THERE IS AN ORDER PROHIBITING PUBLICATION OF THE NAMES OF THE PARTIES AND ANY INFORMATION LEADING TO THE PARTIES' IDENTITY

IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 39
EMPC 282/2016

IN THE MATTER OF	an application for orders under s 140(6) of the Employment Relations Act 2000
BETWEEN	ALA Plaintiff
AND	ITE Defendant

Hearing:	27, 28 February 2017 (heard at Tauranga)
Appearances:	M Ward-Johnson, counsel for the plaintiff Defendant in person (ITE)
Judgment:	12 April 2017

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Compliance orders were made by this Court to reinforce confidentiality obligations that arose from an independent employment agreement and a settlement agreement. The judgment was issued on 15 April 2016.[1]

[2] ALA, which is a local authority organisation, alleges that its former employee, ITE, has subsequently breached the orders of the Court by publishing or communicating confidential information on three occasions. It seeks sanctions of a fine or a term of imprisonment under s 140(6) of the Employment Relations Act 2000 (the Act), and indemnity costs.

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1 *ITE v ALA* [2016] NZEmpC 42.

[3] ITE strongly contests the application, stating in essence that the publications or communications he made are protected by a principle of qualified privilege.

Key facts

The compliance orders

[4] It is first necessary to describe the background facts which gave rise to the making of the compliance order. Judge Inglis found that in summary these were as follows:

> [1] The plaintiff was employed as an IT Network Specialist with the defendant organisation from 30 October 2005. The defendant is a local authority. The plaintiff undertook project work involving the defendant and other local authorities (the shared services project). Security concerns relating to the defendant's information systems arose in March 2014. A meeting with the plaintiff was convened on 10 March 2014 and he was placed on special leave. An employment investigation followed.
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> [2] At around this time the defendant made a complaint to the Police, which resulted in a criminal investigation. The plaintiff was subsequently formally charged with two offences, namely of damaging or interfering with a computer system and of accessing a computer system without authorisation. Both related to actions the plaintiff was alleged to have taken during the course of the employment investigation, while on special leave. The plaintiff was suspended from work shortly thereafter. He accepted that he had remotely accessed the defendant's computer system and had deleted information from it but contended that he had done so because the information belonged to other organisations which were involved in the shared services project and deletion was necessary to protect their interests.
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> [3] The parties attended mediation in an effort to resolve matters and settlement was reached. One of the terms of settlement[2] was that the plaintiff's employment would come to an end on an agreed basis, namely by reason of redundancy. The agreement was signed off by a mediator pursuant to s 149 of the Employment Relations Act 2000 (the Act). The agreement included express reference to the plaintiff's ongoing obligations of confidence and included expanded undertakings of confidentiality in relation to matters arising from the employment investigation.
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> [4] The plaintiff subsequently appeared in the District Court and entered a plea of not guilty on the criminal charges. The charges were subsequently withdrawn by leave on 4 February 2015.
>
> [5] It is apparent that by this stage the plaintiff felt very aggrieved. He decided to prepare a video in which he set out his explanation and perception of what had occurred and why. He made the video available via his website and on 5 March 2015 sent emails to a large number of the defendant's staff and staff of other organisations. The emails included an invitation to view

[2] Entered into by way of settlement agreement dated 10 June 2014.

> the video. The plaintiff's website and video advised that further disclosures and interviews would follow.
>
> [6] The plaintiff's communications, website, video and associated publication has been an ongoing source of concern for the defendant. It says that he has breached his obligations under the agreed terms of settlement and/or his personal undertaking and/or his employment agreement. The plaintiff denies this. He contends that he has a right to ventilate matters that are of concern to him and that the video is an important educational tool to enable those involved in the process, or interested in it, to learn some valuable lessons.

[5] The Court went on to conclude that there had been multiple breaches of the relevant confidentiality obligations by ITE. Certain emails which ITE had sent were in breach of the settlement agreement because they referred to his position in relation to an employment process which had been undertaken.[3] Similarly, the publication of a webpage breached ITE's obligations under the settlement agreement.[4] A video which ITE prepared and placed on his website also breached his obligations under the settlement agreement.[5]

[6] In light of these breaches, the Court ordered ITE to pay a penalty of $6,000.[6]

[7] Then consideration was given to the making of compliance orders. On this topic, Judge Inglis stated:

> [70] I have already dealt with the issue of breach. I am satisfied that compliance orders are necessary. The plaintiff has doggedly breached his obligations under the settlement agreement and it is apparent that he has an appetite to continue to disregard the terms of settlement which he agreed to. I appreciate that the plaintiff has very strong views about a number of issues, including the competency of various ex-colleagues, and considers that publication is necessary to clear his name and in the broader public interest. However, the terms of settlement which he voluntarily agreed to compromise his ability to do so. It is this point that he has been unwilling to accept, and which makes the imposition of compliance orders, and the possibility of sanctions for breach, particularly appropriate.
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> [71] I am satisfied that compliance orders are necessary to prevent any future breach and to bring home to the plaintiff the seriousness of his obligations. …

[8] The Court's order was made in these terms:[7]

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3 *ITE v ALA*, above n 1, at [40].
4 At [42].
5 At [44].
6 At [66].

> [75] The plaintiff is ordered to comply with all of his obligations under the terms of the settlement agreement, including (but not limited to):
>
> (i) Not publishing any information about the employment investigation and disciplinary process (including information about his activities in deleting data on 11 March 2014) by way of his website, video recordings and/or email or other communications. This includes but is not limited to publication to past or present staff and/or elected members of the defendant organisation;
>
> (ii) Ceasing any and all communication by any means with any third party (including employees of other local authorities but not including his own legal adviser) about matters subject to his confidentiality obligations to the defendant organisation.
>
> The timeframe for compliance is *immediate*.

[9] Since the order referred to the confidentiality obligations of the settlement agreement, it is appropriate to set out these which were referred to by the Court; these were as follows:[8]

> **Clause 1**
>
> These terms of settlement and the fact that a settlement has been reached and all matters discussed on a without prejudice basis at the meeting between the parties … shall remain, as far as the law allows, or [the defendant] policy requires, strictly confidential to the parties and/or their professional, legal and financial advisers.
>
> …
>
> **Clause 5**
>
> … [The plaintiff] expressly acknowledges and agrees that clause 9.2 of his IEA applies to the termination of his employment in that during the 12 week notice period in that he remains an employee of [the defendant] and will continue to be bound by his duties of confidentiality and fidelity, which duties [the plaintiff] agrees survive the termination of his employment pursuant to clause 14 of his IEA (refer clause 11 herein).
>
> **Clause 6**
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> ... [the parties] agree that no statement will be made to staff at [the defendant] or any other third party about the reason for termination or [the plaintiff's] employment until his employment end date ... and from that date any statement will be limited to termination by redundancy.

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7 At [75] and [104].
8 At [13].

…

Clause 11

[The plaintiff] expressly acknowledges and agrees that clause 14 (confidentiality and non disclosure) of his IEA continues to apply despite the termination of his employment. [The plaintiff] further agrees that this obligation of confidentiality includes and extends to disclosures to [the defendant's] staff (past or present) and to:

11.1 any and all information and/or reports and/or data of any kind whatsoever provided to him during the course of [the defendant's] employment investigation into him (investigation data) and/or the resulting disciplinary process;

11.2 any and all information and/or data related to his employment at [the defendant] in his possession, power or control regardless of whether or not that information and/or data relates to the employment investigation and/or the resulting disciplinary process; and

11.3 the scope of the employment investigation and/or resulting disciplinary process including (but not limited to) [the plaintiff's] own position in response to any issue raised with him during the course of the investigation and/or the resulting disciplinary process.

