IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 23
EMPC 222/2016

IN THE MATTER OF	an application for orders under ss 138(6) and 140(6) of the Employment Relations Act 2000
BETWEEN	JOSUE DOMINGO Plaintiff
AND	MENG SUON AND NGAN HENG (T/A TOWN AND COUNTRY FOOD) Defendant

Hearing:	15 February 2017 (Heard at Auckland)
Appearances:	N Santesso, advocate for plaintiff M Meyrick, counsel for defendant
Judgment:	7 March 2017

JUDGMENT OF JUDGE CHRISTINA INGLIS

Background

[1] The background to this proceeding is conveniently set out in the Employment Relations Authority's substantive determination of 31 May 2016.[1]

[2] Mr Domingo is a migrant worker from the Philippines. His employment agreement was provided by an immigration agent. He came to New Zealand and worked for the defendant. While Mr Domingo's employment agreement set out his hours of work as being 40 hours per week, he actually worked 76 hours per week. He was provided with accommodation and food. He was not paid holiday pay or public holiday pay.

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1 *Domingo v Suon* [2016] NZERA Auckland 170.

[3] Mr Domingo considered that he had not been paid his minimum entitlements and filed a claim in the Authority. It found that he had been underpaid and ordered that the defendant pay Mr Domingo $2,464.00 gross by way of unpaid wages; $2,560.00 by way of unpaid holiday pay; $1,920.00 gross by way of unpaid public holiday pay; $1,000 as a penalty for breach of Mr Domingo's employment agreement, payable to Mr Domingo; and $71.56 by way of disbursements.

[4] The defendant took no steps to challenge the Authority's substantive determination. Nor did it take steps to satisfy the orders made against it. This prompted Mr Domingo to return to the Authority, this time in pursuit of a compliance order.[2]

[5] The defendant opposed Mr Domingo's application for a compliance order. As the Authority's compliance determination records, one of the arguments advanced was that the amounts ordered against the defendant were liable to be set-off against the amounts which the defendant contended Mr Domingo owed it for board. It was further argued that set-off did not fall within the Authority's jurisdiction. The defendant's argument did not find favour with the Authority and it issued a compliance order, requiring the defendant to comply with the terms of its earlier determination within a period of a calendar month. The Authority coupled its compliance order with an order that the defendant pay interest on the outstanding amounts, together with the filing fee on the plaintiff's application for a compliance order.

[6] The defendant failed to take any steps to comply with the Authority's compliance order. Nor did the defendant take any steps to challenge the Authority's compliance determination.

[7] Mr Domingo wrote to the defendant in an attempt to bring matters to a close. This proved fruitless. He then applied for further orders, this time in the Employment Court under ss 138(6) and 140(6) of the Employment Relations Act 2000 (the Act). Section 140(6) empowers the Court to impose a range of sanctions (a fine, sequestration and/or imprisonment) in circumstances where it is satisfied that

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2 *Domingo v Suon* [2016] NZERA Auckland 244.

a person is in breach of a compliance order made by the Authority. While an order of sequestration of the defendant's assets featured in the plaintiff's statement of claim, this has not been pursued and it can be put to one side. Rather Mr Domingo seeks a fine, towards the top end of the range (the maximum being $40,000).[3]

[8] The plaintiff's application was originally set down for an undefended hearing in November 2016. While the plaintiff's statement of claim and notice of hearing had been served on the defendant no steps were taken by it until the day before the hearing, when an application for leave to file a statement of defence was filed. This was granted over the objection of the plaintiff.[4] I made an order requiring the defendant to pay the sum of $8,000 into Court, together with an order of costs. These amounts were duly paid. I also granted an adjournment of the hearing and leave to the defendant to file an application for an extension of time to file a challenge to the Authority's determination. While a statement of defence was subsequently filed, no application was advanced to extend the timeframe for filing a challenge. That meant that the only live issue before the Court remained the plaintiff's application for orders under s 140(6).

[9] The application was set down for hearing on 15 February 2017 and various timetabling orders were made. Evidence was filed for Mr Domingo. No evidence was filed or presented on behalf of the defendant. Accordingly the hearing proceeded on the basis of Mr Domingo's unchallenged affidavit evidence and legal submission.

