (and, indeed, the Authority) such a power, it would have done so explicitly, as it did in both s 42(2) and, in the case of Anton Piller orders, s 26J(4) of the Judicature Act 1908. Judge Sheppard, of the Planning Tribunal, made this point well in *Geotherm Energy Ltd v Waikato Regional Council*, where his honour stated:

> as the tribunal is not a superior Court with inherent jurisdiction, having regard to the nature of Planning Tribunal proceedings generally, and the omission of the relevant topic from the powers of the District Court selected for conferring on the Planning Tribunal, I hold that the Tribunal does not possess authority to order the giving of security for costs. If it is intended that the Tribunal should have that authority for the future, it can be conferred expressly . . .

### VI REMEDIES

Those whom the Authority has already made orders against will be unable to appeal to the Employment Court, as such challenges had to have occurred within 28 days after the determination. However, given that such a challenge will question the jurisdiction of the Authority to make the orders in question, the determinations will

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122 District Courts Act 1947, s 42(2).
123 Section 42(2) of the District Courts Act 1947 provides: “Notwithstanding subsection (1) of this section, an interlocutory injunction restraining a party to a proceeding (whether domiciled, resident or present in New Zealand) from removing from New Zealand, or otherwise dealing with, assets in New Zealand is the only interlocutory injunction in the nature of a Mareva injunction that a Judge may grant”.
124 *Geotherm Energy Ltd v Waikato Regional Council* [1994] NZRMA 139 (PT), 144.
125 Employment Relations Act 2000, s 179.
still be open to judicial review.\textsuperscript{126} The Employment Court will hear such a review.\textsuperscript{127} Similarly, challenges to the Employment Court’s jurisdiction to grant Mareva injunctions and Anton Piller orders are reviewable by the High Court.\textsuperscript{128}

A \textit{Grounds of Review}

Excess of jurisdiction is a well-recognised ground of review.\textsuperscript{129} In relation to determinations of the Authority, an application for judicial review must be filed with the Employment Court.\textsuperscript{130} To review decisions of the Employment Court, an application must be filed with the High Court pursuant to \textsection 4 of the Judicature Amendment Act 1972.

In both cases, the applicant should request an order in the nature of \textit{certiorari},\textsuperscript{131} which, if granted, will quash the decision of the Authority/Employment Court to grant the orders in question.\textsuperscript{132}

It should be noted, however, that the decision to provide relief is discretionary. As such, delay may be fatal to any possible review.\textsuperscript{133} As a result, it is possible the Employment Court/High Court will refuse to provide relief in most of the cases addressed in this paper.

B \textit{Consequences of successful review proceedings}

Before the Authority or Court grant a Mareva injunction or Anton Piller order, the applicant must give an undertaking as to damages to the defendant.\textsuperscript{134} The

\textsuperscript{126} Employment Relations Act 2000, \textsection 184(2)(b).
\textsuperscript{127} Employment Relations Act 2000, \textsection 194(2).
\textsuperscript{128} Employment Relations Act 2000, \textsection 193(2)(b).
\textsuperscript{129} Jason Bull (ed) \textit{Brokers Employment Law} (looseleaf, Brokers, Wellington, Employment Relations Act 2000) para ER194.05 (last updated August 2003).
\textsuperscript{130} Employment Relations Act 2000, \textsection 191.
\textsuperscript{131} Judicature Amendment Act 1972, \textsection 4(2).
\textsuperscript{132} See \textit{Re Erebus Royal Commission; Air NZ Ltd v Mahon} [1981] 1 NZLR 614 (CA); for in-depth discussion of \textit{certiorari} and other possible remedies, see Nicola Burdon (ed) \textit{McGechan on Procedure} (looseleaf, Brokers, Wellington) para JA4.0 (last updated September 2003).
\textsuperscript{133} Turner v Allison [1971] NZLR 833, where delay of nearly a year was fatal.
\textsuperscript{134} There is debate as to whether an applicant need give an undertaking where the High Court grants a Mareva injunction on the basis on its inherent jurisdiction, rather than \textsection 236A(3) HCR. However, this argument is of little relevance to both the Authority and the Court. If either body does have jurisdiction, it is derived from statute: see \textit{Francis v Supreme Services Ltd} (1987) 2 PRNZ 532; see also Nicola
undertaking must be one of substance, and provide real protection to the defendant in the event the Mareva injunction was wrongly issued. 135

In *Bradley v Byrne*, Holland J held that: 136

the undertaking given by the plaintiff is an undertaking to the Court and is not a contract between the parties. Nevertheless in order to provide some degree of certainty in the application of the law it has been held that the assessment should be made as if the undertaking were a contract so that the award would not cover loss which could not form part of an award for damages at common law for breach of contract.