Clause 12

[The Plaintiff] further agrees: to return and/or not retain copies of; not to disseminate or disclose to any third party (verbally or otherwise); destroy if any copies have been made and not interfere with in any way; all of the investigation data provided to him during the course of [the defendant's] employment investigation and/or resulting disciplinary process and/or any other information and/or data related to his employment at [the defendant] in his power, possession or control regardless of whether or not that information and/or data relates to the employment investigation and/or the resulting disciplinary process. The clause does not apply to the file held by [the plaintiff's lawyer].

Clause 13

[The plaintiff] agrees and acknowledges that, if he breaches clauses 11 and/or 12 of this agreement, he will be liable for any of [the defendant's] costs and/or disbursements (including expert fees and/or solicitor/client costs) incurred in addressing, responding to or dealing with the breach.

[10] Finally, the Court drew ITE's attention to the potential consequences of breaching the compliance orders. The Court referred expressly to s 140(6) of the Act and stated that if ITE did not comply with the compliance orders, ALA could apply to the Court for an order that he be imprisoned, that he be fined up to $40,000, and/or that his property be sequestered. It was emphasised that these were

significant orders and reflected the importance which the Act places on individuals complying with orders imposed on them.[9]

[11] The Court subsequently considered costs issues both for a cross-challenge brought by ALA against the costs determination of the Authority on the basis it was entitled to indemnity costs under the terms of the settlement agreements, and for such costs in connection with the hearing of the challenge in this Court.

[12] In the result, ITE was ordered to pay to ALA the sum of $153,120, comprising $48,859.73 (legal costs with regard to the Authority's investigation); $90,500 (legal costs post dating the Authority's determination); $12,331.98 (relating to relevant attendances of a psychologist); and disbursements of $1,429.90.[10]

Appellate proceedings

[13] Because the subsequent steps which have been taken in the senior courts provide part of the context for the present application, it is necessary to summarise them.

[14] First, ITE filed an application for leave to appeal this Court's judgment of 15 April 2016. On 10 August 2016, the Court of Appeal dismissed the application for leave,[11] also determining that ALA was entitled to costs with regard to the unsuccessful application for leave; these were subsequently quantified in the sum of $3,841.

[15] Then, on 7 February 2017, ITE lodged an application in the Court of Appeal for leave to appeal this Court's costs judgment of 15 November 2016, out of time. That application is opposed by ALA, and has yet to be heard by the Court. ALA has confirmed that in the meantime it does not intend to enforce the costs judgment since it has brought bankruptcy proceedings in the High Court against ITE as a result of the costs award made by the Court of Appeal in its favour. It says that the costs award made in this Court will become a debt provable in ITE's bankruptcy were the High Court to make an order of adjudication.

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9 At [76] and [77].
10 *ITE v ALA* [2016] NZEmpC 147, at [16].
11 *B v ALA* [2016] NZCA 385.

[16] Next, on 14 February 2017, ITE filed in the Supreme Court an application for leave to appeal both the decision of this Court of 15 April 2016, and the Court of Appeal decision of 10 August 2016 declining leave to appeal.

[17] Finally, on 17 February 2017, O'Regan J issued a minute on behalf of the Supreme Court stating that there was no right of appeal against a decision of the Court of Appeal refusing to give leave to appeal.[12] The application for leave to appeal would therefore be treated as applying only to the decision of the Employment Court. The outstanding application before the Supreme Court has been timetabled for the filing of submissions, which the Court will then consider for the purposes of ITE's leave application.

Alleged breaches of compliance orders

[18] Against that background, I summarise the three alleged breaches of the compliance orders made by this Court.

[19] The first relates to the bankruptcy proceedings instituted by ALA.

[20] On 29 September 2016, ALA issued out of the High Court a bankruptcy notice in respect of the costs which had been ordered for payment by the Court of Appeal. On the same day it sought a without notice application for an order prohibiting publication of the names of parties and any identifying particulars. In a minute of the next day, Associate Judge Bell directed that access to the documents pertaining to the application would not be made available to any person unless authorised by the order of a judge.

[21] All the foregoing documents in the bankruptcy proceeding were served on ITE on 14 October 2016.

[22] On 31 October 2016, ITE filed a memorandum and affirmation in the bankruptcy proceedings. It is the filing of these documents about which ALA complains. It contends that by filing the documents, ITE placed into the public arena in a published format evidence of matters that had been finally determined between

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[12] Supreme Court Act 2003, s 7(b).

the parties and evidence of matters which pre-date the settlement agreement. It is submitted for ALA that this material is confidential information which was covered by the compliance orders.

[23] More particularly, ALA says that the material includes critical references to its staff, as originally made during the employment investigation and disciplinary process and which was the subject of the settlement agreement; to ITE's assertions of a history of management failures which pre-dated the settlement agreement; to matters to which ITE referred when responding to the employment investigation and disciplinary process undertaken by ALA; to the steps he took to delete information after the employment investigation had commenced; to his views of ALA's management, including allegations of stupidity and malice; and to details relating to the settlement agreement into which the parties had entered.

[24] For his part, ITE submits in summary that he had just cause for filing this material in the High Court so as to defend the claim brought against him; consequently it cannot be concluded that he has breached this Court's compliance orders. Included in his grounds of opposition was the point that a redundancy payment referred to in the settlement agreement was not correctly paid, the inference being that it will be necessary to consider the terms of the settlement agreement in determining whether the sum described in the bankruptcy notice is outstanding.

[25] I also record that ALA responded to the filing of this material by seeking an order restricting access to these documents. In a minute issued by Associate Judge Bell on 10 November 2016, it was directed for interim purposes that any request for access to these documents would need to be made under relevant provisions of the High Court Rules, and that such an application should be referred to the Associate Judge for his consideration. The Court went on to observe that ITE may wish to use the matters set out in his memorandum and affidavit in opposition to any adjudication application. The Judge said, however, that on a brief perusal of the documents it appeared that ITE wished to engage on the merits of an employment dispute with ALA. He invited ITE to obtain legal advice as to whether the merits of the employment dispute could be a relevant matter in a bankruptcy application where a creditor relied on an unpaid order for court costs.

[26] On 31 October 2016, ITE filed a further affirmation in the High Court which contains similar material as his earlier affirmation. No sanction is expressly sought for the filing of that document.

[27] This Court was advised at the hearing that ALA would be seeking an order of adjudication at a hearing which was scheduled to take place on 29 March 2017.

[28] The second alleged breach of the compliance order relates to a complaint which ITE filed with the New Zealand Psychologists' Board (the Psychologists' Board or the Board) on 25 October 2016. The complaint related to a psychologist who had been instructed to provide assistance to ALA in relation to some aspects of the relevant events which preceded the settlement agreement; and who gave evidence to this Court during the hearing of the challenge.

[29] The complaint refers to a background document which refers to a range of matters similar to those filed by ITE in his High Court affirmation. ALA asserts that in doing so ITE has gone well beyond the scope of any legitimate complaint about the psychologist; and he has referred to matters that are the subject of his confidentiality obligations and the compliance order. Again ITE says that he is justified in filing a complaint in respect of a health practitioner, and that he was not precluded by the order from providing background information for that purpose.

[30] The third and final alleged breach of the compliance order relates to emails sent to two newly elected members of ALA on 1 and 2 November 2016. Attached to one of the emails was a PDF copy of a submission which ITE had previously made under the Protected Disclosures Act 2000 (the PD Act) on 2 October 2015; links were also provided to the video which ITE had prepared relating to the employment process; and a PDF copy of ITE's affirmation filed in the High Court in response to the bankruptcy notice was also provided. The PD Act submission was considered by this Court in its judgment prior to making the compliance orders;[13] as was the video.[14]

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13 *ITE v ALA*, above n 1, at [33], [35], [55] and [56].
14 At [27], [43] and [44].

