IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 3
5312456

	BETWEEN	WARREN SKERRETT INVESTMENTS LIMITED First Applicant
	A N D	CAMELOT NEW ZEALAND LIMITED PARTNERSHIP Second Applicant
	A N D	DONALD BROAD Respondent

Member of Authority:	Helen Doyle
Representatives:	Rob Towner, Counsel for Applicant Peter Churchman QC, Counsel for Respondent
Submissions Received:	18 December 2013 from Applicant 2 and 23 December 2013 from Respondent
Date of Determination:	13 January 2014

COSTS DETERMINATION OF THE AUTHORITY

A I have ordered that the first and second applicants' are jointly and severally liable to pay costs to the respondent in the sum of $29,000.

The application for costs

[1] The Authority found in favour of the respondent that the restraint of trade covenant in his employment agreement with the first applicant was unenforceable and

did not exercise its discretion to modify the restraint covenant. The Authority found one breach of the duty of fidelity on the part of the respondent although did not find damages arose as a result. It did not find any other alleged breaches of fidelity and confidentiality made out.

[2] The Authority found that the benefits of the restraint of trade covenant were not capable of being assigned and were not assigned to the second applicant. The second applicant's claim was dismissed.

[3] Costs were reserved in the determination and a timetable set for an exchange of submissions. The Authority now has submissions from Mr Towner and Mr Churchman.

The respondent's submissions

[4] Mr Churchman refers to the leading judgment on costs in the Authority, *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808. Mr Churchman submits that there should be an indemnity award of the costs incurred by the respondent from the date a *Calderbank* offer was made on 1 October 2010. He submits that the actual costs incurred are reasonable.

[5] The Calderbank offer was made in a letter headed *without prejudice save as to costs* and was sent after a mediation between the first applicant and the respondent on 21 September 2010 from Todd Whitcombe a partner in the Dunedin firm of O'Neill Devereux to Mr Towner. The offer was at the end of a fairly lengthy letter that canvassed in some detail difficulties that the respondent saw with the first applicant's case. The offer was expressed to be made by the respondent on the basis that he is *entirely pragmatic* and realises there is a cost to him in proceeding to defend the claim. The offer was as follows:

(a) Payment of the sum of $12,000 to the first applicant;

(b) The first applicant to file an immediate discontinuance of the proceedings;

(c) Each of the parties' costs to lie where they fall;

(d) Settlement to be in full and final settlement of all matters relating to the employment relationship problem and to be confidential.

(e) There was no time limit to responding to the offer or to the time it remained open but Mr Towner was asked to take instructions from his client and return.

[6] Mr Churchman seek on behalf of the applicants's an award of costs be in the sum of $48,344.42. Mr Churchman refers to the references in the Authority determination that the first applicant is a shell company and that the second applicant largely drove the matter. He submits the applicantas' should be jointly and severally liable for any costs award.

[7] Mr Churchman referred in his submission to the leading Employment Court judgment on costs in the Authority in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and the principle therein about the daily tariff on which basis costs are usually determined. He refers to that being increased with the present of certain factors in a case including Calderbank offers – *Chen v New Zealand Sugar Co Ltd* [2010] NZEmpC81. Mr Churchman submits that simply increasing the daily tariff is not going to adequately resolve the issue of costs because of the timing and nature of the settlement offer.

[8] All invoices rendered to the respondent and/or Mr Churchman's instructing solicitors have been attached to submissions. Costs incurred by the respondent prior to the settlement offer on 1 October including those for mediation have not been included in the amount of $48,344.42. From my own calculation disbursements including Mr Churchman's flights to Dunedin have not been included in that sum.

The applicants' submissions

[9] Mr Towner lodged submissions on behalf of the first and second applicants. He accepts in his submission that costs follow the event and that the applicants should make a contribution to the respondent's costs. He submits that costs should be determined on the basis of a daily tariff with a modest uplift in light of the *Calderbank* offer made to the first applicant but that that should be counterbalanced by the applicants' success in three interlocutory proceedings. He proposes an appropriate starting point would be $7000 for the two day investigation meeting at the daily tariff rate of $3,500 per day.

[10] Mr Towner submits that an adjustment downwards is appropriate to take into account the applicants' success in the interlocutory procedures. The respondent's

opposition to the application for joinder and third party discovery was unsuccessful. The respondent's application to have the issue as to whether the restraint of trade covenant is assignable to and enforceable by the second applicant determined as a preliminary issue was unsuccessful. The respondent's opposition to an application for confidentiality orders for the sale and purchase agreement was also unsuccessful. Costs were reserved in all three preliminary determinations.

[11] Mr Towner submits that there is no basis to award indemnity costs to the respondent and that no Calderbank offer was ever made to the second applicant who was joined to the proceedings on 23 August 2011 some 10 months after the Calderbank offer was made. Mr Towner submits that a substantial portion of the costs incurred by the respondent was after the second applicant was joined to the proceedings and it is contrary, he submits, to the basic principles of Calderbank offers for such an offer to have any effect on costs in relation to a party to whom it was not made.

