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Noble v Ballooning Canterbury.Com Limited [2020] NZEmpC 167 (14 October 2020)

Last Updated: 19 October 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2020\] NZEmpC 167](#)

EMPC 85/2018 EMPC 119/2018

IN THE MATTER OF a challenge to a determination of
the Employment Relations
Authority

AND IN THE MATTER of a removed application for costs
in the Employment Relations
Authority

AND IN THE MATTER of an application for costs in the
Employment Court

BETWEEN ROBERT NOBLE
Plaintiff

AND BALLOONING CANTERBURY.COM
LIMITED
Defendant

Hearing: (on the papers)

Appearances: No appearance for plaintiff
A Toohey, counsel for defendant
R Towner, counsel for Goldstein Ryder
Limited

Judgment: 14 October 2020

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves a range of costs issues.

[2] The litigation giving rise to those issues stems from litigation about an arrangement entered into between Mr Noble, formerly of New Zealand but now residing in the United States, who came to New Zealand to assist Ballooning

ROBERT NOBLE v BALLOONING CANTERBURY.COM LIMITED [\[2020\] NZEmpC 167](#) [14 October 2020]

Canterbury.com Ltd (BCL) as pilot in command of its balloons for some two and a half months in late 2015. Difficulties arose following an incident when Mr Noble flew a balloon low over a pig farm, an incident which had financial consequences for BCL.

[3] A short time later, Mr Noble was sent a letter by the company ending his relationship with it. As a result, he raised a personal grievance on the basis he was an employee. It was this proposition which the Authority, and then the Court, rejected.¹

[4] In both instances BCL raised a counterclaim for the consequences of the low flight, which it said should be considered were the Authority or Court to conclude Mr Noble was an employee.

[5] The first costs issue relates to the investigation conducted by the Employment Relations Authority. The Authority determined it did not have jurisdiction to consider Mr Noble's claims, because he had not established he was an employee of BCL.² BCL had brought a counterclaim against Mr Noble, but it too could not be considered given the outcome on the jurisdictional point. Subsequently, the Authority removed the costs application made by BCL to the Court.

[6] Mr Noble challenged the Authority's determination. Jurisdiction was considered as a preliminary issue. I concluded Mr Noble had not been an employee, and there was accordingly no basis for considering his alleged personal grievance. I reserved costs and indicated that these should follow the event.³ BCL filed an application for costs. For reasons I will explain later, no submissions in reply were filed. BCL's application for costs is the second matter the Court must resolve in this judgment.

[7] The third set of costs issues follow interlocutory applications which were brought in the context of BCL's application for costs. Two of these were brought by the law firm which was on the record for Mr Noble, Goldstein Ryder Ltd (GRL), and

1. *Noble v Ballooning Canterbury.com Ltd* [2018] NZERA Christchurch 25 [Substantive determination]; *Noble v Ballooning Canterbury.com Ltd* [2019] NZEmpC 98 [Jurisdiction judgment].
2. *Noble v Ballooning Canterbury.com Ltd* [2018] NZERA Christchurch 49 [Removal determination].

³ Jurisdiction judgment, above n 1, at [128]–[129].

by counsel who appeared on his behalf at the hearing, Mr Goldstein and Ms Ryder. They sought a declaration from the Court that counsel had ceased to be on the record since Mr Noble had not responded to any request for instructions on BCL's application for costs. They also sought directions for substituted service of that application since they were unaware of his physical location overseas. A third application was brought by BCL against GRL and/or counsel, asserting that in the circumstances where Mr Noble's location was unknown, they should be joined as parties for costs purposes.

[8] These applications were resolved in an interlocutory judgment.⁴ As I shall outline later, substituted service of the application for withdrawal was not ordered, and service of the application for withdrawal did not occur. Ultimately, both of GRL's applications were withdrawn. BCL now seeks costs in respect of these applications from GRL. I also dismissed BCL's application to join GRL and counsel; on that application, each party seeks costs against the other. I have received detailed submissions from counsel, which will be referred to where relevant.