[31] In his covering email to the newly elected members, ITE made the following statement:

> I have decided to make this information available to you two as I believe you are the most likely elected members who will use this information to effect a worthwhile outcome.
>
> This information should be **treated as confidential** as it is made in violation of a court order. The CEO and [named employee] working in conjunction with Matthew Ward-Johnson (Barrister) have in the past achieved the outcome from the [E]mployment [C]ourt that these matters are not to be made available to elected members.
>
> This causes a problem for me as elected members are there to guide both the CEO and thereby staff in the direction they want [ALA] to take. This includes the establishing of appropriate conduct of [ALA] staff in performing their duties.
>
> This "disclosure" is therefore being made under the principle of "qualified privilege" whereby an entity who is lawfully able to deal with a matter can still be engaged even when a court order exists.
>
> Given that Matthew Ward-Johnson and [named employee] have both endeavoured to obtain non-publication orders pertaining to information being released to [members of the organisation] I would suggest you get back in touch with me before acting on this information. **It will almost certainly result in additional legal action by the CEO [named employee] and [Mr Ward-Johnson]. They want a separation between elected member and the [ALA] staff but this goes against the principle that elected members set the direction of [the organisation] and are democratically elected to perform their duties and should be accessible to all …**

Are the breaches established?

[32] It is first necessary to refer to the statutory provisions which provide for the imposition of sanctions when there is a breach of compliance order.

[33] Section 140(6) of the Act relevantly provides:

> **140 Further provisions relating to compliance order by court**
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> …
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> (6) Where any person fails to comply with a compliance order made under section 139, or where the court, on an application under section 138(6), is satisfied that any person has failed to comply with a compliance order made under section 137, the court may do 1 or more of the following things:
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> …

(c) order that the person in default be sentenced to imprisonment for a term not exceeding 3 months:

(d) order that the person in default be fined a sum not exceeding $40,000:

(e) order that the property of the person in default be sequestered.

(7) An order under sub-section (6)(d) may direct that the whole or any part of the fine must be paid to the employee concerned.

[34] The key question is whether ITE has failed to comply with a compliance order made under s 139, and if so whether the Court should exercise its discretion to impose a sanction of fine or imprisonment (an order of sequestration is not sought).

[35] I must now consider each element of the compliance order, so as to determine whether it has been breached.

[36] Section 139(3) states that when making a compliance order the Court must specify a time within which it is to be obeyed. That requirement is met in the present case because the order was stated to be of immediate effect.

[37] Before the Court can consider whether there has been disobedience to an order, it must be satisfied that the order was made against the party involved personally, and it must have been served on him personally or otherwise brought adequately to his notice: *Bamber v Air New Zealand*.[15]

[38] Both those requirements are met in the present case. The order was made in a proceeding to which ITE was a party, and in which he participated; and it clearly directed him to comply with his obligations under the terms of the settlement agreement.

[39] I also find that ITE was aware of the making of the order. That is established by the sending of the Court's judgment on 15 April 2016 to ITE's usual email address, by the steps he subsequently took when dealing with costs issues arising from the judgment, by instituting an application for leave to appeal the judgment in the Court of Appeal, and by the statement made in his email to the members of the

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15 *Bamber v Air New Zealand* AEC1/95, 1 February 1995 at 3.

plaintiff organisation that he was forwarding information "in violation of a Court order".

[40] As a matter of commonsense, the conduct complained of should be assessed by having regard to the precise meaning of the order, considered in the context in which it was made.[16]

[41] The compliance order began with a broad introductory statement that ITE was to comply with all of his obligations under the terms of the settlement agreement, including, but not limited to, the two specific orders which followed.

[42] In the first of these, para (i), it is quite clear that "publishing any information about the employment investigation and disciplinary process (including information about his activities in deleting data on 11 March 2014) by way of his website, video, recordings and/or email or other communications", created an all encompassing obligation.[17] Also of wide ambit is the statement in the next sentence that such a publication "is not limited to publications to past or present staff and/or elected members of the defendant organisation".

[43] Next, I consider para (ii). "Ceasing any and all communication by any means with any third party" is a statement which is also of wide scope, and obviously so.

[44] No exclusions were referred to in the order. The Court made orders that were intended to have an obviously broad reach.

[45] Next, I consider the relevant context. I accept Mr Ward-Johnson's submission that the purposes of the compliance orders in this instance were clearly spelt out when the Court considered whether it should make the orders that were sought. It was found that ITE had doggedly breached his obligations under the settlement agreement; that it was apparent he had an appetite to continue to disregard the terms of the settlement agreement; that he had very strong views about a number of issues including the competency of various ex-colleagues, and considered

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16 *Fletcher Development and Construction Ltd v New Zealand Labourers IUOW* [1997] NZILR 954 (LC).

17 At [75].

publication was necessary to clear his name and in the broader public interest; that he had been unwilling to accept that he had entered into terms of settlement in which he voluntarily agreed to compromise his ability to publish his views.

[46] I do not accept ITE's contention that the order applied "to the extent that the information was only available in terms of the employment investigation", as he put it in evidence. Having regard to the language used and the purposes of the order as determined by the Court, there was no such restriction.

[47] In considering the question of whether there has been a breach, the onus falls on the party seeking sanction to establish by its own evidence each ingredient of the grounds upon which it relies for the imposition of a sanction: *Fletcher Development & Construction Ltd v New Zealand Labourers IUOW*.[18]

[48] The same case also referred to the fact that the standard of proof is beyond reasonable doubt, given the potential severity of the sanctions.[19] That this is the appropriate threshold is well established in respect of a civil contempt, where it is contended that a person has disobeyed a court order directed at him or her.[20]

[49] I now consider each of the alleged publications/communications in light of those principles.

[50] First, I make the following findings as regards the two documents filed by ITE in the High Court bankruptcy proceeding:

a) There is no dispute that ITE filed these documents on 31 October 2016.

b) There was thereby publishing and communicating of confidential information, particularly in the affirmation.

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18 At 958.
19 At 959 and 960.
20 *Duff v Communicado Ltd* [1996] 2 NZLR 89 (HC) at 98; and *Solicitor-General v Miss Alice* [2007] 2 NZLR 783 (HC) at [29] – [30].

c) Included was information about the employment investigation and disciplinary process, including information about ITE's activities in deleting data on 11 March 2014.

d) The information related to matters which were the subject of confidentiality obligations to ALA, as referred to in the compliance order.

[51] Turning to the complaint lodged with the Psychologists' Board, I make the following findings:

a) There is no dispute that ITE was responsible for lodging the complaint and its associated background document with the Board on 25 October 2016.

b) There was thereby publishing and communicating of confidential information.

c) Included was information about the employment investigation and disciplinary process, including information about ITE's activities in deleting data on 11 March 2014.

d) The information related to matters which were the subject of confidentiality obligations to ALA as referred to in the compliance order.

[52] In respect of the communications sent to the two recently elected members of the defendant organisation, I make the following findings:

a) There is no dispute that ITE forwarded to those persons emails containing links to certain documents and a video on 1 and 2 November 2016, two of which had led to the Court granting the compliance order.

b) There was thereby publishing and communicating of confidential information.

c) Included was information about the employment investigation and disciplinary process, including information about ITE's activities in deleting data on 11 March 2014.

d) The information related to matters which were the subject of confidentiality obligations to ALA.

[53] To this point, then, I am satisfied beyond reasonable doubt that steps were taken by ITE which fall within the scope of the compliance order made by this Court, and thereby breached it.

Public interest justification?

[54] As summarised earlier, ITE contends that public interest factors justified the steps he took, and that no sanction is warranted.

[55] In advancing this submission ITE referred to an issue which arose prior to the hearing of the challenge, to which it is convenient to refer at this stage.

[56] ITE had contended in an interlocutory application which he brought prior to the substantive hearing of the challenge that ALA had breached the interim non-publication orders made in those proceedings. ALA had argued that it had good reason to take the steps which it did.