[12] Mr Towner in his submission does not agree an award of indemnity costs is appropriate and submits that this would be inconsistent with the Authority approach to Calderbank offers and tantamount to punishing the applicants for a claim brought in good faith.

[13] Mr Towner accepts on behalf of the applicants that costs should follow the event and submits that an appropriate award would be the sum of $12,000.

Determination

[14] The applicants accept the usual principle that costs follow the event. The respondent was ultimately the successful party. Both counsel refer to the usual daily tariff in the Authority of $3500 per day for an investigation meeting.

[15] There is a discretion as to whether costs are awarded and, if so, in what amount. That discretion is to be exercised in accordance with principle and not arbitrarily. Some of the basic tenets when considering costs as stated in *PBO* are as follows. Costs are not to be used as a punishment or an expression of disapproval of the unsuccessful parties conduct although conduct which increase costs unnecessarily can be taken into account in increasing or decreasing an award. Without prejudice save as to costs offers can be taken into account. Awards are generally modest and the nature of the case can influence costs.

[16] Counsel for the respondent says that the Calderbank offer should either support indemnity costs or a significant uplift in costs. Counsel for the applicants' says that any uplift should be counterbalanced by success in three preliminary applications and that an indemnity award would be inappropriate .

[17] The rationale behind making Calderbank offers is for the party facing a claim against it to obtain some means of limiting exposure to costs by making an offer to settle the claim. This has been recognised as a sensible approach – *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA). In *Elmsly* it was stated at [53] in comparing the resources committed in the case and the actual result – *Nonetheless, a more sensible approach by the defendants to the making of Calderbank offers and steely responses by the Courts where plaintiffs did not beat Calderbank offers would have been in the broader public interest.*

[18] The Authority can in exercising its discretion have regard to conduct which increased costs unnecessarily and also to *without prejudice save as to costs offers.* In *PBO* the Court took into account a settlement offer in the nature of a *Calderbank* offer made by Ms Da Cruz who was both successful with her claim and in resisting a significant counterclaim. At [59] the Court concluded that one of the offers was a reasonable compromise of the claim and had it been accepted it would have spared both parties further expenditure of costs.

[19] Mr Towner submits that there should only be a modest uplift by virtue of the Calderbank offer. He refers to Authority determinations that there is no absolute protection to the party which had made the offer in terms of costs if a party is awarded a lesser amount than the amount offered in the Calderbank letter – *Larnach v Gipsy Ltd* [2013] NZERA Auckland 450 at [11]; *Barton v Dargaville High School Board of Trustees* [2013] NZERA Auckland 192 at [7] and *Fitzpatrick v Eldercare Services Ltd* [2013] NZERA Auckland 112 at [14].

[20] I accept that the effect that a *Calderbank* offer has is discretionary. I note that in *Fitzpatrick* what was described as *full* weight was given to the *Calderbank* offer made by the applicant and weight was placed on the *Calderbank* offer made by the respondent in *Barton*.

[21] Mr Towner's submission is correct that the *Calderbank* offer can only be taken into account in the exercise of any discretion in relation to the first applicant.

That is because it was only an offer made to that applicant A separate issue arises that will need to be addressed at a later point whether the second applicant should be jointly and severally liable for costs awarded to the respondent.

[22] This was a case where there were some legal complexities. A legalistic approach was taken by both parties in accordance with the nature of the claim. Senior counsel were involved.

[23] The settlement offer was made at an early stage in the litigation. By way of background the original statement of problem was lodged with the Authority on 15 July 2010. The respondent's employment had ended with the first applicant on 29 July 2009 and the first applicant had sold its business on 30 September 2009 to the second applicant. The first applicant was the only applicant named in the original statement of problem. After the lodging of a statement in reply and mediation the settlement offer was made on 1 October 2010. I accept Mr Churchman's submission that many of the difficulties with the case against the respondent set out in the letter that contained the offer were accepted by the Authority in its determination. The reasons for the offer was set out in the letter as an appreciation by the respondent of the costs he would face in containing to defend the proceedings. The offer was made at a time before either party had incurred significant costs.

[24] The offer was not accepted and I have then considered whether that was unreasonable. The time to make that assessment should be at the time of the rejected offer. The recipient of a *Calderbank* offer should undertake some careful evaluation of the strengths and weaknesses of the case. I find that at that very early stage there was considerable risk and difficulty to the first applicant with its case. Many of these had been set out in the settlement offer letter. Whilst I would not conclude that there was simply no prospect of success at all particularly given discovery had not been completed, the prospects of success were sufficiently in doubt. The first applicant I find, took a risk that in rejecting the offer, if ultimately unsuccessful, it could face an award of costs higher than may normally be awarded in the Authority where modest awards are usually made. In that sense the rejection of the offer weighed against that risk was unreasonable. Given that by the time of the offer the first applicant had sold its business, only retaining it for a short period after the respondent's employment ended then the amount of $12,000 offered was not an insignificant amount. Ultimately the first applicant was unsuccessful.

