IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 105
ARC 61/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	YASODHARA DA SILVEIRA SCARBOROUGH Plaintiff
AND	MICRON SECURITY PRODUCTS LIMITED Defendant

Hearing: On the papers filed on 24 April, 13 May and 18 May 2015

Appearances: Y Scarborough, plaintiff in person
D France, counsel for defendant

Judgment: 3 July 2015

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] The defendant has applied for costs following my earlier judgment[1] dismissing Miss Scarborough's challenge to a determination of the Employment Relations Authority.[2] The defendant seeks an order of $5,777.16 by way of indemnity costs in respect of four interlocutory applications which were unsuccessfully advanced by Miss Scarborough; $10,498.38 in costs on her unsuccessful challenge; and a contribution of $500 in costs in relation to its application for costs. Miss Scarborough is opposed to any order of costs being made against her, for reasons fully set out in a memorandum.

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1 *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 39.
2 *Scarborough v Micron Security Products Ltd* [2014] NZERA Auckland 231.

[2] Miss Scarborough's opposition to costs is focussed on the merits of her substantive claim and a number of outstanding issues which she says exist, including a Ministry of Social Development investigation into the circumstances surrounding her dismissal which is said to be on foot. These issues are not relevant to a determination of costs. Miss Scarborough also touches on her financial position. This is a point I return to later.

[3] Miss Scarborough repeats a number of allegations against witnesses and counsel, who she contends perverted the course of justice during the course of the proceedings and who have allegedly committed other criminal offences. Those allegations are serious. They have not been substantiated. It is notable that these allegations have followed earlier ones of a similar nature, despite warnings about the perils of doing so absent cogent evidence of their truth.

[4] For completeness, I note that Miss Scarborough has applied for a rehearing of the Court's substantive judgment, which has yet to be determined. She also applied for a stay pending the outcome of the application, which was declined for reasons set out in my interlocutory judgment.[3]

Framework

[5] The starting point is cl 19(1) of Sch 3 of the Employment Relations Act 2000 (the Act). It confers a broad discretion as to costs, providing that:

> (1) The Court in any proceedings may order any party to pay to any other party such costs and expenses … as the Court thinks reasonable.

[6] Regulation 68(1) of the Employment Court Regulations 2000 (the Regulations) also deals with costs. It provides that, in exercising the Court's discretion under the Act to make orders as to costs, the Court may have regard to any conduct of the parties tending to increase or contain costs. This provision has particular relevance in the circumstances of this case.

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[3] *Scarborough v Micron Products Ltd* [2015] NZEmpC 69.

[7] It is well accepted that this Court may award indemnity costs.[4] The High Court Rules may usefully be applied by way of analogy.[5] Rule 14.6(4)(a) is relevant in this case. It provides that:

> (4) The court may order a party to pay indemnity costs if—
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> (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
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> …

[8] The sort of circumstances in which indemnity costs have been ordered include where a party has made allegations of fraud, knowing them to be false, and has made irrelevant allegations of fraud; has made allegations which ought never to have been made; or has unduly prolonged a case by making groundless contentions.[6] It is the allegedly aggravating manner in which Miss Scarborough has conducted her litigation which is the central focus of the defendant's application for costs.

[9] The discretion to award costs, while broad, is to be exercised judicially and in accordance with principle. The primary principle is that costs follow the event. The usual starting point in ordinary cases is 66 percent of actual and reasonable costs. From that starting point factors that justify either an increase or decrease are assessed.[7] I approach costs in this case on the usual basis.

Actual costs

[10] I accept, based on the material before the Court, that the defendant incurred actual costs of $13,997.84 (excluding GST) on the plaintiff's challenge, excluding the costs associated with the four interlocutory applications in relation to which indemnity costs are sought. In addition, I accept that the defendant incurred actual costs of $315.58 (excluding GST) on the plaintiff's stay application; $3,631.56 (excluding GST) on the application for review and joinder of Mr and Mrs Weston; $1,330.02 (excluding GST) on the plaintiff's interlocutory application dated 8

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4 *Snowdon v Radio New Zealand Ltd* [2014] NZEmpC 180 at [29]-[32]; *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [21].