Non-compliance - s 140(6)

[10] Prior to making any of the orders set out in s 140(6), the Court must be satisfied that the person has failed to comply with a compliance order made under s 137.

[11] The Authority's orders were clear, requiring the defendant to comply with its substantive determination within a specified timeframe, namely on or before

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3 Employment Relations Act 2000, s 140(6)(d).
4 *Domingo v Suon* [2016] NZEmpC 155.

20 August 2016. The Authority drew to the defendant's attention the strict nature of the obligation to comply, noting this Court's powers relating to non-compliance.

[12] I am satisfied that the order complies with the statutory obligations placed on the Authority when issuing such orders, and the defendant does not suggest otherwise. Nor is there any dispute that the defendant failed to comply with the Authority's compliance order within the timeframe specified for doing so. Indeed it is common ground that no payment at all has been made to the plaintiff, despite attempts made by both Mr Domingo and his representative to secure compliance.

Jurisdiction for the Employment Court to impose a fine before enforcement action taken in the District Court?

[13] The key point advanced on the defendant's behalf is a jurisdictional one. In a nutshell, Mr Meyrick argued that this Court has no jurisdiction to impose a sanction for non-compliance in circumstances where, as here, a plaintiff has the option of seeking enforcement via the District Court. That is because (it is said) it is in that forum that a set-off defence can be mounted in response to the plaintiff's claim and it is premature to progress matters in this Court before that step has been taken.

[14] There are a number of difficulties with the defendant's submission but the primary one is that it conflicts with the statutory prohibition on employers to off-set claims by reducing minimum statutory entitlements.[5]

[15] Wages and holiday pay are minimum entitlements.[6] These entitlements have been reinforced by recent amendments to the Act, most particularly new Part 9A which came into force in 2016. Section 142ZC provides a list of defences for breach of a minimum entitlement provision, none of which includes set-off.

[16] The Wages Protection Act 1983 does not allow for any deductions from wages except in limited circumstances. Those circumstances do not extend to retrospective unilateral action by an aggrieved employer who considers that their ex-

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5 A point made in *Edwards (Labour Inspector) v Topo Gigio Restaurants Ltd* AEC109/95, 16 October 1995 (EmpC) at 5.

6 Section 5, definition of "minimum entitlements".

employee owes them money for board and lodgings. And while the Minimum Wage Act 1983 recognises that there may be a deduction for board of no more than 15 per cent (where no specific amount has been agreed),[7] this provision cannot be used as a basis for non-compliance with an order of the Authority.

[17] The position is further reinforced by s 131(1) of the Act ("Arrears"), which provides that where there has been a default in payment to an employee of any wages or other money payable under an employment agreement, such wages or other money may be recovered by the employee by action in the Authority. Section 131(2) provides that this applies despite the acceptance by the employee of any payment at a lower rate or any express or implied agreement to the contrary.

[18] All of this reflects that an express or implied arrangement to provide some hours 'gratis' to compensate for board and lodging does not preclude the employee from recovering unpaid wages.

[19] The defendant's set-off argument is effectively (mis)directed at the correctness of the Authority's original orders. The focus of the Court on a s 140(6) application is compliance, not correctness. Concerns relating to the latter are dealt with by way of challenge in the Employment Court's exclusive jurisdiction.[8] The defendant could have exercised its statutory right to challenge but did not.

[20] The defendant's argument that the plaintiff's application under s 140(6) must be suspended until he has sought enforcement of the Authority's original orders in the District Court requires a substantial carve-out of the Court's jurisdiction and a reading in of a number of precursor steps which Parliament has not expressly provided for. Section 140(6) is plain on its face. It enables a party to obtain an order from the Court where there has been a failure to comply with an earlier compliance order. There is nothing in the Act to suggest that the Court's jurisdiction is suspended or deferred in certain circumstances, or that an affected employee is required to seek enforcement, rather than a sanction for breach of a compliance

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7 Minimum Wage Act 1983, s 7.