Costs in the Authority

[9] Pursuant to leave reserved, each party filed costs submissions in the Authority. A particular issue arose from those submissions. Prior to the investigation meeting, it had been anticipated the Authority could rule on jurisdiction on the first of three days set down for the investigation meeting. This did not prove possible, so the Authority investigated not only the issue of jurisdiction, but also the issues relating to Mr Noble's grievance and to BCL's counterclaim. Ultimately, the Authority determined there was no jurisdiction to consider either party's claim. Then it was asserted for Mr Noble that wasted costs were incurred because of the approach adopted by the Authority. In the face of these assertions, the Authority removed the costs issue to the Court.⁵

[10] The Court has before it the submissions that were presented to the Authority by each party; and further supplementary submissions given to the Court by Ms Toohey, counsel for BCL.

⁴ *Noble v Ballooning Canterbury.com Ltd* [2020] NZEmpC 60 [GRL interlocutory judgment].

⁵ Removal determination, above n 2.

[11] The essence of BCL's position is that indemnity costs should be awarded for several reasons. The first of these was that BCL had requested that the jurisdictional matter be dealt with on an interlocutory basis, with the filing of affidavits and submissions. Mr Noble had opposed this course of action, preferring it to be dealt with at the substantive hearing which he would travel to New Zealand to attend. As already noted, the Authority then ruled it would deal with jurisdiction at the substantive hearing. It was submitted that Mr Noble's preference led to BCL having to prepare the entire case; in turn this led to the Authority concluding it was necessary to consider all that evidence so as to properly determine the jurisdictional issue.

[12] Next, Ms Toohey, counsel for BCL, submitted that Mr Noble's case that he was an employee was weak because, for example, he insisted during his short period of his employment that he not be paid as an employee.

[13] Pecuniary penalties had been sought but the claim for these were withdrawn at the commencement of the hearing. The preparation for that aspect of the matter was an aggravating factor.

[14] Whilst BCL had mounted a counterclaim, it had acknowledged this could only be considered by the Authority if Mr Noble was an employee. Accordingly, it was not a case where mixed success principles could apply.

[15] Ms Toohey submitted that costs should follow the event. On a tariff basis an appropriate amount would be \$17,800 for 4.8 days. Actual costs were \$53,354.21. In addition, there was a disbursement in respect of an expert witness of \$3,412.08. Adopting an indemnity approach, the sums actually paid by BCL should be awarded.

[16] In her submissions to the Court, Ms Toohey also said that the bulk of the hearing was consumed with Mr Noble's claim that he was an employee and his grievance, and that BCL had succeeded on both points. She argued the evidence in support of the counterclaim was relatively confined; it related to an issue as to whether Mr Noble had been aware he should not have been flying over the pig farm, and as to the extent of the damage which allegedly arose from that incident which focused mainly on documents.

[17] In the submissions filed in the Authority for Mr Noble, Ms Ryder submitted BCL had failed to place Mr Noble's status in issue initially; it was this fact that led to practical difficulties at the investigation meeting.

[18] It was asserted the parties had agreed to the jurisdictional issue being dealt with at the outset of the investigation, and that the Authority had failed to comply with that agreement. The responsibility for this outcome should not be visited on Mr Noble.

[19] Ms Ryder said that indemnity costs should not therefore be awarded to BCL. Also relevant was the fact that BCL's counterclaim had been dismissed; Mr Noble should be awarded costs in respect of that event.

[20] In summary, the position for Mr Noble was that BCL should be awarded tariff costs only in respect of the jurisdiction issue, and then only for part of the first hearing day (between \$2,250 and \$3,375); and that Mr Noble should be awarded costs in relation to the counterclaim, also on a tariff basis, which was between 25 per cent and 30 per cent of the total hearing time (between \$4,625 and \$5,500). In regard to the balance of the hearing, costs should lie where they fell.

[21] The net effect of Mr Noble's submission was that a small amount would be paid by BCL to him.

Analysis

[22] The Authority's jurisdiction to award costs is derived from cl 15 of sch 2 of the [Employment Relations Act 2000](#) (the Act). Costs are to be awarded as the Authority thinks reasonable. There are many decisions outlining the applicable principles, which do not need repetition here, other than to observe they were fully discussed by the full Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.⁶

[23] As noted, it was contended for Mr Noble that BCL initially failed to put into issue the question of status when filing its statement of reply in the Authority.

⁶ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [\[2005\] NZEmpC 144](#); [\[2005\] ERNZ 808 \(EmpC\)](#) at [\[44\]](#).