5 *George v Auckland Council* [2014] NZEmpC 100 at [11].

6 See, for example *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZCA 348 at [10]; *Bradbury v Westpac Banking Corporation* [2009] NZCA 234 at [7].

7 *Binnie*, above n 3 at [14].

October 2014; and $500 on her application dated 10 February 2015 for the case to be returned to the Authority. The actual costs incurred by the defendant are supported by copies of invoices before the Court.

Costs on the plaintiff's challenge: reasonable?

[11] As I have said, the defendant incurred actual costs of $13,997.84 (excluding GST) in relation to the plaintiff's challenge. The attendances included providing disclosure, preparation for and attendance at a relatively lengthy hearing management meeting on 17 December 2014, preparation of briefs of evidence and a bundle of documents, and preparation for and attendance at a hearing that occupied just under one day. In the event, the hearing time that had been anticipated was significantly reduced because of the stance adopted by the plaintiff. At the outset of the hearing she confirmed that she would not be cross-examining any of the witnesses and declined to give any evidence herself. The defendant was however obliged to prepare on a broader basis and prepared substantial written submissions, responding to the wide range of issues raised in the plaintiff's pleadings and documentation filed in advance of the hearing.

[12] It will not always be necessary, or reasonable, for parties to incur substantial costs in preparing briefs of evidence on a de novo challenge in circumstances where evidence has already been prepared for the Authority's investigation. However, I accept counsel for the defendant's submission that detailed briefs of evidence were required in this case given the nature of the plaintiff's allegations and that the briefs filed in Court were expanded from the statements prepared for the Authority investigation meeting.

[13] The allegations advanced by Miss Scarborough engaged reputational interests which the defendant was entitled to treat seriously. It is not surprising that the defendant engaged counsel of Mr France's seniority and experience in the circumstances. I do not however accept that the proceeding was of such complexity or of such a nature that it warranted the appearance of two counsel. I therefore make an adjustment downwards to reflect the estimated costs of second counsel's appearance.

[14] I conclude that actual costs of around $12,000 on the challenge would be reasonable in all of the circumstances. This leads me to a starting point of around $8,000.

Uplifting factors

[15] Mr France submits that an uplift from the starting point is justified having regard to the conduct of the plaintiff's case. I agree. The plaintiff filed a quantity of material, and entered into communications with the defendant, which added unnecessarily to the legal costs incurred by the defendant. The defendant was obliged to respond to the serious but unfounded allegations of fraud and dishonesty mounted against a witness for the defendant. The defendant was also obliged to respond to numerous personalised and scurrilous allegations against the same witness and a director of the company. Numerous ill-founded allegations were pursued against counsel and against the Authority member. The plaintiff also raised a number of criticisms and concerns about the Authority's determination. As the Chief Judge had observed at an early stage in the life-cycle of these proceedings (in a minute dated 7 July 2014), criticisms of the determination were irrelevant in circumstances where a hearing de novo had been elected.[8]

[16] The defendant seeks what I regard as a modest uplift to 75 per cent. I would have been inclined to uplift by a greater margin, while being mindful of the need not to double-account for Miss Scarborough's conduct of the litigation. Applying the percentage sought on behalf of the defendant results in a possible costs award of $9,000 in relation to the challenge. I return to the issue of whether there are factors warranting a decrease in costs below. It is, however, convenient at this juncture to deal with the defendant's application for indemnity costs in respect of the interlocutory matters referred to above.

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[8] Minute of Chief Judge Colgan dated 7 July 2014 at [1].

The four interlocutory applications – indemnity costs?

[17] These applications were advanced by the plaintiff and were dismissed. It is necessary to consider each application in turn to understand the defendant's submissions in support of its application for indemnity costs.