8 Employment Relations Act 2000, s 179.

order, where an employer has indicated that it wishes to pursue a claim against an employee.

[21] As the Court of Appeal has recently made clear, the District Court provides a party with an alternative route to securing compliance, but the more punitive option of an order under s 140(6) remains available. The primary purpose of the "plain wording" of s 140(6) is, as the Court of Appeal has said, to secure compliance; the secondary purpose is to impose a sanction for non-compliance.[9]

[22] Mr Meyrick accepted that his analysis (that the plaintiff must go to the District Court to enforce a determination made it his favour to enable the defendant to raise an argument against him about set-off) would lead to an odd result, but submitted that regard must be had to the fairness of the situation. It remained unclear why it would be fair that an employee who had obtained orders in relation to unpaid wages, and then a compliance order, would be prevented from seeking a sanction for breach of that order in this Court without first going to the District Court to pursue enforcement to enable the defendant to argue set-off, even assuming that set-off was available.

[23] I do not accept that the Court is prevented from dealing with the application under s 140(6) at this time.

Should a fine be imposed? If so, what quantum?

[24] I turn to consider whether this is an appropriate case for a fine to be imposed, and if so, what the level of fine should be.

[25] Breach of a compliance order is to be taken seriously.[10] This is reflected in the nature and scope of the sanctions available to the Court under s 140(6).

[26] While each case will turn on its own facts, a number of factors will likely be

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9 *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer (Labour Inspector)* [2016] NZCA 464 at [28], [75].

10 At [57].

relevant (to a greater or lesser extent):[11]

(a) The nature of the default, whether deliberate or wilful;

(b) Repeated or one-off/defendant's track record;

(c) Ongoing or remedied;

(d) Steps taken to remedy the breach;

(e) The circumstances of the employer, including financial circumstances;

(f) The circumstances of the employee, including financial circumstances;

(g) The need to deter non-compliance, either by the party involved or more generally.

[27] I deal with each in turn based on the information currently before the Court.

The nature of the default, whether deliberate or wilful

[28] Mr Meyrick submitted that the defendant strongly believes that Mr Domingo owes it money and a set-off should apply, and that the defendant's perspective ought to be taken into account. There are two points that can be made in relation to this submission. First, the defendant elected not to give evidence. That means that there is a paucity of evidence before the Court as to why the defendant has failed to pay the money owed to the plaintiff under the Authority's determination and the genuineness or otherwise of its motivations.

[29] Second, even accepting what Mr Meyrick says, it follows that the default has been deliberate. If the defendant disagreed with the outcome of the Authority's original or subsequent determination, it could have filed a challenge and tested its interpretation of the law. The fact that it may harbour strong beliefs about the Authority's conclusions, and the basis for the orders made against it, is not atypical in situations such as this and does not, in my view, tell against the imposition of a

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11 At [76]–[77].

fine or otherwise amount to a mitigating factor. The facts of the present case can be contrasted with cases involving employer "muddlement" leading to non-compliance such as was found to be the case in *Reynolds*.[12]

[30] Mr Meyrick submitted that the Court should have regard to the "good will" shown by the defendant to the plaintiff throughout. I have been unable to identify any evidence which might support such a characterisation.

Defendant's track record

[31] It was common ground that this is the first time that the defendant has breached a compliance order of the Authority.

Ongoing or remedied

[32] The Authority's initial orders were made in May 2016; its compliance orders were made on 20 July 2016. Around nine months have elapsed since the initial orders, and seven since the compliance orders were made.

[33] The defendant has failed to take any steps to meet its obligations. It has simply asserted that it does not owe Mr Domingo the money ordered against it because of what he is said to owe it. As I have said, the Authority rejected this argument and the defendant did not challenge the Authority's determination.

[34] I accept Mr Domingo's evidence that he has taken numerous steps to engage with the defendant over its non-compliance. It can be inferred that the defendant has variously put its head in the sand and sought to ignore the situation; assertively gone on the front foot contending that Mr Domingo had no right to the money ordered in his favour; and engaged in delaying tactics (for example in its belated steps to participate in the present proceedings).