[57] Judge Inglis dealt with this matter in the judgment of 15 April 2016. She recorded that the alleged non-compliance was directed at ALA's advice to the police that it had safety concerns relating to ITE in respect of his firearms licence.[21] It was this disclosure which ITE argued breached the Court's interim non-publication order.

[58] The Court held that there was no suggestion that any such alleged breach would be repeated or would be ongoing. Even if there had been a limited disclosure which was one-off, and directed at a particular end (namely alerting the police to safety concerns), it was made for the rational reasons which had been explained in affidavits. These included having regard to ALA's obligations to ensure the safety

[21] *ITE v ALA*, above n 1, at [99].

and wellbeing of its staff. The Court concluded that even if it was accepted that ALA had breached the non-publication order, the Court would not have been minded to issue a compliance order. The application was accordingly declined.[22]

[59] At the hearing before me, ITE contended that the approach which was adopted in that instance demonstrated the application of qualified privilege principles, and that these should apply with regard to the various steps he took. He submitted that ALA's conduct in that instance was no different from his subsequent conduct.

[60] However, the issue is not so straightforward. Any analysis as to whether there is a justification for not complying with a Court order is one that must be approached in a careful and principled fashion; and the relevant principles must be considered on a case by case basis.

[61] I begin my consideration of this issue by describing those principles.

[62] With regard to the protection of confidential information, the correct approach as to how public interest factors should be assessed was confirmed in the speech of Lord Goff in *Attorney-General v Guardian Newspapers Ltd (No 2):*[23]

> … [A]lthough the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply … to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.
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> Embraced within this limiting principle is, of course, the so-called defence of iniquity. In origin, this principle was narrowly stated, on the basis that a man cannot be made "the confidant of a crime or a fraud" … it is now clear that the principle extends to matters of which disclosure is required in the public interest …

[63] The Court of Appeal has put it in this way:[24]

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22 At [99] and [100].

23 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (HL) at 282.

24 *European Pacific Banking Corporation v Television New Zealand Ltd* [1994] 3 NZLR 43 (CA) at [46]. The citation for *Gartside v Outram* is (1857) 26 LJ Ch 113.

> What has been called ever since *Gartside v Outram* (1857) … the defence of iniquity, is an instance, and probably the prime instance, of the principle that the law will not protect confidential information if the publication complained of is shown to be in the overriding public interest.

[64] Contemporary authorities are clear that in order to be justified, a disclosure should usually be made to a person who has a proper interest in receiving the information. So, the learned authors of *Law of Torts* state:[25]

> In some cases the public interest may favour publication, but not necessarily to the world at large. Often disclosure to an authority competent to deal with the matter will be sufficient, in which case wider publication will be a breach of confidence. So disclosure of alleged financial wrongdoing solely to the Inland Revenue Department,[26] of photographs of a habitual shoplifter to local shopkeepers[27] of convictions for paedophilia of caravan dwellers to the site owner,[28] and of statements by a registered nurse to the police when under caution to the regulatory body for nursing[29] in each case was permissible.

[65] As it is put by the learned authors of *Gurry on Breach of Confidence*, the cases confirm that "making a restricted disclosure to a limited circle, in particular to a regulatory or other proper authority, is likely to be considered the most proportionate way of advancing the public interest".[30]

[66] The term "qualified privilege", on which ITE relied, is usually used with regard to an alleged defamatory statement. Several statutes confer qualified privilege for specific types of statement.[31] For present purposes, however, the common law description appropriately defines the concept. Lord Atkinson, in *Adam v Ward* described the principle as follows:[32]

> A privileged occasion is … an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it.

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25 Stephen Todd (ed) The Law of Torts in New Zealand (7th ed, Thomson Reuters, Wellington, 2016) at 806.

26 *Re a Company's Application* [1989] Ch 477.

27 *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804.

28 *R v Chief Constable of the North Wales Police, ex parte Thorpe* [1999] QB 396 (CA).

29 *Woolgar v Chief Constable of the Sussex Police* [2000] 1 WLR 25 (CA).

30 Tanya Aplin and others *Gurry on Breach of Confidence*: *The Protection of Confidential Information* (2nd ed, Oxford University Press, Oxford, 2012) at 697.

31 Todd, above n 25 at 941.

32 *Adam v Ward* [1917] AC 309 (HL) at 343.

[67] This concept is consistent with an aspect of the public interest defence to which I have already alluded, that is, the disclosure of otherwise confidential information to an authority which is authorised to receive it. But for present purposes, case law relating to the disclosure of confidential information is more appropriately considered than that which relates to claims in defamation.

[68] I turn now to assess the three alleged breaches of compliance order, in light of these principles.

Publication/communication to the High Court: bankruptcy proceeding

[69] Before turning to the specifics of the steps taken by ITE in filing a memorandum and affirmation in the High Court, it is useful to consider another similar step which ITE undertook, when he filed an application for leave to appeal this Court's costs judgment. In support of that application, he filed an affirmation which refers to a wide range of background information of the kind filed in the High Court bankruptcy proceedings. It was not contended before me that this constituted a breach of the compliance order. Nor could it be. ITE has a right to apply for leave to appeal under the Act. In exercising that right, the proper authority (in that instance the Court of Appeal), will determine any issues as to relevance, non-publication of information on the Court file, which persons should be permitted to have access to the file, and so on.

[70] In summary, while it might be concluded that the information submitted to the Court of Appeal is within the scope of this Court's compliance order, it does not follow that such a breach warrants the imposition of a sanction. That is because the context of the disclosure is crucial when considering such a question. The Court of Appeal has a proper interest in receiving the information, and will deal with it as it sees fit according to the various discretions vested in it. Its interest in managing cases before it as it sees fit is an interest which must prevail over this Court's compliance order. It would be inappropriate and wrong for this Court to conclude that filing of that material in the Court of Appeal amounted to a breach warranting the imposition of a sanction.

[71] A decision of this Court is also of assistance. In *Evolution E-business Ltd v Smith*, Judge Ford was required to consider whether a former employee had breached his employment agreement and in particular his duties of good faith and confidentiality, when he provided his employer's former joint venture partner with an affidavit that it could use in litigation against his former employer.[33] In the relevant proceedings, there had been a question as to whether the former employer had breached a High Court injunction which the joint venture partner had previously obtained.

[72] The Court concluded that providing by way of affidavit evidence of actions which contravened a Court injunction and therefore amounted to a contempt of court clearly met the public interest requirement referred to in the authorities; the circumstances constituted an exception to the obligation on the employee not to disclose confidential information.[34]

[73] In my view, the same process of reasoning must apply with regard to the documents which were filed in the High Court on this occasion. In such circumstances, there is a countervailing public interest which outweighs the public interest in enforcing a compliance order that has been breached. It relates to the application of the rule of law. Disputes are to be resolved within the law by the courts and tribunals which are established to do justice. Public interest in the administration of justice in such a case outweighs the interest in confidentiality, albeit one confirmed by a compliance order.[35]

[74] Here, the documents were filed as an aspect of a bankruptcy dispute. Plainly, ITE had a right to file documents in the High Court for the purpose of defending a proceeding brought against him.

[75] With regard to ALA's concerns as to the confidentiality of the contents of those documents, the High Court is vested with a range of mechanisms available to it when dealing with such information. They include, for example, s 69 of the

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33 *Evolution E-business Ltd v Smith* [2011] NZEmpC 109, [2011] ERNZ 105.

34 At [60].

35 A useful discussion as to the balancing of these interests is found in *McCully v Whangamata Marine Society Inc* [2007] 1 NZLR 185 (CA) at [44].