It follows that the principles of foreseeability or remoteness apply as well as the principle that a person wronged should not be able to recover damages which have been unreasonably incurred.

It may be possible to obtain damages if the Authority/Employment Court acted *ultra vires*. In *Advanced Hair Studio Ltd v Barry*, 137 the Authority noted the possibility, if it did not have jurisdiction to grant Mareva injunctions, of the defendant seeking to enforce the applicant’s undertaking as to damages.

In the case of Mareva injunctions, if the plaintiff was eventually successful at trial, the defendant will not have recourse, as the assets in question will no longer be hers. However, if the case settled, or the plaintiff was unsuccessful, the defendant may be able to obtain compensation for any loss incurred as a result of her assets being frozen.
Although there is clear authority that simply because an Anton Piller order has been executed, this is no reason why it should not be set aside. However, expiration of time may weigh against discharge of the order. In *Columbia Picture Industries Inc v Robinson*, Scott J, refusing to discharge an order executed 3 years previous, on the ground of material non-disclosure by the plaintiff, stated that “I am instinctively disinclined to make by judicial order what seems to me to be an empty gesture”. Irrespective of the conduct of the applicant, the Court would still have had discretion to grant the order. In this case, the Authority/Employment Court were acting without authority, and as such, the principles enunciated in *Columbia Pictures Industries Inc* should not apply. However, as noted, the Court may refuse to grant relief in judicial review proceedings due to lapse of time.

The case of Anton Piller orders is more interesting. As Scott J noted in *Columbia Pictures Industries Inc*:

> solicitors who execute an Anton Piller order do so, in important part, as officers of the court. It is the court which places them in a position to do that which would, without the court authority, be a flagrant and inexcusable trespass. They are placed in a position in which their actions are likely to cause shock, distress and often outrage to those against whom the orders are executed.

It is possible that a solicitor, in execution of an Anton Piller order, could be caught by the New Zealand Bill of Rights Act 1990 (“BORA”), pursuant to s 3(b). Section 3 provides:

3 Application—

This Bill of Rights applies only to acts done—

(a) By the legislative, executive, or judicial branches of the government of New Zealand; or

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138 *Booker McConnel v Plascow* [1985] RPC 425; *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 2 All ER 589 (CA).

139 The applicant for a Mareva Injunction or Anton Piller Order is under a duty to the court to make full and frank disclosure of all material facts: see *Siporex Trade SA v Comdel Commodities Ltd* [1986] NLJ Rep 538.

140 *Columbia Picture Industries Inc v Robinson* [1987] 1 Ch 38, 87.

141 *Columbia Picture Industries Inc*, above, 380.
By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

In *R v N*, the Court of Appeal held that a private citizen in the performance of a citizen’s arrest did not fall within s 3(b). The Court came to this conclusion on the basis that s 35 of the Crimes Act did not positively empower citizens to perform arrests; it simply provides immunity from prosecution. Given that, it could not be said that a citizen’s arrest is a “public function, power, or duty”.

Where a solicitor gives effect to an Anton Piller order, similar difficulties do not arise. As noted above, solicitors do so as officers of the court, and act pursuant to a court order. As such, they are performing either a “public function or power”, the authority to do so having been conferred by a court order.

There could be a claim that the defendant’s s 21 right to be free from unreasonable search and seizure have been breached. Although “illegality is not the touchstone of unreasonableness”, if the court gives due regard to the illegality the solicitor’s conduct, and the likely invasive nature of any given search, the Court may conclude that the search amounted to an “unreasonable search and seizure”. However, presuming the order has been effected in an orderly manner, the Court may consider the breach to be of a purely technical nature, and as such, not unreasonable. Given that the solicitors in question would have thought themselves authorised to undertake the searches, this is a likely result.