Application for stay

[18] The plaintiff applied for a stay of Authority proceedings. There were difficulties with the application given that after the plaintiff had succeeded in the Authority, the defendant had attempted to make payment of the remedies ordered to her, but the plaintiff had instructed her bank to return this money. The Chief Judge drew these difficulties to the plaintiff's attention and invited her to consider whether she wished to pursue the application in the circumstances.[9] The plaintiff then filed an amended application for a stay. The defendant filed a memorandum pointing out that there was nothing in any part of the proceedings in the Authority, or consequent on it, that could be stayed. The plaintiff's application was clearly hopeless and was dismissed.[10]

[19] There was no express reservation of costs on the application. However, as the High Court observed in *Exportrade Corp v Irie Blue New Zealand Ltd*,[11] the failure to reserve a question of costs on a judgment on an interlocutory application should not deprive the Court of the ability to make an award of costs post-judgment.

Application for review and joinder of Mr and Mrs Weston

[20] Miss Scarborough also pursued an application for orders joining the directors of the defendant company as parties. She also filed a purported claim for judicial review, asking the Court to direct the Authority to re-determine the proceeding. In dealing with these applications the Chief Judge made the following observations:[12]

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9 Minute of Chief Judge Colgan dated 7 July 2014.
10 By way of minute of Chief Judge Colgan dated 8 August 2014.
11 *Exportrade Corp v Irie Blue New Zealand Ltd* [2013] NZHC 427 at [14], applied in *George v Auckland Council*, above n 4 at [40].
12 *Scarborough v Micron Security Products Ltd* [2014] NZEmpC 183.

> [17] I should note that Ms Scarborough has not taken up *the Court's repeated advice that she obtain professional assistance with these proceedings*. She insists upon the right to represent herself. Judicial review proceedings are, in particular, technical and difficult.
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> …
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> [20] There is *little or no evidence put forward by Ms Scarborough in support of her application to join Mr and Mrs Weston as parties.* This alone would cause her application to fail. But the defendant has provided the Court with a substantial body of [uncontested] evidence indicating that Mr and Mrs Weston were not Ms Scarborough's employers.
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> [23] *Mr Weston's affidavit also tends to confirm his contention that Ms Scarborough is seeking to join Mr and Mrs Weston for frivolous, vexatious and scurrilous reasons*. These are principally in emails that Ms Scarborough has sent to the defendant's counsel… *I think I can safely say that they are of such an egregious and scurrilous nature and so irrelevant to the issue in the proceedings that counsel would refuse to include them in pleadings and would decline to act further if Ms Scarborough insisted on pursuing them*.
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> [24] Therefore, not only has Ms Scarborough failed to make out grounds for joining Mr and Mrs Weston as parties to her challenge under s 221 of the Act, but there are strong grounds for not exercising the discretion to do so in her favour.
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> [Emphasis added]

[21] Miss Scarborough's application for review was dismissed on the basis that it was statutorily barred as her challenge was still before the Court. The Chief Judge also agreed with Mr France's submission that the plaintiff had failed to file proceedings for judicial review under s 194 of the Act in the manner that the legislation required.[13]

[22] The Chief Judge recorded that the defendant was entitled to a contribution to its reasonable costs in opposing the applications, the amount of which was reserved for later consideration.[14]

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13 At [25].
14 At [45].

Application "for leave to apply for jurisdiction of Court"

[23] Miss Scarborough filed a further application "for leave to apply for jurisdiction of Court" dated 8 October 2014. Judge Perkins dealt with the application and dismissed it. In doing so he said:[15]

