IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 8
ARC 98/13
ARC 22/14

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	SHABEENA SHAREEN NISHA (NISHA ALIM) Plaintiff
AND	LSG SKY CHEFS NEW ZEALAND LIMITED First Defendant
AND	PRI FLIGHT CATERING LIMITED Second Defendant
AND	TERRY WILLIAM HAY ALSO KNOWN AS TERRY HAY Third Defendant

Hearing:	(6 and 7 September 2017 in person and 25 October 2017 by AVL)
Appearances:	K Wendt, counsel for plaintiff C Meechan QC and J Douglas, counsel for first defendant D France and S Worthy, counsel for second defendant N Scampion, counsel for third defendant D France and S Worthy, counsel for non-party Mr Nathan
Judgment:	23 February 2018

COSTS JUDGMENT (NO 1) OF JUDGE B A CORKILL

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Introduction

[1] This is a most unusual costs judgment. It resolves costs issues with regard to two preliminary judgments, 19 interlocutory judgments, the substantive judgment, and five judgments which dealt with various aspects of costs; and problems as to the apportionment of costs between the various liable parties. Finally, the Court must consider a challenge to a costs determination of the Employment Relations Authority (the Authority).[1]

[2] The background is that Ms Alim brought a challenge against her former employer, LSG Sky Chefs New Zealand Ltd (LSG). She was, and is, relatively impecunious. However, her challenge was funded by her former employer, PRI Flight Catering Ltd (PRI), and interests associated with it.

[3] LSG and PRI were competitors who provided flight catering services. Dynamics between these entities had a significant effect on the conduct of Ms Alim's relatively straightforward claims.

[4] As a result, the Court was required to resolve a plethora of issues prior to the substantive hearing, and after it. Regrettably, all of this has led to complex costs issues. Unusually, three hearing days were devoted to the receipt of submissions on costs from the multiple parties involved.

[5] As the Court of Appeal stated with regard to one of the three applications for leave to appeal various aspects of the proceeding, "the history of the litigation [in the Employment Court] raises real concerns about abuse of its processes and resources".[2]

What was the case about?

[6] It is first necessary to analyse the essentials of the case.

[7] By the conclusion of the hearing, there were six pleaded causes of action, that is:

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1 *Nisha v LSG Sky Chefs New Zealand Ltd* [2013] NZERA Auckland 528.
2 *Hay v LSG Sky Chefs New Zealand Ltd* [2017] NZCA 153 at [15].

a) there had been breaches of Ms Alim's employment agreement;

b) she had been dismissed constructively by LSG;

c) LSG had breached good faith obligations which it owed her;

d) LSG had failed to provide all wage and time records;

e) there was a breach of the transfer provisions of Part 6A of the Act;

f) Ms Alim had been justifiably disadvantaged during her employment with LSG.

[8] Ms Alim sought unpaid entitlements in the sum of $6,611.97 plus interest, reimbursement of three months' lost wages, that is, $10,661.98; compensation for hurt and humiliation of $15,000; penalties for LSG's alleged repeated breaches of Ms Alim's employment agreement totalling 30 in number; penalties for LSG's alleged breach of good faith and for failing to provide wage and time records. Counsel for Ms Alim told the Court that the monetary payments which were sought totalled $32,273.95, and that the total claim for penalties was for $660,000.[3]

[9] All pleaded causes of action were dismissed. There was one aspect of Ms Alim's claim, however, on which she succeeded; this was on a basis which was raised by the Court itself.

[10] Ms Alim was one of 40 employees of PRI who were transferred to LSG under Part 6A of the Employment Relations Act 2000 (the Act). Shortly before the transfer, PRI commenced paying Ms Alim a supervisor's hourly rate, and increased her leave entitlements. After the transfer, LSG concluded that the increases were not genuine, although on an interim basis it paid Ms Alim at the hourly rate which PRI had used shortly before transfer; LSG intended that the interim arrangement would apply whilst it clarified the true position as to Ms Alim's terms and conditions.

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3 *Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 171, (2015) 13 NZELR 185 at [6] (Substantive judgment).

[11] There were difficulties in resolving the correct position, catalysed by the fact that PRI did not cooperate in providing to LSG relevant documents such as wage and time records which would have facilitated the confirmation of the correct terms and conditions. Eventually, Ms Alim resigned. She then alleged she had been constructively dismissed.

[12] An aspect of that claim was her assertion that she had consistently sought resolution of issues relating to her correct terms and conditions, without success. There was an issue as to whether the uncertainties concerning her pre-existing transfer entitlements should have been resolved more promptly by LSG.