If the court does consider the given search to have been in breach of s 21, the defendant may seek to obtain *Baigent* compensation. Further, if evidence has been obtained as a result the search, and this formed the basis of a successful claim by the plaintiff, the defendant could seek to have the case reopened and the evidence

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142 *R v N* [1999] 1 NZLR 713 (CA).
143 *R v N*, above, 720.
144 *R v Grayson & Taylor* [1997] 1 NZLR 399 (CA), 407.
145 *R v Grayson & Taylor*, above, 408 – by analogy to search warrants.
146 *Simpson v A-G (Baigent’s Case)* [1994] 3 NZLR 667 (CA).
excluded. However, given that, unlike in a criminal context, monetary compensation is probably sufficient, exclusion of evidence is unlikely.

Further, there exists the possibility of simply taking an action for trespass against the solicitor. If the solicitor’s actions were unlawful, an action in trespass is likely to be the easiest route to obtaining a remedy, as damages are available even if the defendant has suffered no harm.

VI SHOULD THE AUTHORITY AND EMPLOYMENT COURT HAVE JURISDICTION?

The starting point of this discussion must be the nature of the orders themselves. While ancillary to the main action, Anton Piller orders or Mareva injunctions often have a decisive effect on a case. As Sir John Donaldson LJ stated in Bank Mellat v Nikpour, [i]t [the Mareva injunction] is in effect, together with the Anton Piller order, one of the law’s two “nuclear” weapons.

Further, since, in determining whether to grant Mareva relief a judge will use her discretion and experience to decide the merits of the application, appellate courts have been reluctant to interfere with the exercise of that discretion. Consequently, the imposition of a Mareva injunction is not lightly ordered.

It has been emphasised that the Anton Piller order is at the extremity of the court’s powers. The orders are, however, granted with increasing frequency. Although no record of numbers is kept, in 1977 the Mareva injunction was

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148 R v Shaheed, above, 418.
149 Mayfair Ltd v Pears [1987] 1 NZLR 459 (CA).
151 Mellat v Nikpour [1985] FSR 87, 92; see also Columbia Pictures v Robinson [1986] 3 All ER 338, 356, concerning the ‘traumatic effect’ of an Anton Piller Order.
152 Ninemia Corporation.
154 Anton Piller KG v Manufacturing Processes Ltd [1976] Ch 55 (CA), 61, Ormrod LJ.
155 Nor is any such record kept in the UK.
described as “extremely popular”, while in 1978 the Anton Piller order was said to be “in daily use”. In *Siporex Trade SA v Comdel*, Bingham J noted:

> [t]he advent of the Mareva injunction has, as is notorious, led to [ex parte] applications [for injunctive relief] becoming commonplace, hundreds being made each year and relatively few refused.

Further, the courts have periodically commented that Mareva injunctions and Anton Piller orders are, perhaps, being too freely granted. In *Systematica v London Computer Centre*, Whitford J stated that too free use was being made by plaintiffs of the Anton Piller provision. In *Siporex Trade SA v Comdel*, Bingham J made reference to ‘the laxity of practice which the Mareva injunction has indirectly caused’.

### A The Authority?

It is difficult to discern from the Authority’s determinations whether its decisions to grant Mareva relief and Anton Piller orders have been reasonable. However, there is empirical evidence to suggest that, as Scott J noted in *Columbia Pictures v Robinson*, “…on these one-sided applications judges may very easily become too enthusiastic”. Since 1996, the Employment Court has granted nine Mareva injunctions and six Anton Piller orders – keeping in mind that the

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Tribunal did not claim jurisdiction to do so. Since 2001, however, the Authority has already granted four Mareva injunctions and five Anton Piller orders. Given the invasive nature of both orders, one would have expected the Authority to act in a more judicious manner.

Further, as counsel for both parties commented in *Jerram v Franklin Veterinary Services (1977) Ltd.*, it was a remarkable change from previous practice that injunctive orders (including Anton Piller orders and Mareva injunctions) might now be made by adjudicators, some of whom are not legally qualified or trained following an informal meeting around a table at which some unsworn evidence was provided and relied on, as I was told had occurred in this case.

In *McAlister v Cayman Holdings Ltd*, the Authority stated that:

> [i]t might be expected that for the purposes of efficiency, to avoid double cost and double handling, resolution of the employment relationship problem should be dealt with through its various stages in the one place.

With respect, this is not a compelling reasoning for allowing the Authority wide-ranging injunctive powers. When a party seeks to obtain a Mareva injunction or Anton Piller order, a separate application must be made to hear the issue, most likely on an *ex parte* basis. Whether a party had proceedings pending with the Authority makes little difference to the efficiency of such a hearing. The party can easily make an application to the Employment Court and indeed the High Court as it can to the Authority. Presumably, these bodies will consider such applications expeditiously.

