

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 510
5479923

BETWEEN RON LEVER AND WENDY
LEVER (NEE
CLARRICOATS)
Applicants

A N D FITZGERALD TRUST AND
TRUSTEES YVONNE DICK
AND JOHN ALEXANDER
First Respondent

AND MICHAEL BRIAN DICK
Second Respondent

Member of Authority: Rachel Larmer

Representatives: Warwick Reid, Advocate for the Applicants
No appearance for Respondents

Investigation Meeting: 8 December 2014 at Tauranga

Date of Determination: 10 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Ron Lever and his wife Ms Wendy Lever (nee Clarricoats) entered into a Record of Settlement under s.149 of the Employment Relations Act 2000 dated 09 May 2014 which was signed by a mediator from the Ministry of Business, Innovation and Employment.

[2] The Record of Settlement records the name of the parties as *Ron Lever and Wendy Clarricoats (Ron and Wendy) and Fitzgerald Trust and Trustees Yvonne Dick and John Alexander (the Trust)*.

[3] Mr Malcolm Dick attended the mediation as a representative for the Trust and he signed as respondent on behalf of *Fitzgerald Trust and Trustees Yvonne Dick and John Alexander*.

[4] The Levers say that they have not received any of the funds that were to be paid under the Record of Settlement.

[5] The first respondent says that the Trust has been wound up, that there are no funds available and that a compliance order should not be made because the liability of the trustees is limited to the assets of the Fitzgerald Trust, of which there are none.

[6] Mr Dick says he should not be named as second respondent because his involvement was limited to acting as an agent for the Fitzgerald Trust. At the Authority's investigation meeting Mr Reid withdrew the claims against Mr Dick in recognition he was a representative for the first respondent so signed as an agent and not a party to the Record of Settlement.

[7] The Levers seek a compliance order against the first respondent to enforce the terms of the Record of Settlement. The first respondent did not file any evidence. It also failed to comply with the Authority's directions to provide relevant information.

[8] I am satisfied that the first respondent has not complied with its obligations under the Record of Settlement and that if a compliance order is not issued then it is unlikely to do so.

[9] The Levers have produced evidence to the Authority that strongly suggests that even if the Trust no longer has any assets the trustees have interests in at least three properties which have substantial Council valuations. Because the first respondent did not provide evidence or appear at the Authority's investigation the evidence presented by the Levers about the trustees' means is uncontested.

[10] Although Mr Dick sent an email to the Authority disputing that the trustees had interests in property this was a mere assertion that was not supported by evidence. The evidence produced to the Authority (Council rates information and Property title report) strongly suggests the trustees are in a position to comply with a compliance order due to these recorded property interests.

[11] I consider the assertion that the Trust has been wound up is irrelevant. The Trust is not a legal person. The trustees can only contract in their own right and are therefore personally liable unless the contract provides otherwise.

[12] The fact a trustee named in a contract is described as a trustee of the Trust does not limit a trustee's personal liability. An express contractual statement that personal liability of the trustees is limited is needed in order for them to avoid exposure to personal liability.

[13] I find that those same fundamental legal principles apply to a s.149 Record of Settlement. Parties who enter a Record of Settlement need to be held to those obligations. The reference to "Fitzgerald Trust" identifies why Ms Dick and Mr Alexander are named as a party. It is descriptive only – it does not avoid or limit the trustees' personal liability. There is nothing in the record of settlement (i.e. the contract in this matter) which limits the personal liability of Ms Dick and Mr Alexander.

[14] I am satisfied that this is an appropriate case in which to exercise my discretion to issue a compliance order. Fitzgerald Trust and trustees Yvonne Dick and John Alexander are ordered to comply with the Record of Settlement dated 09 May 2014 within 28 days of the date of this determination.

[15] As the successful party the Levers are entitled to a contribution towards their costs. I assess costs on a pro rata basis based on the Authority's usual notional daily tariff based approach to costs.

[16] Within 28 days of the date of this determination the Fitzgerald Trust and trustees Yvonne Dick and John Alexander are ordered to contribute \$500.00 towards the Levers actual legal costs and to reimburse them \$71.56 for their filing fee.

Rachel Larmer
Member of the Employment Relations Authority