[13] I dealt with this allegation under s 122 of the Act, finding that there was a personal grievance for a type other than that which was alleged.[4] I considered that whilst the situation which LSG found itself was not of its making, it nevertheless had an obligation to resolve the uncertainties in a timely way. I upheld, therefore, a disadvantage grievance, awarding modest compensation of $3,000, reduced under s 124 of the Act to $1,500. No penalty was awarded in respect of this aspect of the matter.[5]

General principles as to costs

[14] Clause 19 of sch 3 of the Act governs the award of costs in this Court. In addition, reg 68 of the Employment Court Regulations 2000 (the Regulations) provides that in the exercise of its discretion, the Court may have regard to "any conduct of the parties tending to increase or contain costs".

[15] In their submissions, counsel referred to the well-established principles as set out in the Court of Appeal judgments of *Victoria University of Wellington v Alton-Lee*;[6] *Binnie v Pacific Health Ltd* [7] and *Health Waikato Ltd v Elmsly*.[8]

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4 At [235] – [236].
5 At [244] – [246].
6 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].
7 *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
8 *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [17].

[16] The following summary from the Court of Appeal in *Alton-Lee* is important in explaining the underlying factors which are relevant to an assessment of costs:

> [48] The primary principle is that costs follow the event. As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred. These principles reflect a balance involving a number of factors. We mention only some of them. Access to justice considerations point away from automatic full recovery of costs for the successful party. On the other hand, a monetary judgment will often be of little practical moment to a successful party unless the losing party is required to make a substantial contribution to the costs of obtaining it. Further, litigation is expensive, time-consuming and distracting and the requirement that a losing party not only pays his or her own costs but also makes a subsequent contribution to those of the successful party undoubtedly acts as a disincentive to unmeritorious claims or defences. Special rules as to costs which apply where there have been payments into Court or *Calderbank* letters encourage settlement.

[17] Under those principles, a 66 per cent contribution to the reasonable costs as determined by the Court is normally regarded as fair and reasonable, but that percentage contribution may be adjusted upwards or downwards, depending on particular circumstances.

[18] It is well established that the costs discretion is broad, and one which is able to be exercised in light of the Court's equity and good conscience jurisdiction.[9]

[19] In *Shirley v Wairarapa District Health Board*, the Supreme Court emphasised that although the cost jurisdiction is discretionary, it is not to be exercised in an unprincipled manner or else it would be "unacceptably arbitrary".[10] In support of this proposition, the Court referred to the following observation of Lord Halsbury LC, in *Sharp v Wakefield*:[11]

> … when it is said that something is to be done within the discretion of the authorities … that something is to be done according to the rules of reason and justice, not according to private opinion … according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular.

[20] I proceed on the basis of these principles. It will be necessary, elsewhere in this judgment, to consider authorities relating to particular sub-topics with regard to

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9 At [33] and [45].
10 *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [16].
11 At [16] citing *Sharp v Wakefield* [1891] AC 173 (HL) at 179.

costs in the Court, and for the purposes of a challenge brought by Ms Alim as to the costs determination of the Authority.[12]

The Calderbank offers

[21] Before turning to the relevant judgments, it is necessary to consider the Calderbank offers which were made at various stages of the litigation. The history of these is as follows.

[22] The first Calderbank offer was made on 16 May 2012, some four months prior to the Authority's initial investigation meeting. LSG offered $1,500 for gross wages, and $4,500 under s 123(1)(c)(i) of the Act. It was not accepted. It was repeated in the course of the investigation process; the investigation continued until 27 September 2013, with the determination ultimately being issued on 15 October 2013. The renewed offer was made on 1 March 2013. At that point, Ms Alim's lawyers counter-offered seeking greater amounts than had been offered, as well as an apology. The counter-offer was declined by LSG.

[23] After Ms Alim's challenge to the Authority's determination was initiated, a sequence of interlocutory applications commenced, each of which required consideration by the Court. Between the issuing of interlocutory judgments (No 4) and (No 5), LSG advanced a fresh Calderbank offer, on 31 March 2015. It offered gross wages of $3,500, compensation under s 123(1) of $5,000, and that each party would meet their costs of the challenge; further LSG would waive recovery of costs which by then the Authority had ordered Ms Alim to pay in the sum of $21,000; security for those costs which had been paid by Ms Alim into Court of $10,500 would be repaid to her. The offer was made on the basis that acceptance would constitute a full and final settlement of all claims either party had with regard to Ms Alim's employment and its termination, including the (separate) challenge which has been brought to the Authority Member's determination not to recuse himself,[13] and/or for any judicial review proceedings.

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12 *Nisha v LSG Sky Chefs New Zealand Ltd*, above n 1.
13 ARC62/13.

[24] Ms Alim's lawyers responded on 6 May 2015. They said it would be "facile" for Ms Alim to withdraw her "judicial review proceedings", this apparently being a reference to the non-recusal challenge.[14] Ms Alim's lawyers went on to assert that LSG had not offered Ms Alim any additional benefit that could be considered proper consideration for withdrawing that particular challenge. Other comments were made, including a point that Ms Alim was pursuing her claim against LSG "as a matter of principle". The offer, it was said, did not address the issue of personal vindication.