Evidence Act 2006 which provides that Court with an overriding discretion as to the admissibility of confidential information; the ability to decide whether evidence, if admitted, is relevant to the issues before the Court; the ability to make non-publication orders; the ability to make orders with regard to the access of information on a Court file, and the ability to award increased or indemnity costs where an unmeritorious or vexatious step is taken.

[76] On any view, the High Court is a proper authority possessing the necessary discretions to receive and deal with such information as it may be required to consider. In the present instance, the High Court's right to manage the case before it as it sees fit is an interest which must prevail over this Court's compliance order.

[77] The nub of the argument advanced for ALA is that the bankruptcy notice on which the bankruptcy petition is based is founded on a costs order from a concluded application for leave to appeal in the Court of Appeal. Mr Ward-Johnson argued that the defendant's background information is "irrelevant", and that the filing of the material is simply "a disingenuous attempt to re-litigate or re-engage in the merits of his perceived sense of grievance in any open forum possible".

[78] The difficulty with this submission, however, is that it pre-supposes that it would be appropriate for this Court to determine what evidence is relevant for the purposes of a proceeding in another court.

[79] Comity precludes such a possibility. This Court must act in a way which respects the duty and capacity of another court to conduct its business independently. Judicial or jurisdictional comity principles ensure that a court should be slow to intervene by cutting across the prescribed processes of another court.[36]

[80] In considering Mr Ward-Johnson's point that the disclosure of confidential information to the High Court was simply an attempt to re-litigate matters that have been settled and that ITE's assertions are totally misconceived, I return to Lord Goff's speech in *Attorney-General v Guardian Newspapers (No 2)*, when he said:[37]

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[36] For example, *Shafik v Makary* [2015] NZHC 2194, [2015] NZAR 1596 per Mander J at [39].

[37] *Attorney-General v Guardian Newspapers (No 2)*, above n 23, at 283.

> … [A] mere allegation of iniquity is not of itself sufficient to justify disclosure in the public interest. Such an allegation will only do so if, following such investigations as are reasonably open to the recipient, and having regard to all the circumstances of the case, the allegation in question *can reasonably be regarded as being a credible allegation from an apparently reliable source.*
>
> (Emphasis added)

[81] Whether an allegation might be regarded as credible from an apparently reliable source may require consideration of the motive behind the disclosure, including whether it was prompted by malice as is asserted in this case.

[82] That is an issue for the judicial body receiving the information to determine. A court obviously has the right to determine whether the information is relevant and if so, reliable; it would be inappropriate for this Court to embark on such an assessment.

[83] Mr Ward-Johnson submitted that ITE should have applied to the Court for a variation of the contempt order, on the basis that it was necessary for him to do so.[38] Whilst such a step – or even advice to ALA – would have ensured he was acting transparently so that a possible dispute may have been avoided, and whilst the Court would have been on notice as to the intended steps, it would nonetheless have reached the same conclusion: that it was not for it to determine what information should or could be provided to another court.

[84] I conclude that the countervailing public interest factors justified ITE's breach of the Court's compliance order and that it is unnecessary for the Court to consider the imposition of a sanction. I dismiss this aspect of ALA's claim.

Complaint to Psychologists' Board

[85] In considering a complaint to a regulatory authority such as the Psychologists' Board, it is necessary to describe the statutory framework involved.

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[38] As was referred to in *Neuronz Ltd v Tran* HC Auckland CP 623 – SW01, 14 May 2002, at [100] per Williams J; and in *Solicitor-General v Miss Alice* [2007] 2 NZLR 783 at [86].

[86] That is provided by the Health Practitioners Competence Assurance Act 2003 (the HPCA Act). Section 3 states that the principle purpose of that Act is to protect the health and safety of members of the public by providing mechanisms to ensure that health practitioners are competent and fit to practice their professions.

[87] Part 4 deals with complaints and discipline. Certain complaints are dealt with by the Health and Disability Commissioner under the Health and Disability Commissioner Act 1994;[39] or a regulatory authority such as the Psychologists' Board may from time to time consider whether a complaint justifies the appointment of a professional conduct committee to consider it.[40]

[88] Ultimately, a professional conduct committee, or the Director of Proceedings under the Health and Disability Commissioner Act in respect of a complaint considered by the Health and Disability Commissioner, may lay a disciplinary charge with the Health Practitioners Disciplinary Tribunal.

[89] The activities of each of these entities are regulated by the statute. Throughout these processes, the fact a complaint has been lodged, and any confidential information submitted to those entities, remains confidential unless a decision is expressly made to publish. Because complaints relate to patients' confidential circumstances, and to health practitioners' reputations, such publication occurs very rarely and only after a consideration of the provisions of the Health Information Privacy Code, any relevant statutory provisions as well as considerations of natural justice.[41] The only exception is where a formal charge is laid against a health practitioner in the Health Practitioners' Disciplinary Tribunal, a body which is required to sit in public unless there are proper grounds for sitting in private.[42] At that point, mechanisms similar to those which I have described with regard to the High Court and the Court of Appeal may be applied; these enable confidential information to be protected.[43]

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39 Such a possibility was referred to in the Health Practitioners Competence Assurance Act 2003, ss 64 – 66 and Health and Disability Commissioner Act 1994, s 31 and following.

40 Health Practitioners Competence Assurance Act 2003, s 71 and following.

41 As described in Peter Skegg and Ron Paterson (eds) *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015) at Ch 11.

42 Health Practitioners Competency Assurance Act 2003, s 95.

43 Section 95, and Sch 1.

[90] In summary, the filing of a complaint does not result in automatic publication of confidential information to the world.

[91] The question which then arises is whether there was a public interest which permitted the submission of confidential information for complaint purposes, even if that breached this Court's compliance order.

[92] The decision of the English Court of Appeal in *Woolgar v Chief Constable of Sussex Police* is of assistance.[44] In that instance, the plaintiff was a registered nurse and the matron of a nursing home who was arrested after a patient died in her care. She was interviewed by police under caution. There was insufficient evidence to charge her, but the police did, however, refer the matter to the professional authority responsible for the regulation of nurses. That body contacted the police for further relevant information. The police, in accordance with their practice, sought the plaintiff's authority to disclose a transcript of the interview which they had conducted, which was not given. At issue was the question of whether the requested disclosure should occur. The Court of Appeal held that the public interest in ensuring the free-flow of information to the police for purposes of criminal proceedings, which required that information given in confidence would not be used for some collateral purpose, had to be balanced against a countervailing public interest in protecting public health and safety. The question was whether that interest entitled the police to disclose to an authority operating in the regulatory field confidential information which it reasonably believed was relevant to an inquiry being conducted by that body, on the basis that confidentiality would otherwise be maintained. The Court of Appeal decided that the public interest required release of the information to the nursing body for the purposes of its inquiry; this was on the basis that in so far as the information would be used by that body, it would remain confidential.[45]

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44 *Woolgar v Chief Constable of Sussex Police* [2000] 1 WLR 25 (CA).

45 *W v Egdell* [1990] Ch 359 (CA) is another often cited example where it was concluded that confidential information may not be protected to the extent that the public interest in the protection of human life and health may outweigh the public interest in confidentiality. In that instance the duty of confidence owed by a doctor to his patient was outweighed by the public interest in protecting others against possible violence, and so that those managing the patient were entitled to receive relevant information from the patient's own doctor.

[93] The case is of assistance in assessing the importance of public health and safety as an aspect of the regulation of health professionals, and to that extent provides a parallel with the circumstances which this Court must consider. However, the facts in the present case differ in one respect. In the English case, there was insufficient information available to the body to deal with the professional issues before it. In the present case, it is argued that there is too much.

[94] I find that the Psychologists' Board is a proper authority under the HPCA Act for the receipt of complaints regarding health professionals. The public interest in maintaining a system for ensuring that health professionals are competent, including the receipt and consideration of complaints, must prevail in this case. The system for professional discipline is one of the means by which the public welfare in a matter of health and safety is safeguarded, as was recognised in *Woolgar*.

