

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 250
5312456

BETWEEN	SOUTHERN WEALTH MANAGEMENT LIMITED Applying Party Joined for Purposes of Costs
A N D	WARREN SKERRETT INVESTMENT LIMITED First Applicant
A N D	CAMELOT NZ LIMITED PARTNERSHIP Second Applicant
A N D	DONALD BROAD Respondent

Member of Authority: Helen Doyle

Representatives: Lesley Brook, Counsel for Applying Party
Rob Towner and Elizabeth Coats, Counsel for Applicants
Peter Churchman, Counsel for Respondent

Submissions Received: 1 February and 5 November 2012 from Applying Party
14 February 2012 from First Applicant

Date of Determination: 14 November 2012

DETERMINATION OF THE AUTHORITY

[1] In my determination, *Warren Skerrett Investments Limited v. Donald Broad* [2011] NZERA Christchurch 128, the Authority considered an application for joinder of Camelot NZ Limited Partnership and an application by Warren Skerrett Investments Limited (WSIL) for production of documents by Southern Wealth Management Limited. (SWM) under s.160(1)(a) of the Employment Relations Act 2000 (the Act).

[2] The application for production of documents was opposed and the Authority received written submissions from Ms Brook and an affidavit of Ross Valentine who is the sole director of SWM.

[3] The Authority made orders in its determination for most of the classes of documents requested in the application by WSIL to be produced through filing in the Authority and provision of copies to counsel. It reserved the issue of costs and although expressing a hope in its determination that costs could be agreed, the parties could not reach agreement, and the Authority now has submissions from Ms Brook and Mr Towner. Leave was reserved in the determination for Ms Brook to come back to the Authority if costs could not be determined by agreement and leave was also reserved for a request that SWM be joined as a party to the proceeding for the sole issue of determining costs.

[4] In her submissions, Ms Brook asked that SWM be joined as a party to the proceeding solely in relation to the costs issue confirming SWM consents to being so joined. On that basis, therefore, I have joined SWM solely for the purpose of determining costs. The application for a non-party to produce documents was made solely by WSIL. It was determined at the same time as an application for joinder of the second applicant, Camelot NZ Limited Partnership. Costs in relation to the production of documents by a third party is only determined with respect to the first applicant.

[5] I apologise to the parties for the delay in determining this matter. This file was to be transferred originally to another Member because it was unlikely the investigation could be completed before my departure from the Authority. This was particularly in light of the number of preliminary matters that the Authority had been required to determine. The transfer to another Member was unable to occur at an early stage for a number of reasons and the costs application was part of that process and unfortunately overlooked.

[6] On further perusal of the file, the Authority requested some further information about the basis for the claim with respect to the hours Mr Valentine spent looking for the documents and with respect to the photocopying fees.

Submissions from WSIL

[7] Ms Brook submits that the total costs incurred and initially sought by agreement arising out of WSIL's non-party application were \$18,651.09. These were made up of the fee from Mr Valentine's time spent accessing files and obtaining the documents of \$7,590; photocopying and printing expenses in the sum of \$920; and SWM's legal fees in the sum of \$10,141.09.

[8] Ms Brook submits that the actual expenses of SWM are both reasonable, given the scope of the orders, and fairly reflect costs and down time incurred by SWM in complying with the order.

[9] It was acknowledged in the Authority's determination that it would be necessary for WSIL to make a reasonable contribution to costs incurred by SWM.

[10] Ms Brook refers the Authority to Rule 8.27 of the High Court Rules that provides:

If an order is made under Rule 8.25(2) or 8.26(2) the Judge may, if the Judge thinks it is just, order the applicant to pay to the person from whom discovery is sought the person's expenses (including solicitor and client costs) of and incidental to the application and in compliance with any order made on the application.

[11] The Court of Appeal in *Kidd v. Equity Realty (1995) Ltd* [2010] NZCA acknowledged that the authorities as to High Court awards of non-party costs are not directly applicable because the Employment Court does not have a direct jurisdiction to award costs against a non-party. Ms Brook submitted that the Employment Court in *Rooney Earthmoving Ltd v. McTeague* [2010] NZEmpC 131 appropriately and reasonably applied the High Court Rules when making non-party orders in the employment jurisdiction. Ms Brook also relied on the Authority being guided by the standard approach of the civil Courts in its authority accepting on the basis that both counsel advanced that, that it was a useful way to approach the exercise.

[12] Ms Brook therefore relies on High Court judgments in her application for costs. She submits that SWM acted reasonably in responding to WSIL and that WSIL did not provide SWM with any opportunity to provide the information requested prior to making the application. Mr Valentine deposed that had WSIL or its lawyers asked him to provide documents which they considered to be relevant to the company's case against Mr Broad, it would have done so. Instead, Ms Brook submits that

Mr Valentine was “*hit out of the blue with the application and had to preserve his position immediately by opposing it*”. On that basis, Ms Brook said that it was reasonable and that Mr Valentine had no choice but to instruct counsel and incur the legal costs that he did.

[13] In terms of the application itself, Ms Brook submitted that the information listed was considered confidential and commercially sensitive. She submitted that although there was a resistance to producing many of the documents listed, Mr Valentine was successful in that there was no order made for disclosure of telephone records and that the persons to whom the documents were to be supplied were very limited.

[14] Ms Brook submits that the application by WSIL was partially successful and the opposition was reasonable and necessary. In any event, she submits that SWM did disclose some documents of its own volition which it considered relevant. Ms Brook referred to a High Court judgment in *Air New Zealand Ltd v. E-Gatematrix New Zealand Ltd* [2007] BCL 445 in which the High Court considered an application for indemnity costs and expenses incurred in responding to an application for non-party discovery which was later withdrawn. In that case, the Associate Judge Abbott determined it was appropriate for the non-party to raise its concerns in formal opposition to the application.