[35] The defendant's default is ongoing.

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[12] At [78].

Steps taken to remedy the breach

[36] The defendant has failed to take any steps to address the issue of its legal obligations to the plaintiff, other than to argue that its liabilities have been erroneously arrived at and to assert that Mr Domingo must first seek the involvement of the District, rather than Employment, Court.

[37] Again, this can be contrasted with other cases where the outstanding amounts have been paid prior to the Court's judgment under s 140(6) and where such payment may, depending on the particular circumstances, be taken to signify a degree of remorse.[13] For completeness, I can see no basis for characterising the payment into Court of $8,000 in the present case in such a way, as it was made pursuant to a Court order consequent on the defendant's belated application for leave to defend the proceedings.

The circumstances of the employer, including financial circumstances

[38] There is no information before the Court in relation to the defendant's ability to pay a fine. Nor is there anything to suggest that it is in a financially compromised position. As Mr Meyrick observed, it was able to make a prompt payment into Court of the $8,000 and costs.

The circumstances of the employee, including financial circumstances

[39] Mr Domingo is in straitened financial circumstances. The amount at issue totals around $8,000, plus interest (which is accruing at a rate of five per cent from the date of the Authority's compliance determination). That is a significant amount of money for a person in Mr Domingo's position.

[40] The impact of non-compliance has been particularly acute for Mr Domingo. He was and is in a vulnerable position as a migrant worker, isolated from support networks, with English as a second language and with a limited understanding of the applicable legal framework. He has found the situation very stressful, confusing and

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[13] Such as was found to be the case in *Reynolds*, at [78].

uncertain. Because the defendant failed to pay the plaintiff his wage and holiday entitlements Mr Domingo was unable to fund a trip back to the Philippines to see his children, including a daughter he has not seen for almost three years. He was obliged to borrow money from his sister. He has been struggling to pay that money back because the defendant continues to fail to meet its liabilities. This has been an ongoing source of embarrassment.

[41] Mr Domingo has been put in a position, not of his making, that he has found very difficult. He says that he has felt like a burden to his sister and a failure to his family. This has caused damage to his relationships. His evidence was not challenged and I accept it.

The need to deter non-compliance, either by the party involved or more generally

[42] The position Mr Domingo has found himself in is not unique. Having secured orders for unpaid wages and holiday pay (namely minimum employment entitlements) he then found himself unable to extract payment from his ex-employer. The process has been a long one and a number of obstacles have been thrown up along the way. It is clear that it has taken a degree of personal endurance to pursue matters to this point. Mr Domingo said that he had felt like "giving up" in terms of seeking compliance with the Authority's awards. These are observations which the Employment Court frequently hears in cases such as this.

[43] It is not consistent with the broader interests of justice to encourage defaulting employers to ignore compliance orders until they arrive at the Court door, testing an employee's resolve and financial capacity to pursue matters to this point. This is particularly so in cases involving vulnerable employees, including migrant workers and those with little knowledge of New Zealand employment law. All of this is underscored by the purposes of the Act (which include express acknowledgment of the inherent power imbalance between employer and employee).[14]

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[14] Section 3(2)(ii).

[44] It is desirable to deter breaches of orders of the Authority and the Court, particularly ones relating to minimum entitlements, and to encourage early – rather than protracted – compliance.

[45] Mr Domingo summed up his position by saying that his ex-employer should be fined because it "did not respect me or the authorities". I agree with this sentiment.

[46] For the foregoing reasons I conclude that this is an appropriate case for a sanction to be imposed and that the defendant ought to be fined.

[47] In assessing the appropriate quantum of fine, I have considered the factors traversed above. It is desirable that there be a degree of consistency in terms of the quantum of fines imposed under s 140(6)(d). Mr Santesso took me through the cases involving the imposition of a fine under s 140(6), and the distinguishing facts relating to each.