[95] Mr Ward-Johnson submitted that a great deal of material was provided, which is plainly not relevant to the complaint, and which amounted to being an opportunist step by ITE to breach his confidentiality obligations, and in turn the compliance orders.

[96] Once again, this Court is in effect being required to determine an issue of relevance. However, this Court has no jurisdiction to influence the processing of a complaint under the HPCA Act. The principles of comity to which I referred earlier apply.[46]

[97] While it is apparent that ALA is strongly of the view that the information placed before the Psychologists' Board is speculative, unreliable and probably prompted by malice, these are issues for the Board. It has the ability to determine what is relevant and what is not; and if relevant, whether the submitted information is reliable. It also has the ability to deal with the confidentiality issues. In that regard, ALA is at liberty to inform the Board of its confidentiality concerns.

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[46] See [80] above.

[98] I repeat my earlier finding as to whether ITE should have applied to the Court for a variation of the compliance order – it may well have been wise to do so for the reasons already given, but the Court could not have resolved the issue of relevance.

[99] I conclude that there are valid countervailing public interest factors justifying this breach of the Court orders. The Psychologist's Board is the proper authority for the consideration of a professional disciplinary complaint, and principles of comity mean that it has the responsibility to resolve the issues of relevance, reliability and confidentiality raised by ALA. I dismiss this aspect of ALA's claim.

Disclosure to elected members of plaintiff organisation

[100] To this point it has been necessary to consider disclosures to judicial and quasi-judicial bodies.

[101] The third alleged breach, however, is in a different category. It relates to the disclosure to an administrative body constituted under the Local Government Act 2002 (the LG Act).

[102] Moreover, the challenged disclosure is one which was expressly referred to in the Court's compliance order, when it was stated that the order was "not limited to publication to past or present staff" but also to "elected members of the defendant organisation". There is no doubt that the order was breached.

[103] ITE obviously understood this because when the subject emails were sent he told the recipients that the information was being forwarded "in violation of a Court order", although he claimed that it was justified under "qualified privilege principles". It is that issue which is at the heart of his defence.

[104] ITE argued that there was just cause in him sending the emails on a number of grounds. In summary, these were justification because he was in effect acting as a whistleblower raising a serious accountability issue; justification on health and safety grounds; and justification having regard to the specific terms of a variety of statutory provisions. I now deal with each.

[105] The context for his submission was, he said, based on the good employer principles of the LG Act, particularly those contained in s 39(d) and cls 33 and 36 of Sch 7 of that Act.[47] Further, he referred to cl 36(2)(a) of Sch 7, which stipulates:

> … a good employer mans an employer who operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring … good and safe working conditions.

[106] He claims that those provisions were breached whilst he was an employee of ALA. He says that the seriousness of the issues are such that the organisation should now be held accountable, so that any of the three bases on which he put his case meant he was permitted to re-submit documents to the newly elected members.

[107] First, was ITE justified in making the disclosure on whistle-blowing grounds? The PD Act contains the applicable statutory provisions. It applies to employees and former employees of an organisation, so that complying disclosures are protected.[48]

[108] However, this was not a qualifying disclosure. Section 6 of the PD Act describes the type of disclosure to which the Act applies. It is clear that the employee must wish the disclosure to have been one made for the purposes of the Act.[49]

[109] In his covering email to the newly elected members, ITE forwarded a range of material so as to describe his concerns. As already described, this included his affirmation as filed in the High Court of 31 October 2016, his PD Act submission of 2 October 2015, and a copy of the video which he had previously placed on a website. The content of these materials overlapped. Specifically, the points made in the PD Act submission were also covered in the other materials.

[110] Plainly ITE was not making a fresh submission under the PD Act. He forwarded a range of documents which he had previously created relating to his concerns.

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47 He also refers to s 59, but that provision relates to Council-controlled organisations, which the present plaintiff is not.

48 Protected Disclosures Act 2000, s 3.

49 Protected Disclosures Act 2000, s 6(1)(d).

[111] Nor did he contend that he was making a fresh PD Act disclosure. He said the material was being forwarded in violation of a court order, that it should be treated as confidential, and that he was relying on principles of qualifying privilege.

[112] The disclosure did not comply with the provisions of the PD Act for another reason. Section 7 requires disclosure of information in the manner provided by the internal procedures of an organisation. It is plain from Judge Inglis' findings that ITE's PD Act disclosure was made to ALA, and that when the organisation provided its response it advised ITE that he had rights under the Act to complain to the Ombudsman about that response.[50]

[113] Obviously, ALA's internal procedures did not provide for a re-submission of a previously made disclosure to members of the organisation again. Nor could this step be regarded as a mere "technical failure" for the purposes of s 6A of the PD Act.

[114] I turn to common law principles. Could the forwarding of these materials be justified on the basis that ITE, as a former employee, was justified in acting as a whistleblower on public interest grounds?

[115] The plaintiff organisation was obviously well aware of ITE's concerns, including by means of the video and PD Act submission which he re-submitted to the newly elected members.

[116] A settlement agreement was entered into with ITE which contained strict obligations of confidentiality; this was subsequently reinforced by the making of a compliance order. It could not be right that in these circumstances ITE was at liberty to persist with yet further disclosures to members of the very organisation with whom he had settled. There could be no public interest in allowing this to occur, given the fact and nature of the settlement agreement. To conclude otherwise would render the express statement in para (i) of the compliance order, not to publish to "elected members of the defendant organisation" of no effect at all. In all these circumstances, the public interest in the agreed confidentiality must outweigh any perceived right to continue with such whistle-blowing initiatives.

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50 *ITE v ALA*, above n 1, at [33] – [35].

[117] Secondly, I refer to ITE's contention that there was a public interest in that disclosure having regard to the health and safety obligations held by ALA. In assessing competing contentions as to where the public interest lies, the observations of Bingham LJ in *W v Edgell* are apposite.[51] He observed that the answer to the balancing must not turn on what the person making the disclosure thinks, "… but on what the court rules".[52]

[118] It is also well established that a rigorous approach is to be undertaken, and that there must be cogent evidence to establish a pressing need for the information to be disclosed on health and safety grounds.[53]

[119] I emphasise a point already alluded to. ITE had already raised his concerns – albeit not to his satisfaction – with ALA; and then entered into the settlement agreement and its confidentiality obligations. It could not in those circumstances be said that there was a pressing need on health and safety grounds for the information to be disclosed, given the history of ITE's previous disclosures. I do not consider in those circumstances that the Court should conclude the publication and communication to ALA's newly elected members was justified in the public interest.

[120] Lastly, ITE also relies on a range of other statutory provisions, which he says trump the Court's order. I deal with each separately.

[121] ITE relied on the provisions of the Local Government Official Information and Meetings Act 1987 (the LGOIM Act). He submitted that if information was given to a local authority, then the provisions of this statute required that such information would be generally available under the principle of availability contained in s 5. It provides a presumption of availability of local authority official information, unless there is a good reason for withholding such information.

[122] The application of such a provision, however, begs the question as to whether these provisions should be construed as meaning that ITE could in the public interest

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51 *W v Edgell*, above n 45.

52 At 422.

53 *In re L (Sexual Abuse: Disclosure)* [1999] 1 WLR 299 (CA); *R (on the application of D) v Secretary of State for Health* [2006] EWCA CIV 989, [2006] All ER (D) 268; *R v Local Authority and Police Authority in the Midlands*, ex parte LM [2000] 1 FLR 612.

provide confidential information which was the subject of a compliance order of the Court to newly elected members, so that the local authority could be requested subsequently to release that information under the availability provision of the LGOIM Act.

[123] The possibility of a release of information is somewhat different from the question which arises in this case: was it in the public interest for ITE to publish or communicate confidential information in any event to those persons?