> [7] The application refers to a number of sections in the Act relating to compliance, offences and general functions and powers of the Court. *It is totally un-focussed. The application is accompanied by a rambling affidavit from Ms Scarborough. This repeats and adds to serious allegations, which Ms Scarborough had earlier made* against the proprietors and a fellow employee of her employer…. *It was on the basis of the assertions by Ms Scarborough that Chief Judge Colgan came to the view that Ms Scarborough was seeking to join the proprietors for frivolous, vexatious and scurrilous reasons*.
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> [8] It is difficult to ascertain what Ms Scarborough is now seeking from her further application, although in the application itself there appears to be a repetition or redirection of her earlier application attempting to bring the matter within the judicial review jurisdiction of the Court. The true intention of the application is perhaps ascertained in the final paragraphs of her supporting affidavit where it seems plain that once again she is applying to have the matter transferred back to the Authority. *Chief Judge Colgan has already dealt with and rejected such an application*. If the further application is once again seeking judicial review of the Authority, then it overlooks the extremely limited nature of the Court's jurisdiction to judicially review the Authority. In any event Ms Scarborough has failed to understand Chief Judge Colgan's earlier comment as to procedural requirements and her further application does not remotely comply with such requirements.
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> …
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> [13] What appears to be *the real purpose of Ms Scarborough's application is to simply relitigate issues that were raised in her earlier applications and which have been dealt with by Chief Judge Colgan in his judgment*.
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> …
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> [16] *I repeat the concern expressed by Chief Judge Colgan in his earlier judgment that Ms Scarborough is choosing to represent herself in circumstances where she should be receiving the benefit of proper legal advice*. If Ms Scarborough chooses to continue representing herself in the preparation of briefs of evidence, then *it is appropriate that she realises that she is not to repeat in them the insulting and scurrilous comments she has made against parties involved in this matter, counsel for the defendant and the Authority member*.

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15 *Scarborough v Micron Security Products Ltd* [2014] NZEmpC 216.

> [17] In view of the fact that Ms Scarborough's application has been dismissed and was in reality an attempt to relitigate matters already dealt with by the Court, the defendant is entitled to reasonable costs in opposing the application. The amount of such costs is reserved for later consideration…
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> [Emphasis added]

Application for order remitting matter back to Authority

[24] Shortly before the hearing Miss Scarborough sought further orders, which appeared to be for an order remitting the matter back to the Authority and an adjournment. The timeframe for filing interlocutory applications had lapsed by this time. It was drawn to Miss Scarborough's attention that two previous applications had been declined by the Court but that if she wished to advance a further application it would be dealt with at the outset of the hearing. Miss Scarborough pursued the application and it was dismissed, on the basis that it constituted an attempt to relitigate matters that had already been dealt with by the Court and because it could not have succeeded in any event. I observed that: [16]

> While Ms Scarborough made it clear that she did not agree with the conclusions reached by the Chief Judge and Judge Perkins that does not provide a basis for seeking to re-litigate matters. The fact that the application had effectively been previously dealt with was enough to dispose of it.

[25] Costs were reserved.

[26] The first three interlocutory applications referred to above were dealt with on the papers. The final application was dealt with at the outset of the substantive hearing. The defendant estimates that its costs on this application amounted to $500. That figure is modest, in light of written submissions that were prepared. I accept that the actual legal costs as claimed in relation to these interlocutory applications were reasonable having regard to the matters that the defendant was obliged to respond to. I turn to consider the defendant's claim for indemnity costs in relation to each application.

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[16] *Scarborough v Micron Security Ltd* [2015] NZEmpC 39 at [9].

[27] The plaintiff's application for a stay was hopeless and was advanced despite the difficulties with doing so having earlier been squarely brought to her attention by the Court. I accept that uplifted costs to 75 per cent of reasonable costs are appropriate. I do not, however, consider that indemnity costs are warranted on this application.

[28] The second application was also pursued on hopeless grounds and for frivolous, vexatious and scurrilous reasons. However, it is apparent that the Chief Judge, who had the advantage of dealing with the application, considered that a reasonable contribution – rather than full costs – would be appropriate. I consider that a reasonable contribution, uplifted in the circumstances, would be 80 per cent of the defendant's costs on the application.