[48] The maximum fine that can be imposed is $40,000. In the most recent case of *Reynolds* the Court of Appeal reduced a fine to $750. Mr Meyrick characterised *Reynolds* as the guideline case. However the circumstances arising in that case were very different, including evidence that the employer had been labouring under a degree of "muddlement", had paid the amounts ordered against it by the time the matter came back before the Court, and was in a compromised financial position.[15] None of those factors are present in this case.

[49] I have considered the range of fines imposed by the Court in cases involving s 140(6) and the individual facts of this case. It is not uncommon for fines of around $8,000 to $10,000 to be imposed in cases where the employer has taken no steps to address its liabilities, there is no demonstrable issue of financial capacity and no history of previous breaches.

[50] In *Reynolds* the Court of Appeal drew analogies with two civil contempt cases in the High Court, which had attracted fines of $5,000 and $5,500 respectively.

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15 At [78].

These sums were considered appropriate to mark out the Court's disapproval in the particular circumstances, but it is notable that in the first, the fine for contempt of $5,000 was coupled with an order that the defendant not work in his chosen profession (so it may be inferred that the totality of orders made against him would have had a more significant financial impact) and in the second the fine of $5,500 was imposed in circumstances where very little harm flowed from the disclosure of confidential information. In both cases the wrong (contempt) was against the Court. This can be contrasted with the present case which has involved a wrong against a vulnerable employee (a migrant worker) for breach of a compliance order for non-payment of minimum employee entitlements which has impacted significantly on the employee personally, and a wrong against the Authority (breach of its order).

[51] A factor which may be considered along with others is proportionality. The sum at issue in *Reynolds* was $1,568. The fine was ultimately reduced to $750, so half of the original amount owing to the employee, although in circumstances where a number of mitigating factors were also found to be present. In the present case the sum at issue is around five times greater than in *Reynolds* and the mitigating factors that applied in that case are notably absent. Indeed I have only been able to identify one such factor and that is that the defendant has not previously come before the Court for breach of a compliance order.

[52] The reality is that $8,000 is a sizeable amount of money, particularly for someone in Mr Domingo's position. To put it into perspective, Mr Domingo was earning $16 per hour at the time his employment came to an end. The amount of money which he was owed (and which has been ordered in his favour and which he has not been paid) equates to around 12 weeks' work, based on a 40 hour week.

[53] Weighing the above factors, including the fact that there is no issue of capacity to pay, the aggravating features of the defendant's conduct, Mr Domingo's personal circumstances and vulnerability, and the significant detrimental impact of the defendant's ongoing default, I consider that a fine of $11,000 is appropriate.

Part/whole payment of fine to plaintiff?

[54] Mr Santesso submitted that the Court should exercise its discretion to direct that the whole of the fine be paid to Mr Domingo. The defendant did not seek to advance submissions on this particular point.

[55] Section 140 has recently been amended to include express provision for the payment of part or the whole of a fine to be paid to the employee concerned.[16] There are no indicators of the sort of factors which the Court should have regard to in exercising its discretion to do so. Previous cases involving part-payments of penalty awards to employees have suggested that it may be appropriate to make such an order to compensate the employee, particularly where the underlying orders were non-compensatory in nature.[17] It may be that a similar approach can be applied by way of analogy to fines. However this raises difficult issues as to the (conflicting) underlying purposes of fines vis-à-vis compensatory orders, whether a distinction ought to be drawn between employees who have secured an underlying award with a compensatory as opposed to non-compensatory component, and the spectre of double-recovery.

[56] What is clear is that Parliament has made provision for payment of a fine to an affected party rather than to the Crown fund, and has left it to the Court's broad discretion to decide when that might be appropriate. However, as with all discretions, it is to be exercised in accordance with principle.

[57] There will be some cases where the burden of pursuing a fine is primarily shouldered by a Labour Inspector. In the present case that role has fallen squarely on Mr Domingo. I have regard to this factor in exercising my discretion under s 140(7) to order that part of the fine be paid to Mr Domingo, while being cognisant of the fact that he will be entitled to pursue a claim for costs and it is important to avoid double-recovery. I also have regard to the desirability of encouraging, rather than discouraging, applications of this sort. I see part-payments to affected employees as an effective mechanism for achieving this end.