[124] I have already found that such a disclosure could not be justified in the public interest. The statutory provisions of the LGOIM Act cannot change that reality.

[125] Next, ITE referred to several provisions of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).

[126] The context for his submission arose from the fact, he said, that had he been charged with two offences (damaging or interfering with a computer system and accessing a computer system without authorisation).[54] He subsequently appeared in the District Court and entered a plea of not guilty to these charges, which were later withdrawn by leave on 4 February 2015.[55] This was of course some months after the settlement agreement had been entered into between the parties, on 10 June 2014.[56]

[127] ITE said that having had charges against him withdrawn, he was entitled to present his side of the story to ensure the picture was balanced; and that this was provided for in the Bill of Rights Act, under such provisions as s 13 which provides for freedom of thought, conscience and religion, s 14 which provides for freedom of expression, and s 27 which provides for a right to justice in certain circumstances.

[128] This argument has already been considered and resolved. In this Court's judgment of 15 April 2016, the Court considered a submission made by ITE to the effect that he was permitted to refer to otherwise protected material in order to prove his innocence. It noted that the charges against him were withdrawn and that he was

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54 *ITE v ALA*, above n 1, at [2].
55 At [4].
56 At [3].

not called on to defend them in the criminal court. Consequently the justification which ITE sought to rely on did not arise.[57]

[129] Similarly, the Court of Appeal, when it considered ITE's application for leave to appeal, considered a potential question as to whether ITE's expression of an opinion would be a breach of his confidentiality obligations, especially in light of the right to freedom of expression preserved by s 14 of the Bill of Rights Act. The Court of Appeal held that these issues had been directed by the Judge in this Court, and there was no merit in this proposed ground of appeal.[58]

[130] I respectfully endorse the conclusions already reached in this Court. Disclosure of the information provided to newly elected members cannot be justified on the basis of the provisions of the Bill of Rights Act, when the parties have entered into such strict confidentiality restrictions which were endorsed by the Court's compliance order. The effect of the agreement/order cannot be said to constitute an unreasonable fetter on any of the rights described in the Bill of Rights Act. Nor could it be argued, with reference to s 5 of that Act, that the order was an unreasonable limit prescribed by law and one which was not justified in a free and democratic society.

[131] Finally, ITE referred to the provisions of the Criminal Procedure Act 2011, which ITE argued should or could override the compliance order. This statute has no relevance to the disclosure made to the newly elected members since it obviously did not occur under the processes of that particular statute.

[132] I am satisfied that there is no possible basis for concluding that ITE could be justified in submitting the material he did to the newly elected members, because of a countervailing public interest. He has pointed to no other statutory provision or common law principle which could justifiably be invoked to override the effect of the Court's order. He agreed not to publish or communicate the relevant confidential information to those persons, yet he did so deliberately.

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57 At [48].

58 *B v ALA*, above n 11, at [11].

[133] Accordingly, I find that there has been a breach of a compliance order. The Court must now consider whether that breach requires the imposition of a sanction.

Sanction?

[134] Mr Ward-Johnson's submission as to the imposition of a sanction was based on the presumption that ALA would establish three breaches of the compliance order.

[135] On that basis he said that there was a very high degree of culpability justifying a fine and/or imprisonment. He said that there was a significant need for deterrence and denunciation because ITE had been unwilling to accept the terms of settlement and the compliance order made by the Court; and that he had taken no steps to address his non-compliance, and demonstrated no insight.

[136] Whilst ALA also sought the imposition of a term of imprisonment, Mr Ward-Johnson recognised that such a possibility was rare, and only to be implemented as a sanction of last resort: *Coventry v Singh.*[59] His submissions focused on the possibility of a fine.

[137] He submitted that since the Court had already imposed a penalty of $6,000 because ITE had breached the settlement agreement, that figure should be adopted as a starting point; but it should be increased having regard to the factors just described.

[138] ITE did not make any submissions as to an appropriate sanction, save for answering questions that were put to him by counsel for ALA and the Court as to his financial circumstances. His primary position, of course, was that he had been justified in acting as he did.

[139] An analysis of s 140 of the Act was given in the recent Court of Appeal decision of *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer.*[60] The case concerned a fine which had been imposed because an employer had failed to comply with a compliance order requiring it to pay certain sums of

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59 *Coventry v Singh* [2012] NZEmpC 34 at [18].

60 *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer* [2016] NZCA 464.

money, but the Court made some general observations as to the purpose of the provision.

[140] The Court of Appeal stated that as a starting point, imprisonment and sequestration should be regarded as sanctions of last resort for failing to comply with a compliance order.[61]

[141] The Court went on to observe that the imposition of a fine does not involve deprivation of liberty, but it does make clear that a failure to comply with a compliance order is to be taken seriously. Such a conclusion was reinforced by the increase in the maximum sum available for a fine from $10,000 under the Employment Contracts Act 1991 to $40,000 under the current Act.

[142] It was also stated that the power had to be exercised in context. That context was an enforcement response for non-compliance in a manner akin to contempt.

[143] Coming on to describe considerations which would be relevant to the amount of a fine, the Court of Appeal stated that the primary purpose of the sub-section was to secure compliance. That was apparent from the wording of the section. Secondly, however, the sub-section was intended to enable the Court to impose some form of sanction for non-compliance.[62]

[144] Consequently a range of factors would be relevant, which were described in the following passage:

> [76] … factors will include the nature of the default (deliberate or wilful), whether it is repeated, without excuse or explanation and whether it is ongoing or otherwise. Any steps taken to remedy the breach will be relevant together with the defendant's track record. Proportionality is another factor and will require some consideration of the sums outstanding. Finally, the respective circumstances of the employer and of the employee, including their financial circumstances, will be relevant.
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> [77] The wording of s 140(6) does not prevent a fine being imposed even where compliance has been achieved. The need to deter non-compliance, either by the party involved or more generally, is not to be overlooked. …

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61 At [56].
62 At [75].

[145] Accordingly, the correct approach in this case is to commence by considering whether a fine should be imposed, and if so for how much, having regard to the foregoing factors; that analysis will also clarify whether a term of imprisonment should be considered.

[146] The analysis must focus solely on the established breach which relates to the emails which ITE sent to ALA's elected members.

Nature of the default

[147] ITE continues to maintain that he was justified in forwarding the emails which he did to the newly elected members, on what he contended were qualified privilege grounds.

[148] I consider that his reliance on that defence was opportunistic. As ITE said in his covering email to the newly elected members, he was acting in violation of a Court order. He predicted additional legal action, because it was obvious that he was not permitted to make such a disclosure.

[149] His apparent concerns could not possibly give rise to a public interest defence entitling him to make the disclosures. The Court ruled out such a possibility when it granted the compliance order. The reasons for the making of the order were clearly spelt out. Plainly, ITE was not at liberty to continue his crusade by making further disclosures to ALA.

[150] The step he took was in direct contradiction of the express terms of the order. Moreover, the disclosure incorporated two documents that had been specifically considered by the Court when making the compliance order, the video and the PD Act submission.

[151] The sending of the emails was a yet further breach of the obligations of a binding settlement agreement into which he had chosen to enter.

[152] I am satisfied that the breach was a deliberate and flagrant disregard of the Court's order.

Steps taken to remedy the breach

[153] No steps have been taken to remedy the breach; rather ITE has chosen to raise a defence which it should have been apparent could not apply.

Track record

[154] This breach followed the multiple breaches which were considered by the Court when it granted the compliance order. The disclosures were made notwithstanding the warning given to ITE by the Court that disobedience of the Court's order would likely lead to the imposition of sanctions. ITE's track record strongly suggests the need for the imposition of a fine.