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164 See note 51.

165 *Jerram v Franklin Veterinary Services* [2000] 1 ERNZ 157 (EC), 164-165.

166 *McAlister & Anor v Cayman Holdings Ltd* (5 December 2002 Employment Relations Authority Auckland) para 7.
Further, such an application will have little in common with substantive employment law issues. As such, the Authority’s contention that allowing it such power avoids double handling it not credible.

Further, it is submitted that providing the Authority with jurisdiction to grant Mareva injunctions and Anton Piller orders would be inconsistent with the underlying purpose of the Authority. As s 157 of the ERA states:

> The Authority is 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 operates in an informal way, and was not intended to be an overtly legal body. Both Mareva injunctions and Anton Piller orders are complicated and technical forms of relief. They are of a purely legal nature, and do not concern substantive employment law. By attempting to extend its jurisdiction in this respect, the Authority is moving away from its primary focus, that being the employment relationship. While the Authority’s attempt to become a ‘one stop shop’ for litigants could be considered noble, this is not its proper role. Both Mareva injunctions and Anton Piller orders are particularly invasive powers, and as such, should be administered by a limited number of highly trained judicial officers. It should also be noted that Authority Members are not required to be legally trained, and although they will no doubt have received training with respect to injunctive relief, Members are unlikely to be as qualified to make such orders as High Court Judges.

B The Employment Court

The author notes that most of the preceding arguments are of limited application to this body. Considering that the Authority and Employment Court together have exclusive jurisdiction of employment issues in New Zealand, and that

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the District Court has been granted authority, at least in relation to Mareva injunctions,\textsuperscript{171} there seems no reason why the Employment Court should not be extended the same powers.

**VIII CONCLUSION**

Conventionally, only the High Court has had jurisdiction to grant both Mareva injunctions and Anton Piller orders. The basis of the High Court’s jurisdiction is its status as a court of inherent jurisdiction.\textsuperscript{172} The Authority is not a court of inherent jurisdiction, nor, indeed, is it a court of record. On this basis alone, the jurisdiction of the Authority to make such orders is shaky.

Although the Authority has claimed such a power, its attempts to draw on disparate provisions in the ERA to justify this are unconvincing. Sections 157, 160 and 221 concern the procedure of the Authority, and cannot be said to empower it to make wide-ranging injunctive orders that are essentially unrelated to the procedure of the Authority. Section 162 (which also applies to the Employment Court) only empowers the Authority to make orders of a contractual nature, and as such, does not authorise the granting of Mareva Injunctions or Anton Piller orders. Although there is ostensibly supporting authority for the proposition that s 162 does provide the requisite jurisdiction, that authority, \textit{McNaught}, is based upon a flawed reading of the purported supporting authority, and is inconsistent with the clear words of the section.

Further, s 186 of the ERA does not empower the Employment Court to grant Mareva injunctions and Anton Piller orders. Although courts of record have inherent powers, they do not have inherent jurisdiction. Given the pervasive nature of both orders, and the fact that both can be ordered against people who are not, as yet, parties to proceedings before the Employment Court, the Employment Court’s status as a court of record does not provide it with the requisite jurisdiction. The authority to grant such orders derives from the High Court’s ability to generally administer the law.

\textsuperscript{171} District Courts Act 1947, s 42(2).

\textsuperscript{172} \textit{Mareva Compania Naviera SA v International Bulk Carriers SA} [1975] 2 Lloyd’s Rep 509 (CA); \textit{Anton Piller KG v Manufacturing Processes Ltd} [1976] Ch 55 (CA).
The Employment Court, as an inferior court, must act within the bounds of its constitutive statute.¹⁷³

In the event that either the Authority/Employment Court have acted *ultra vires*, their actions are judicially reviewable. Presuming the decisions are quashed, the original defendants may be able to obtain compensation through enforcement of any undertakings as to damages, *Baigent* compensation, or through an action in trespass.

Irrespective of the jurisdictional issue, the Authority was established to be a non-technical institution, whose focus is to be on the employment relationship. Allowing the Authority to grant Mareva injunctions or Anton Piller orders is inconsistent with its primary purpose, and should therefore not be allowed. There appears no good reason why the Employment Court should not be granted jurisdiction.

¹⁷³ *Prior v Parshelf 45 Ltd (in re) [2000] 1 NZLR 385 (CA).*
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