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16 Section 140(7), inserted on 1 April 2016 by s 17 of the Employment Relations Amendment Act 2016.

17 See, for example, *Prins v Tirohanga Group Ltd* [2006] ERNZ 321 (EmpC) at [74]; the discussion in *Borsboom v Preet PVT Ltd* [2016] NZEmpC 178, including at [51].

[58] It is also important to recognise that the fine represents the Court's response to the defendant's failure to comply with an order of the Authority. The defendant's behaviour has been inconsistent with due respect for the administration of justice. Ordering part of the fine be paid to the Crown addresses this point.

[59] These points emerge from the Court of Appeal's judgment in *Taylor Bros Ltd v Taylors Textile Services Auckland Ltd*, although in a different context (involving an order of solicitor/client costs and the imposition of a fine for breaches of an interim injunction, part of which was to be paid to the appellant rather than wholly to the Crown). There Cooke P observed that:[18]

> As to the question of a fine, there is no doubt at the present day that a fine may be imposed for this type of "civil" contempt of court, involving as it does disobedience of court orders in proceedings between private parties. *That must apply with especial force where the proceedings have been based successfully on breach of the Fair Trading Act 1986 – an Act primarily directed at protecting the interests of consumers,* though in the interests of consumers a trade competitor is entitled to enforce it.
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> …
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> In *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612, this Court held that there is inherent jurisdiction to order a writ of sequestration of the property of a company which is in contempt of Court; but that the lesser alternative of a fine is available. By parity of reasoning, and with the assistance of the United States and New South Wales authorities, we think that the jurisdiction regarding a fine must and does extend to *ordering that part of it be paid to a complainant who has set the Court proceedings in motion. In cases under the Fair Trading Act that may help to promote the self-policing objective of the Act*. Perhaps there is no fundamental objection in principle to accepting even that the Court could order the whole fine be paid to the complainant. We think, however, that this would be to go too far. The contempt jurisdiction exists in the public interest as a sanction to ensure that orders of the Court are complied with. *An element of amends to the public institution should always be present in a fine.*
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> [Emphasis added]

[60] In the particular circumstances I consider it appropriate to direct that 60 per cent of the fine be paid direct to the plaintiff. The other 40 per cent is to be paid to the Crown.

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[18] *Taylors Bros Ltd v Taylors Textile Services (Auckland) Ltd* [1991] 1 NZLR 91 (CA) at 92.

Conclusion

[61] It follows from the foregoing that the defendant must pay a fine in the sum of $11,000, 60 per cent of which (namely $6,600) is payable to the plaintiff. The money held in the Court's trust account in these proceedings is to be paid out to Mr Domingo towards satisfaction of the amounts ordered in his favour by the Authority. Any residual amount owing is to be paid by the defendant to Mr Domingo, through his representative, within ten working days of the date of this judgment.

[62] The Registrar is to refer the fine to the Collections Unit of the Ministry of Justice for enforcement purposes.

Costs

[63] Mr Domingo is entitled to apply for costs. Any submissions in relation to such an application may wish to address the Court's costs guidelines and whether increased, or indemnity costs, may be appropriate, including having regard to the nature of the proceeding and the way in which I have dealt with the part-payment of fine issue.[19]

[64] If costs cannot be agreed any application together with supporting material should be filed and served within 20 days of the date of this judgment, with the defendant filing and serving anything in reply within a further 15 days**.**

Christina Inglis
Judge

Judgment signed at 3.30 pm on 7 March 2017

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[19] See, for example, *Taylor Bros* (where solicitor/client costs were imposed, together with a fine, 50 per cent of which was ordered payable to the appellant for breach of an interim injunction); *Kang v Yu* [1999] 13 PRNZ 380 (HC) (where the High Court declined to order part payment of a fine to the plaintiff for breach of an injunction on the basis that it would not be appropriate, in light of the order of indemnity costs made against the defendant); and the discussion in *Borsboom v Preet PVT Ltd*, above n 17 at [50], where the full Court observed that the exercise of the Court's discretion to order part payment of a penalty to an aggrieved party does not affect the Court's costs regime.