[25] I have then considered whether the *Calderbank* offer should result in an award of indemnity costs. Several matters were advanced by Mr Churchman about the conduct of the case on the part of the applicants. He referred to delays. A year had passed before the original statement of problem was lodged. Then the applicant requested an adjournment of the investigation meeting dates set for in June 2011. The Authority accepts responsibility then for delay over determining a preliminary matter. This was due to a real prospect, that in fact did not eventuate, of having to transfer the file to a new member and the considered desirability of having the new member determine a matter relevant to the conduct of the investigation.

[26] Other matters referred to were the failure by the second applicant to comply with a direction of the Authority to lodge a second amended statement of problem within the required period leading to difficulties for the respondent in preparation of evidence. I accept that there was a cost factor involved in that matter because Mr Churchman had to write to the Authority and notwithstanding the second applicant had been joined at a much earlier stage the respondent was not aware of the nature of the second applicant's claim. There was however a practical reason for the failure to comply as the second applicant was waiting for the first applicant to be restored to the companies register to prevent having to file two lots of proceedings. A detailed outline of the second applicant's claim was provided at the request of the Authority and when the second amended statement of problem was finally provided it was almost identical to that outline.

[27] The Authority was as Mr Churchman submits required to essentially infer from circumstantial evidence 11 clients had been solicited by the respondent and there was a further amendment to the claim requested on the first day of the investigation meeting. I am not satisfied that those matters lead to a measurable increase in costs.

[28] I have considered all these matters but I am not satisfied that the behaviour/conduct of the applicants' was such an indemnity award would be a reasonable response to the conduct referred to. I do however consider significant weight should be given to the offer. The respondent unlike the applicants' could not choose whether to continue with the litigation or not. He made a reasonable offer to settle at an early stage and in doing so pointed out some difficulties the first applicant faced in proceeding. The proposed uplift by Mr Towner of $2500 per day on the usual daily rate of $3500 taking into account some success in preliminary applications

by the applicants is inadequate. Post rejection of the Calderbank offer the respondent incurred $48,344,42 costs.

[29] I have carefully considered the invoices attached to the respondent's submissions. I am satisfied that there is no double up of charging. The hourly rate for Mr Churchman who is a senior counsel and at the time of the investigation meeting Queens Counsel, is reasonable. The work undertaken is set out in detail. There were a number of reasonably complex legal issues in this case. The submissions provided in writing after the investigation meeting were lengthy and detailed.

[30] I accept that there should be some adjustment downwards for the successful applications by the applicants' for discovery, joinder and confidentiality in the sum of $1000. I do not however make any adjustment for the successful opposition to the respondent's application to have the issue of assignment of the restraint of trade covenant dealt with as a preliminary matter. The Authority recognised in its determination in [20] that the application was made with the view to reducing costs and expense for the respondent. Ultimately the Authority was not satisfied for reasons expressed in the determination that that would have been the result. In the final determination the respondent was successful and the Authority found that the restraint of trade covenant could not be assigned. I make no adjustment for that preliminary matter.

[31] In the exercise of my discretion I find that there should be an initial uplift from $3500 per day to $15000 per day. I then make a downward adjustment to that daily rate of $500 to bring into account the preliminary matters referred to above. The rate adjusted per day is $14,500. There were two days of investigation. The respondent is entitled to an award of costs in the sum of $29,000.

Joint and several award?

[32] Mr Churchman submits that the first and second applicants should be jointly and severally liable for the costs awarded. He refers the Authority to the Employment Court judgment in *Orakei Group (2007) Limited v Kapadia* EmpC Auckland AC37/08 23 September 2008 as an example of the Court being willing to award costs against the directing party.

[33] Mr Churchman refers to a High Court judgment in *GBR Investment Ltd v Goose Bay Range Holdings* CIV 2009-409-613 21 April 2010 as a case in which the

Court has been willing to make other parties jointly and severally liable for costs incurred, where they have clearly funded and directed litigation.

[34] Mr Churchman in his submissions on costs in reply stated that *it is clear beyond doubt that the first applicant was merely the alter ego through which the second applicant was acting.* I accept that as very likely in this case. I agree that the fact that various applications were made on behalf of the first applicant whilst it was removed from the company register in November 2011 and reinstated only in May 2013 before the investigation meeting supports that. I find that the second applicant was the driving force behind the proceedings. It is likely this was from an early stage. The second applicant is likely to be funding the proceedings. The first applicant is a shell company.

[35] I find it is fair and reasonable in those circumstances that there be an order made that the first and second applicants' are jointly and severally liable to pay the respondent's costs.

[36] I order Warren Skerrett Investments Limited and Camelot New Zealand Limited Partnership are jointly and severally liable to pay to Donald Broad the sum of $29,000 being costs.

Helen Doyle
Member of the Employment Relations Authority