[24] I considered this issue in my substantive judgment where it was argued that a binding concession had been made by BCL in its pleadings before the Authority that Mr Noble was an employee.⁷ I was not persuaded that such a concession had been made. I found there was no evidence that BCL gave instructions to acknowledge Mr Noble was an employee. Whilst BCL's position could have been stated more clearly, I was satisfied that the issue of status had been raised with the Authority at an early point and accepted by it subsequently as being live.⁸

[25] In their costs submissions, counsel debated how the status issue should have been resolved. It appears there had been a difference between the parties as to the options, with the Authority ruling that all issues would be resolved at a single investigation meeting. I infer that the fact Mr Noble would have to travel to New Zealand for the purposes of any hearing may have contributed to a decision to attempt to potentially consider all issues at one hearing. In hindsight, it would have been preferable for the jurisdictional point to be resolved separately and as expediently as possible, if necessary on the papers, but that is not a matter for which Mr Noble should now be penalised in costs.

[26] The next consideration relates to the way in which the Authority in fact dealt with the matter. The Authority's minute indicated that it was "likely" an oral determination or indication would be given before the evidence was completed and submissions given. In the determination which the Authority issued after the investigation, it was made clear that the complexity of the case, as presented by the parties, meant that all the circumstances needed to be reviewed.⁹ Given the Authority's ability to follow whatever procedure it thinks appropriate, it was entitled to proceed as it did.¹⁰ These circumstances cannot aptly be described as the Authority overriding an agreement of the parties.

[27] As for the counterclaim, it is clear it was advanced at the investigation meeting on a conditional basis. That is, BCL accepted that if Mr Noble was not an employee,

7 Jurisdiction judgment, above n 1, at [67(b)].

8 At [93].

9 Substantive determination, above n 1, at [19]–[21].

10 [Employment Relations Act 2000, s 160\(1\)\(f\)](#).

it could not be advanced. Further, I accept Ms Toohey’s assessment that the portion of time devoted to it was comparatively limited.

[28] The starting point for the assessment of costs is that these should follow the event. In my view, the material event, when considering costs in relation to the counterclaim, was Mr Noble’s failure to establish he was an employee.

[29] I accept the submission that there was an aggravating factor by Mr Noble seeking pecuniary penalties and discontinuing these at a late stage. Some recognition of that factor is also appropriate.

[30] Also significant is Ms Toohey’s submission that the tariff rate would result in reimbursement of less than a third of BCL’s actual costs, which I accept were not unreasonable having regard to the complexity of the case and the scope of the evidence and submissions given.

Conclusion

[31] Standing back, I am not satisfied that an award of indemnity costs would be reasonable. Rather, costs in the particular circumstances should be assessed by applying a higher than usual tariff. I proceed on the basis of an allowance of \$7,500 per day, which produces a figure of \$36,000. This is approximately 66 per cent of actual costs. I also allow the disbursement of \$3,412.18, which produces a total of

\$39,412.18. I consider that sum to be a reasonable contribution to BCL’s costs in the Authority in the particular circumstances.

[32] I direct Mr Noble to pay this sum to BCL. Interest is to be paid under the [Interest on Money Claims Act 2016](#) (IMCA) on that amount from the date on which the application for costs was made, 23 March 2018, to the date of payment.

Costs in the Court

[33] In support of its application for costs when dealing with the preliminary issue before the Court, BCL submitted that the proceeding should be dealt with under

Category 3B or 3C of the Court’s Guideline Scale as to Costs; or by applying Category 2B but increasing it by 50 per cent.¹¹

[34] Ms Toohey submitted that Mr Noble’s conduct had significantly increased BCL’s costs, because:

- a. He had refused to attempt to resolve any pre-trial issues, which necessitated:
 - A successful application for security for costs,¹² and then a successful application for costs with regard to that step which had initially been opposed.¹³
 - An opposed application for stay when Mr Noble refused to comply with the order for costs (costs were reserved on this application, with Mr Noble agreeing to pay them following a telephone conference).
 - An offer to settle the matter fully by a payment from Mr Noble to BCL of \$35,000 in full and final settlement of all issues, including costs in the Authority.
 - A failure to accept BCL’s offer to settle costs in the Court.
- b. Without first raising the issue with BCL, Mr Noble filed an application to exclude portions of the evidence of BCL. That evidence had been included to respond to Mr Noble’s proposed testimony. Ultimately, he agreed to delete those portions of his evidence, which meant it was unnecessary for BCL to respond to it. This required intensive Court management, which increased BCL’s costs. Costs were reserved on this issue.