[29] The third application was effectively an attempt to relitigate an issue that the Court had previously decided. It was accompanied by the same sort of scurrilous and offensive allegations that the plaintiff had already been warned about. I consider that indemnity costs would be appropriate in the circumstances.

[30] The fourth application constituted Miss Scarborough's third attempt to obtain an order remitting the matter back to the Authority. I accept the defendant's submission that indemnity costs would be appropriate in relation to this application, having regard to the wholly unnecessary costs the defendant was obliged to incur.

Costs against litigant in person

[31] In reaching these conclusions I have been mindful that the purpose of a costs order is not to punish an unsuccessful party.[17] I have also considered Miss Scarborough's position as a litigant in person. While some latitude may generally be expected in such circumstances, it does not provide an impenetrable shield in relation to costs, or a licence to pursue hopeless claims or scandalous allegations with impunity. If it were otherwise it would place the opposing party, and the

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[17] *Dwyer v Air New Zealand Ltd* [1997] ERNZ 156 (EmpC) at 160; *Mihaka v Maori Women's Welfare League* WC5A/00, 5 April 2000 (EmpC) at 1-2.

administration of justice generally, in an invidious position. As the author of *Law of Costs* observes:[18]

> That an unsuccessful party is unrepresented in the proceeding is irrelevant to the exercise of the costs discretion. Certainly an unrepresented person receives no immunity from an adverse costs order because he or she is unrepresented, a point with especial force where a party refuses available legal representation. This must be seen against the backdrop that litigants in person frequently cause costs incurred by the opposing party to be increased. On various occasions, this has inclined the court to order costs against an unrepresented person to be quantified on an indemnity basis. (citations omitted)

[32] Relevantly in this case Miss Scarborough was the recipient of numerous judicial warnings about the potential perils of advancing problematic, scurrilous and repetitious applications and allegations and she was repeatedly advised about the benefits of obtaining legal assistance. Miss Scarborough did not heed those warnings.

[33] This would lead to a total figure of $4971.96 on the four interlocutory matters.

Financial circumstances

[34] I return to the issue of discounting factors. Miss Scarborough is unemployed and appears to be in a compromised financial situation. This Court has generally adopted a costs-follow-the-event starting point but has regard to a party's ability to pay when determining costs. Those two principles do not sit altogether comfortably together, and give rise to a number of difficulties in practice as the cases reveal.

[35] I pause to note that the approach to costs adopted in this Court can be contrasted with the one that applies in the United Kingdom. There the Employment Appeal Tribunal Rules 1993 provide for a costs-free starting point, reflecting a recognition of the desirability of encouraging access to the Appeal Authority (the EAT) for public policy reasons. The presumption that each party will bear their own costs may however be displaced where the "paying party" brought proceedings that were unnecessary, improper, vexatious or misconceived, or where there has been

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[18] G E Dal Pont *Law of Costs* (3rd ed, LexisNexis, Australia, 2013) at 8.34.

unreasonable delay or other unreasonable conduct in the bringing or conducting of proceedings by that party.[19] In determining the amount of any costs order the EAT may have regard to a party's ability to pay.[20]

[36] I proceed on the basis set out in *Tomo v Checkmate Precision Cutting Tools Ltd*, namely that Miss Scarborough's financial position is relevant to determining a just award of costs but it is not decisive and must be weighed against other relevant factors, including the interests of the defendant, the broader public interest, and the aggravating way in which she has pursued her claim.[21]

[37] The defendant is a small company that has itself faced some challenges, including as a result of the global financial crisis.[22] It has a significant interest in not being put to the expense of having to respond to meritless applications and unfounded allegations (including of fraud). The defendant also has an interest in having a judgment in its favour on costs. On this point I respectfully disagree with the approach adopted by Judge Shaw in *IHC New Zealand Inc v Fitzgerald*, where she observed that:[23]

> … it would be unconscionable to make an award of costs in the light of the defendant's financial hardship in the certain knowledge that she would be unable to meet those costs.