[15] Ms Brook submits that both parties have had partial success in terms of the application for production of documents and that this must be taken into account by the Authority and in the circumstances it would be appropriate for WSIL to pay a reasonable contribution to SWM’s costs of having to reasonably oppose the application. In terms of the compliance costs, Ms Brook seeks full costs incurred by Mr Valentine complying with the order. Mr Valentine’s time that is claimed is 22 hours charged at a rate of \$300 per hour. The search was carried out over a three day period.

The respondent’s submissions

[16] Mr Towner submits that the High Court and Employment Court principles regarding non-party costs are not applicable in the Authority. He submits that the principles that govern the Authority’s usual approach to costs should be applied notwithstanding SWM’s costs application relates to costs for a non-party rather than a

party. The relevant principles in the Authority include moderation, a daily tariff approach and that costs generally follow the event.

[17] Mr Towner submits that SWM's approach to non-party costs would have a chilling or deterrent effect on future applications by parties to the investigation for disclosure of relevant documents by non-parties and that the amount of costs SWM seeks is extremely high and disproportionate to the nature of WSIL's application and SWM's only slight success in opposing that.

[18] Mr Towner refers to *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808 where the Full Court accepted that there is sufficient difference between the Employment Court and the Authority to warrant the Authority taking a different approach to costs than that taken by the Court. He refers to para.[41] of *Da Cruz* which provides:

The unique nature of the Authority and its proceedings may mean that parties to an investigation meeting should not have the same expectations about procedure and costs as they have of the Court.

[19] Mr Towner further submits that SWM has incorrectly relied on *Rooney* (supra) as authority for the proposition that the Authority should adopt the High Court's approach because that was the Employment Court's decision in that case. He submits that the Court chose not to apply the High Court approach to costs in *Rooney* relating to non-party disclosure because it was not satisfied that it would be just to do so.

[24] The costs of this morning's hearing are reserved. At this stage I have not made any orders, as contemplated by Rule 8.27 of the High Court Rules, requiring the plaintiff to pay for BMW's costs because I am yet to be persuaded that it would just to do so. That issue is reserved for further consideration.

[20] Mr Towner submits that although SWM is a non-party, any award should bear some relationship to the costs that might have been awarded for disclosure by a party. He submits that, given the importance of consistency, the Authority's approach to costs cannot be completely different in relation to a non-party. He submits that a party to an Authority investigation may have to conduct an extensive and potentially costly process of locating and identifying documents to disclose to the Authority and other party or parties. This process may take hours and be at great expense to the party involved but will not be reflected in a significant adjustment to the Authority's eventual decision in relation to the costs, the starting point for which is the Authority's daily tariff. He submits that it would be wrong in principle for non-

parties to enjoy substantially more generous costs awards than those available to parties following a completed investigation.

[21] Mr Towner further submits that WSIL's application for third party disclosure against SWM was almost wholly successful despite strong opposition. The only exception being the telephone records. Mr Towner submits that the telephone records which the Authority did not require production of were of the lowest importance to WSIL's application. He further submits that the Authority could have made the orders that WSIL sought of its own volition without a formal application from WSIL. He submits that if that occurred, SWM would have been required to undertake the same exercise involving the same amount of time and labour costs but would not have been entitled to seek any costs.

[22] WSIL accepts that it should make a reasonable contribution to SWM's costs arising from its application to produce relevant documents. It submits, however, that the amount sought of over \$18,000 is inconsistent with the Authority's policy and approach in relation to costs and that the amount of \$500 would be a reasonable contribution to SWM's costs given its application was almost wholly successful and in light of the Authority's policy on costs and standard daily approach.

Determination

[23] The Authority under clause 15 of schedule 2 of the Employment Relations Act 2000 may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

[24] I do not find that the Authority is bound to adopt the approach the High Court would when considering non-party costs applications. I accept Mr Towner's submission that *Da Cruz* recognises that unique nature of the Authority and its proceedings and that the expectation about procedure and costs should not be the same as the Court. The focus for the Authority is on what would be a reasonable contribution to the costs of SWM.

[25] There are two aspects to be considered. There is Mr Valentine's costs in complying with the Authority order and the legal fees SWM incurred.

[26] I shall start with the legal fees. I accept that it was reasonable for Mr Valentine to obtain legal advice about the matter of production of documents. I do

not find that the legal fees incurred of \$10,141.09 are reasonable in the circumstances. There was no appearance required and the opposition was only partially successful. Although ordinarily costs follow the event I am prepared to allow a reasonable contribution to the legal costs for the purposes of advice about the matter in all the circumstances of \$1000.

[27] I then turn to Mr Valentine's costs. On request he broke down the photocopying and printing charges of \$800 for 1200 copies to copying at 20 cents per page of \$240 and labour of 28 hours at \$20 per hour. I find that a labour charge is already built into the 20 cents per hour and only allow \$240 for the photocopying charges.

[28] Mr Valentine said that he spent 22 hours searching for and collating documents at an hourly rate of \$300 per hour. I accept that is Mr Valentine's normal hourly rate. The searching and collating of the documents was not his usual role but an administrative type activity for which an hourly rate of \$300 would not be reasonable even allowing for diversion away from normal activity. A reasonable contribution to the costs of Mr Valentine is \$2500.

[29] In conclusion I find that SWM is entitled to an award of costs for production of documents of \$3740.

[30] I order Warren Skerrett Investments Limited to pay to Southern Wealth Management Limited the sum of \$3740 being costs.

Helen Doyle
Member of the Employment Relations Authority