11. “Employment Court of New Zealand Practice Directions” <www.employmentcourt.govt.nz> at No 16.

12 *Noble v Ballooning Canterbury.com Ltd* [2018] NZEmpC 97 [Security for costs judgment].

13 *Noble v Ballooning Canterbury.com Ltd* [2018] NZEmpC 142.

- c. Immediately prior to trial, Mr Noble filed an application to produce documents and sought a costs order against BCL’s counsel personally. BCL had in fact indicated the previous week it was providing the documents and did so before the application was filed. The application was withdrawn. The procedure for filing a notice requiring disclosure under the [Employment Court](#)

[Regulations 2000](#) (the Regulations) was not followed. This put BCL to further unreasonable and unnecessary expense.

- d. Before the Authority and the Court, Mr Noble gave evidence that an email he sent informing one of the directors of BCL of his tax code had been sent prior to the company sending its termination letter. He also included copies of emails in the common bundle on this issue which, on the face of it, contained inaccurate times to support this contention. His evidence was not correct. The Court had found that Mr Noble advanced this aspect of his case on an incorrect basis, which had led the Authority into error.¹⁴ It was submitted he had also attempted to advance the same case before the Court, again on an incorrect basis.
- e. Other unreliable testimony was given by Mr Noble.
- f. BCL is a small family-run business. It had been put to enormous expense on two occasions to defend a meritless and ill-conducted claim against it. The Court, when dealing with Mr Noble's application for security for costs, stated that his position was arguable, but not strongly arguable.¹⁵
- g. Notwithstanding that assessment, the claim had been conducted in a manner which aggravated BCL's costs, including by the provision of unreliable evidence.

¹⁴ Jurisdiction judgment, above n 1, at [72]–[74].

¹⁵ Security for costs judgment, above n 12, at [43].

[35] A detailed assessment of scale costs was provided. Under Category 2, the range was from \$45,540 (Band B) to \$67,540 (Band C). On a Category 3 basis, the range was from \$68,310 (Band B) to \$101,310 (Band C).

[36] No submissions were filed in response by Mr Noble, Mr Towner confirming that his lawyers had not received instructions from him to do so.

Analysis

[37] The Court's jurisdiction to order costs arises under cl 19 of sch 3 of the Act. The Court's Guideline Scale provides guidance in exercising the jurisdiction. That Scale is not, however, intended to replace the Court's ultimate discretion under the statute as to whether to make an order for costs and if so, for how much. It is a factor in the exercise of the discretion.

[38] I comment briefly on the relevant categories and bands. Category 2 refers to proceedings of average complexity requiring a representative with skill and experience considered average in the Employment Court. Category 3 refers to proceedings that, because of their complexity or significance, require a representative to have special skills or experience in the Employment Court.

[39] Band B applies if a normal amount of time is considered reasonable. Band C applies if a comparatively large amount of time for a particular step is considered reasonable.

[40] I have considered the steps outlined in Ms Toohey's submissions and agree that each item is appropriately sought.

[41] Although, well prior to the hearing, I expressed a provisional view that Category 2, Band B would be appropriate, in light of subsequent events I agree that such categorisation would not provide a fair contribution to BCL's costs.

[42] Taking into account the various factors referred to by Ms Toohey, I am persuaded that the case was a Category 3 proceeding, having regard to the range of issues which had to be confronted and dealt with both prior to and during the hearing.

[43] I am not persuaded, however, that the time estimates should be assessed under Band C rather than Band B.

[44] To that point, an assessment on a 3B basis produces a figure of \$68,310.

[45] Next, it is necessary to consider the without prejudice letter sent to Mr Noble's lawyers on 11 July 2018; it proposed payment by him of \$35,000 in respect of all issues, including BCL's counterclaim.