[38] There may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action, or may wish to wait and see whether at some stage in the future the opposing party's personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party's financial position at that particular point in time, denies the successful party the ability to make decisions as to whether, and when, to seek to enforce an award it would otherwise be entitled to.[24]

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19 Rule 34A.
20 Rule 34B(2).
21 *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [16].
22 *Scarborough*, above n 15 at [38].
23 *IHC New Zealand Inc v Fitzgerald* EmpC Wellington WC7/07, 28 February 2007 at [11].
24 *Tomo*, above n 21 at [21].

[39] There is also a broader public interest in encouraging the efficient use of the Court process. As the Court of Appeal pointed out in *Victoria University of Wellington v Alton-Lee*:[25]

> … litigation is expensive, time-consuming and distracting and the requirement that a losing party not only pays his or her costs but also makes a subsequent contribution to those of the successful party undoubtedly acts as a disincentive to unmeritorious claims or defences.

[40] I am satisfied that it is consistent with the overall interests of justice, and consistent with equity and good conscience, that Miss Scarborough be ordered to make a substantial contribution to the defendant's costs. While there may be difficulties in enforcing the Court's orders as to costs, I do not consider that it follows that no order should be made, or that the defendant should be denied the advantage of an order in its favour. The aggravating features of the way in which Miss Scarborough has chosen to pursue her claim, and the unnecessary costs incurred by the defendant as a result, are the key factors that weigh in favour of a significant costs award in this case.

Costs on application for costs

[41] The defendant seeks a contribution to its costs in applying for costs. The parties were directed to seek to agree costs at the conclusion of my substantive judgment. Counsel for the defendant wrote to Miss Scarborough setting out the defendant's position on costs and invited her to respond with any proposal she might have to resolve matters without the need for formal orders. There was no response.

[42] While it does not appear to be the usual practice for this Court to order costs on an application for costs, I have previously accepted that it may be appropriate to

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[25] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

do so.[26] The reality is that where parties have been directed to seek to agree costs, but have been unable to do so, the successful party is exposed to a further necessary expense in relation to the proceeding in seeking an order from the Court. I see no reason in principle why such a step should automatically be excluded from the costs calculus, particularly where (as here) the unsuccessful party has declined to enter into any discussions in an attempt to agree costs.

[43] I am satisfied that it is appropriate that the plaintiff be ordered to make a contribution to the defendant's costs in pursuing an order for costs, which I set at $350.

Conclusion

[44] In the circumstances, I make the following orders:

(a) The plaintiff is ordered to pay to the defendant costs of $4971.96 in relation to the interlocutory applications she unsuccessfully advanced;

(b) The plaintiff is ordered to pay a contribution of $9,000 towards the defendant's costs in responding to the plaintiff's challenge;

(c) The plaintiff is ordered to pay a contribution of $350 in costs in relation to the defendant's application for costs.

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[26] See *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4 at [47]. See too *Beach Road Preservation Society v Whangarei District Council* (2001) 16 PRNZ 13 at [15]: "… costs can now be awarded on a costs argument. Costs will normally be awarded to the party whose submissions are upheld in accordance with normal principles on interlocutory applications."; *Sax v Dempsey Wood Gill Ltd* [2013] NZHC 1126 at [47]: "There is no question that the Court has jurisdiction to make an order of costs of this kind." And *Sax* again at [48], citing *Body Corporate Administration Ltd v Metha* HC Auckland CIV 2009-404-6656, 15 February 2013 at [83]: "It is now well established that costs may be awarded in respect of an application for costs. An application for costs is to be treated no differently for costs purposes from an ordinary interlocutory application, so costs may be awarded according to scale or on an increased or indemnity basis as appropriate."; *Parsot v Greig Developments Ltd* (2008) 18 PRNZ 995 (HC) at [23]: "It is settled law that a successful party is entitled to an appropriate allowance for the preparation and filing of costs memoranda."

[45] Disbursements are not sought and none are ordered.

Christina Inglis
Judge

Judgment signed at 3.30pm on 3 July 2015