Deterrence

[155] Given the wilful conduct, specific deterrence is an important consideration. ITE has acted contemptuously by failing to respect a Court order. The Court must mark its strong disapproval for such conduct, making it clear to ITE that a deliberate flouting of a Court order is unacceptable.

Financial circumstances

[156] ITE has provided information as to his financial circumstances, which are constrained. I find that he is not unable to pay a fine. No adjustment is required for this factor.

Conclusion

[157] The most troubling aspect of the established breach is ITE's complete lack of insight. He continues to breach the strict confidentiality provisions of the settlement agreement, and has now flouted an order of this Court.

[158] The matter has now been considered by the Authority when it made the original compliance order, by this Court when it reconsidered that issue, by the Court of Appeal when it dismissed the application for leave to appeal in respect of the compliance order, and again by this Court. Despite the clear message that emerges from all the previous judicial considerations of the matter to the effect that ITE is

bound by the agreement into which he elected to enter, he has still been determined to breach its terms. A fine must be ordered in these circumstances.

[159] Turning to the appropriate amount, I am not persuaded that the Court should use the sum of $6,000 as a starting point. It was imposed at an earlier stage and as a penalty under s 135 where the maximum penalty was $10,000, not as a sanction under s 140(6) where the maximum fine is $40,000. That said, the fact that notwithstanding the imposition of a penalty and a compliance order, there has been a further deliberate breach is a factor which must be reflected in the amount of the fine.

[160] No comparable cases have been cited to the Court by counsel.

[161] In *Reynolds*, the Court of Appeal undertook a comprehensive analysis of cases where fines had been imposed for non-compliance with orders to pay sums of money. A survey of cases indicated a range of fines of up to $16,000.

[162] Those examples are of limited assistance for comparative purposes, when the breach relates to publication of confidential information.

[163] The Court of Appeal did refer to two such examples by way of cross-check for the purposes of the appeal before it.

[164] The first of these was *Solicitor-General v Miss Alice*, where a lawyer released a document to the media and on the Internet in breach of undertakings he had given when obtaining access to the document involved and of other professional obligations.[63]

[165] In considering penalty, the Court took into account that the lawyer's arrogant and high-handed disregard of due process was mitigated to a degree by the fact that he was responding to a perceived injustice. But the Court held that it was necessary, for reasons of precedent and deterrence, to make plain that a breach of legal and professional obligations by a law practitioner would not be countenanced. Had it not

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63 *Solicitor-General v Miss Alice* [2007] 2 NZLR 783.

been for the mitigating factor, he would have been struck off the rolls. In the event he was suspended from practice for three months, and a fine of $5,000 was imposed.

[166] As Judge Inglis recently commented, the fact that the defendant was precluded from working in his chosen profession meant that the financial impact of the orders made would have been more significant than the fine of $5,000.[64] When considering this case, the overall financial impact of the Court's orders should be taken into account.

[167] The second decision referred to by the Court of Appeal in *Reynolds* was *Solicitor-General of New Zealand v Krieger.*[65] It was a contempt application arising from a civil proceeding initiated by the Earthquake Commission (EQC) against the respondent, who was found to have breached the terms of a High Court injunction by publishing on a website hyperlinks to five different websites from which a spreadsheet which was the subject of the injunction could be downloaded.[66] The Court held that such disclosure may not in fact have been harmful to the EQC. A fine of $5,000 was imposed. The judgment does not indicate that there was any history of previous breaches or relevant infringements, contrary to the position in this case.[67]

[168] There are other examples to which reference may be made, which demonstrate the fact that these assessments are inevitably case specific.

[169] The sequence of orders made in the long running litigation which followed the making of interim injunctions in *Ferrier Hodgson v Siemer* demonstrates an escalating range where there is repeated disobedience.[68] In respect of a first contempt by wide publication, a fine of $15,000 was imposed and the defendant was ordered to pay the plaintiff's costs on a solicitor/client basis amounting to approximately $183,000.

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64 *Domingo v Suon (t/a Town and Country Food)* [2017] NZEmpC 23 at [50].
65 *Solicitor-General v Krieger* [2014] NZHC 172.
66 At [14].
67 At [64].
68 *Ferrier Hodgson v Siemer,* HC Auckland CIV-2005-404-180, 16 March 2006.

[170] For a second such contempt, the defendant was committed to prison for six weeks.[69]

[171] For a yet further breach by publication on websites, the defendant was held to be in contempt, sentenced to six months' imprisonment subject to compliance with the underlying injunction and the provision of an undertaking that the defendant would comply at which time the term of imprisonment would come to an end; [70] the length of the term of imprisonment was varied by the Supreme Court to a term of three months' imprisonment.[71]

[172] In all these cases, publication was to the world at large. In the present case, ITE's publication was to two persons associated with ALA itself, albeit with the intent that the information could, he said, be subsequently released under the availability provisions of the LGOIM Act.

[173] That said, whilst publication was more restricted than occurred in the various judgments just cited, I must take into account that there was a deliberate flouting of Court orders against a background of multiple efforts on his part to avoid the binding provisions of the settlement agreement which had resulted in the making of a compliance order and imposition of a fine. As I explained to ITE at the hearing, the imposition of a sanction where there is an established contempt is not "to protect the dignity of judges but to protect the public interest in the due administration of justice by an impartial court".[72]

[174] As already mentioned, the maximum fine which may be imposed is $40,000, an amount that is more likely to be imposed in the most serious of cases justifying a fine. The Court's approach should be the adoption of a minimum appropriate figure.

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69 *Ferrier Hodgson v Siemer*, HC Auckland CIV-2005-404-1808, 9 July 2007.

70 *Siemer v Solicitor-General* [2009] NZCA 62, [2009] 2 NZLR 556.

71 *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at [70] – [71]. Another illustration of the potential range of penalties for a different type of contempt by publication is found in the judgment of a full Bench of the High Court in *Solicitor-General v Smith* [2004] NZFLR 728 (HC). There was varying culpability for contempts which included unjustified publication. TV3 was fined $25,000 for a serious and inexcusable contempt; Dr Smith, a Member of Parliament, was effectively penalised by the making of the finding of contempt, but an additional fine of $5,000 was imposed; and the least culpable party, Radio New Zealand, was fined $5,000.

72 *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 (CA); *Siemer v Solicitor-General*, above n 71, at [27].

[175] Given ITE's track record of breaches of the settlement agreement and now compliance order, I consider the fine should be $7,500, which is a little below 20 per cent of the maximum.

[176] At this stage, I am not persuaded that a term of imprisonment should be imposed. But it is very likely that any further breaches of the Court's order would result in the imposition of a considerably more serious sanction or sanctions as the cases to which I have referred demonstrate. All options under s 140(6) would fall for consideration.

Permanent non-publication orders?

[177] When this proceeding was initially filed, the Court made the following orders upon application by ALA:

a) An interim order prohibiting publication of the names and/or identifying details of either party to the plaintiff's claim;

b) An interim order preventing any person from searching the Court file, without the prior leave of a Judge of this Court.

[178] Those orders were to remain in place until further order of the Court.[73]

[179] They were made so as not to undermine previous orders of the Court relating to non-publication and searching of the Court file – that is the orders which were made in the Court's judgment of 15 April 2016.[74]

[180] It is not contended that a different approach should be taken at this stage. It is inevitable that permanent orders should now be made, so as not to compromise the orders that were made in the Court's earlier judgment.

[181] Accordingly, the interim orders are now made permanent.

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73 *ALA v ITE* [2016] NZEmpC 148 at [6] – [7].
74 *ITE v ALA*, above n 1, at [103] – [104].

Costs

[182] The parties will need to consider whether there are costs issues requiring resolution. I direct that any application for costs is to be filed and served within 14 days of the date of this judgment; any response is to be filed and served 14 days thereafter.

B A Corkill
Judge

Judgment signed at 12.15 am on 12 April 2017