[46] At the time the letter was sent, the Authority's substantive determination had been issued.¹⁶ Mr Noble's challenge had been brought,¹⁷ and the Authority had removed the cost issues to the Court.¹⁸

[47] I have determined that Mr Noble's liability for costs in the Authority should be

\$39,412.18, which exceeds the sum proposed for payment. Furthermore, if accepted, each party would have walked away from their respective claims. Mr Noble had claimed an unspecified sum for humiliation, loss of dignity and injury to feelings and a pecuniary award of \$7,600 under various heads. In its counterclaim, BCL had alleged there had been breaches of contracts justifying an award of special damages totalling

\$23,330.16 and penalties under the Act.

[48] Mr Noble's grievance related to a short fixed-term contract, and at the time of dismissal he had worked for a short period only. Any award of remedies would have been modest, and likely eroded by BCL's counterclaim. I note that if the counterclaim was not able to be considered in this jurisdiction, it could have been considered in a court of general jurisdiction. If the offer had been accepted, finality would have been achieved. I find Mr Noble's claim was likely a strategy to create difficulties for the cost-effective prosecution of BCL's counterclaim.

[49] Under reg 68(1) of the Regulations, in exercising its discretion as to costs, the Court may have regard to any conduct of the parties which tends to increase (or

16 On 26 February 2018.

17 On 14 March 2018.

18 On 18 April 2018.

contain) costs, including any offer made by either party to the other a reasonable time before the hearing to settle all or some of the matters at issue between the parties.

[50] It would have been reasonable for Mr Noble to accept BCL's offer, since he would no longer face BCL's counterclaim. I am satisfied that Mr Noble's failure to accept it was in the circumstances a matter of conduct which justifies an increase of the scale sum referred to earlier.

[51] As a result, I conclude that a fair sum by way of contribution to BCL's costs is

\$75,000. Mr Noble is to pay that amount to BCL, together with interest under the IMCA from 9 September 2019, the date when the application for costs was made, until the date of payment, due allowance being made for the sum already received by BCL as a result of the payment out of the previously ordered security for costs.

Interlocutory applications

[52] The remaining cost issues concern interlocutory applications made after the resolution of the challenge.

Applications brought by GRL

[53] In my interlocutory judgment of 7 May 2020, I considered in depth GRL's application for substituted service of its application for withdrawal, which followed full submissions being made. I indicated that I was not prepared to approve the steps proposed.¹⁹ I concluded, however, that GRL should have a further limited period to consider if there were any other alternatives on that topic. The application for withdrawal stood adjourned in the meantime.²⁰

[54] After that judgment was issued, GRL withdrew both those applications. It is in that context BCL has sought costs. In summary, Ms Toohey submitted:

- a. Costs should be awarded on a Category 3B or 3C basis; or on a 2B basis with a 50 per cent uplift.

19 GRL Interlocutory judgment, above n 4.

20 At [35] and [65].

- b. The interlocutory applications were ill-conceived from the outset, not researched, and ultimately abandoned after GRL failed to take any of the steps suggested by the Court to locate Mr Noble.
- c. This submission was developed in light of the somewhat complex chronology relating to GRL's applications as summarised in the interlocutory judgment.²¹

[55] In summary, Mr Towner submitted for GRL:

- a. GRL had acted responsibly when seeking to withdraw in the absence of instructions from Mr Noble, and to apply for substituted service when it became apparent BCL could not serve Mr Noble personally.
- b. BCL had opposed GRL's application for its own purposes, which related to concerns about enforcement of any costs order against Mr Noble since his whereabouts were unknown.
- c. BCL must have known from the outset it would have difficulty enforcing any cost orders against Mr Noble, given that he resided in the United States – hence its application for security for costs which was dealt with prior to the Court's hearing. As part of that application, BCL had told the Court it would not be able to take enforcement action against Mr Noble in the United States, regardless as to whether Mr Noble's address was known. Despite that, BCL proceeded to

defend the litigation knowing there could be risks in obtaining a costs order in its favour.

- d. Another reason for opposing the application for directions, had been to facilitate BCL's application to join the firm and its principals, for cost purposes. BCL's opposition to the firm's applications was intrinsically linked to its joinder application, which was ill-founded.

21 At [7]–[16].

- e. This was not a situation where a party had discontinued a proceeding, and thus costs should be assessed on that basis. In the unusual circumstances of the case, costs should be assessed on an entirely different basis than a party discontinuing a proceeding.
- f. The proper order would be to refuse to make an order for costs against GRL in relation to its applications; or if costs were to be awarded, they should be confined to costs on a 2B basis.

Analysis

[56] The issue for resolution is whether the Court should apply the normal rule that costs should follow the event and, if so, to what extent. It is not disputed that there is jurisdiction to make an order of costs against GRL, as an unsuccessful party.

[57] I am not persuaded that the normal rule that costs follow the event should not apply with regard to the present applications.

[58] BCL was entitled in the unusual circumstances to oppose the applications for directions, essentially taking the position that inadequate steps had been taken to locate Mr Noble.

[59] The expectation of the rules of procedure is that a party will provide their address on their pleading unless relieved of the obligation to inform the Court and the other party of that information by the Court. This facilitates service and enforcement.²² Since Mr Noble's address had not been provided on his statement of claim, and the Court had not relieved him of the responsibility to do so, BCL was entitled to take the steps it did which may have resulted in the non-compliance being remedied.

[60] I do not accept the submission that, following the application for security for costs, BCL should have considered the cost effectiveness of defending the claim, and that it ran a risk as to recovery of its costs by doing so. Not to have defended

²² See *Wallace v McDermott* HC Wellington CIV 2003-485-1427, 10 September 2003.

Mr Noble's claim could have exposed it to a compensatory award and thwarted its counterclaim. In reality, BCL took the only sensible step: it defended an unmeritorious challenge and maintained its counterclaim. Moreover, BCL was not to know that Mr Noble would not maintain his professional relationship with his lawyers, which is what gave rise to the subsequent problems.

[61] I do not think it is appropriate to consider the merits of BCL's application for joinder at this stage. Those can be assessed when considering that particular application later.

[62] As a result, I consider GRL should pay costs to BCL for the items claimed, on a 2B basis; 5.65 days at the Category 2 rate of \$2,200 produces a figure of \$12,430, which I order GRL to pay to BCL, subject to consideration of its claim in respect of the joinder application.

BCL's application for joinder

[63] The remaining interlocutory application relates to BCL's unsuccessful application for joinder of GRL and counsel, for cost purposes.

[64] To set the scene for the analysis of costs, I summarise my findings. I concluded that a prudent lawyer acting for a client living overseas should take the precaution of obtaining the client's physical address if it is not to be recorded in the statement of claim, so that all options of contact could be maintained during the proceeding.²³

[65] However, whilst prudence was not observed, I was not satisfied this could be regarded as such a serious breach of the rules of procedure as to warrant joinder.²⁴ Nor was I persuaded that viewed from the perspective of the applicable rules of conduct, there had been a failure of counsel's overriding duty to the Court such as to justify joinder for cost purposes.²⁵

²³ GRL Interlocutory judgment, above n 4, at [49].

²⁴ At [52].

²⁵ At [53].

[66] A third factor I was required to consider related to whether there had been non-compliance with the obligations held by a lawyer under the [Anti-Money Laundering and Countering Financing of Terrorism Act 2009](#) (AML/CFT Act). After the hearing relating to the application, GRL filed a late affirmation from an officer administrator, stating that payments made by Mr Noble to the firm had been made by credit card; this meant that the argument concerning the provisions of the AML/CFT Act was no longer relevant, because payment by credit card was not an international wire transfer which could give rise to obligations under that statute.

[67] I concluded that the application for joinder should therefore be dismissed.

[68] In support of GRL's application for costs, Mr Towner submitted:

- a. There was no reason why the general principle of costs following the event should not apply to this particular application on a 2B basis; the sum sought was \$5,019.
- b. Submissions were developed with regard to a point which had been made for BCL that it would never have raised the AML/CFT Act issue if it had known payments made by Mr Noble to GRL had been made by credit card. Counsel for BCL had submitted at the hearing that this aspect of the application for joinder was independent of the points relating to alleged breaches of procedural rules and/or ethical duties and should be assessed accordingly.
- c. The application had failed regardless of the late filing of the final affidavit in opposition. That was no reason to deny costs to GRL for that reason.

[69] In support of BCL's opposition for costs, and a cross-application for those, Ms Toohey submitted:

- a. GRL's failure to obtain an overseas address for Mr Noble meant that BCL would now in all likelihood absorb the cost of five years of

unsuccessful litigation by Mr Noble against it, because enforcement of any cost judgment it obtained is unlikely to be available.

- b. Despite the judgment of the Court relating to security for costs which specifically referred to the vulnerability of BCL in the circumstances, GRL did not obtain an address for its client.
- c. Accordingly, the usual rule that costs follow the event should not apply. That was because the behaviour of BCL was reprehensible, and sufficient to displace the policy of compensating a successful party for its litigation costs.
- d. Such a description was appropriate because GRL had failed to disclose the fact there was a credit card transaction for a payment made to the firm some five months after BCL first raised with the Court the possibility that there was non-compliance with the AML/CFT Act. GRL had at that time and later maintained that the legislation did not apply first because the firm acted for Mr Noble prior to the legislation coming into force (which Ms Toohey said was an incorrect statement of the law) and, secondly, that it was an irrelevant consideration.
- e. Based on that information, it was submitted the cumulative errors provided BCL with reasonable grounds for anticipating success in making the application for joinder. Furthermore, it would not have made the application had the credit card transaction been disclosed, which did not occur until after the hearing of the application for joinder.
- f. Accordingly, costs were sought against BCL in the proceeding, despite it having been unsuccessful, pursuant to the scale which Ms Toohey said resulted in a claim for \$5,500 on a 2B basis in respect of which there should be a 50 per cent uplift, or on a 3B basis, \$8,250.

Analysis

[70] The Supreme Court has made it clear that unless there are exceptional reasons, costs should follow the result: *Shirley v Wairarapa District Health Board*.²⁶

[71] The Court went on to refer to dicta from the English Court of Appeal which discussed when it may be permissible to depart from the ordinary course, in *Forster v Farquhar*, where Bowen L J had said:²⁷

We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to rule that the costs should follow upon success.

[72] I am satisfied that there is merit in the submission made for BCL that the late disclosure of the credit card transaction gave rise to prejudice; it was an answer to the long-asserted AML/CFT Act point made on several occasions for BCL. Had BCL been informed of this fact in a timely way, the company would at least have been in a position where it could have been advised that this particular ground was not available.

[73] Although this was not the only basis on which the application for joinder proceeded, Ms Toohey submitted the application would not in fact have been brought had the credit card transaction been disclosed.

[74] I am concerned that this is a hindsight assessment; I cannot rule out the possibility that given the unfortunate position in which it had been placed as to costs, the company would in fact have brought a joinder application based on an asserted failure to comply with the Court's procedural rules, and that ethical obligations had not been satisfied. That said, the application would have been much narrower in compass.

[75] I am not persuaded that exceptional circumstances exist justifying a reversal of the normal rule that costs should follow the event. However, I do conclude there should be a reduction of the costs claimed by GRL in respect of the joinder application.

26 *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [19].

27 *Forster v Farquhar* [1893] UKLawRpKQB 53; [1893] 1 QB 564 (CA) at 569.

It seeks \$5,019. I reduce that to \$2,500, which may be satisfied by reduction of the sum GRL has been ordered to pay.

Conclusion

[76] In respect of costs in the Authority, Mr Noble is to pay BCL the sum of \$39,412.18, as a contribution to its costs and a disbursement. Interest is to be paid under the IMCA on that sum from 23 March 2018 to the date of payment.

[77] In respect of costs in the Court, Mr Noble is to pay BCL the sum of \$75,000, as a contribution to its costs. Interest is to be paid under the IMCA from 9 September 2019 to the date of payment, with due allowance being made for the sum already received by BCL as a result of the payment to it of the previously ordered security for costs.

[78] With regard to the interlocutory applications:

- a. In respect of GRL's application for withdrawal and substituted service of that application, which was subsequently withdrawn, it is to pay

\$12,430 to BCL.

- b. In respect of BCL's unsuccessful application for joinder, it is liable to pay to GRL the sum of \$2,500, to be satisfied by deduction from the previous order.
- c. The net effect is that GRL is to pay BCL \$9,930. I direct that this payment be made within 14 days.

[79] I decline to make any order for costs on costs.

Judgment signed at 4.15 pm on 14 October 2020

B A Corkill Judge