[25] On 9 June 2015, LSG's lawyer wrote to Ms Alim's lawyers, again on a Calderbank basis, stating that it was not clear exactly how Ms Alim saw her claim being resolved, because no counter-offer had been advanced. Ms Alim's lawyers replied on 12 June 2015 somewhat unhelpfully stating that LSG should put forward an offer that could be taken seriously.

[26] On 30 June 2015, LSG's lawyers made a further Calderbank offer to pay Ms Alim the sum of $6,611.97 gross wages, $15,000 compensation for hurt and humiliation, $5,000 plus GST as a contribution to her legal fees, an expression of regret that it had been unable to resolve issues relating to Ms Alim's terms and conditions of employment to her satisfaction, and waiving its entitlement to costs in the Authority on the same basis as before. The offer was to remain open until 3 July 2015, at which time it would be withdrawn.

[27] Ms Alim's lawyers stated that the offer did not address the issue of personal vindication; and that the offer was grossly inadequate. It was also stated that three days was an unacceptable period for response. It was declined.

Submissions

[28] In submissions advanced for Ms Alim, it was submitted that LSG's Calderbank offers did not represent a genuine attempt to settle the dispute for several reasons. First it was argued that the offer made during the Authority investigation

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[14] On 2 September 2014, Chief Judge Colgan had held that since a de novo challenge had been brought to the Authority's substantive determination, the non-recusal challenge should be stayed until disposition of the former, or further order of the Court: *Nisha v LSG Sky Chefs New Zealand Ltd* [2014] NZEmpC 160 at [24].

could not be taken into account, because the challenge was advanced on a rather different basis than had occurred in the Authority; furthermore, the offer had already been considered by the Authority in its costs determination, implying that its effect was thereby extinguished.

[29] With regard to the offers made during the proceedings of the Court, it was submitted for Ms Alim that a tactical strategy was adopted, rather than engaging in a genuine attempt to settle the proceeding. So, it was argued, LSG's offer did not address the issue of personal vindication – all that was offered was an expression of regret which did not repair, LSG's failure to address Ms Alim's complaint and only sought to shift the blame. It was argued that the offer did not address adequately the issue of costs, since all that was offered was $5,000 plus GST.

[30] Finally, it was submitted that had LSG been genuine about resolving the dispute, it could have made an offer earlier which would have avoided significant interlocutory costs. The final offer was only made, it was submitted, two months before the scheduled hearing. It was asserted that this must have been a tactical move.

[31] For LSG, it was submitted in response that it was unclear as to why it could be said that there were not genuine attempts by LSG to settle the dispute. The final offer, as presented on 30 June 2015, represented almost Ms Alim's entire claim, except for lost earnings and penalties which were too remote and too difficult to quantify in any event.

[32] The assertion that the expression of regret was inadequate could not justify the refusal to accept the offer. Ms Alim could have reverted through her lawyers, if need be, to discuss this aspect of the offer constructively.

[33] Ms Meechan submitted that the inference to be drawn from the sequence of Calderbank letters is that Ms Alim and/or her funder clearly had other ambitions, which were completely unrealistic. She said that LSG's offers were rejected in a high-handed way. She also commented that the Calderbank offer context was not normal. Often, an offeror would be attempting to realistically assess quantum. Here,

LSG faced a claim that was based on a sham, and penalties of over $600,000 were sought. Ms Meechan said that if ever there was a case that required a "steely response" this was it.

Discussion

[34] In *Bluestar Print Group (NZ) Ltd v Mitchell*, the Court of Appeal referred to the principles which apply where there is a successful Calderbank offer, as follows:[15]

> [6] … Regulation 68(1) states:
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> > 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, including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.
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> [7] Regulation 6 states that where there is no relevant procedure in the Regulations or the ERA, the Court must resolve the issue as nearly as is practicable, in accordance with the High Court Rules.
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> [8] Rules 14.1 – 14.23 of the High Court Rules set out the costs regime. Rule 14.10 states that a party may make a Calderbank offer at any time. Rule 14.11 governs the effect of Calderbank offers on costs:
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> **14.11 Effect on costs**
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> (1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.
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> (2) Subclauses (3) and (4)–
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> (a) are subject to subclause (1); and
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> (b) do not limit rule 14.6 or 14.7; and
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> (c) apply to an offer made under rule 14.10 by a party to a proceeding (party A) to another party to it (party B).
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> (3) Party A is entitled to costs on the steps taken in the proceedings after the offer is made, if party A–
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> (a) offers a sum of money to party B that exceeds the amount of a judgment obtained by a party B against party A; or
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> (b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.
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> (4) The offer may be taken into account, if party A makes an offer that–
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> (a) does not fall within paragraph (a) or (b) of subclause (3); and
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> (b) is close to the value or benefit of the judgment obtained by party B.

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15 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446.

[35] Additionally, as is also clear from *Bluestar*: [16]

a) the Court must have regard to the principle that the public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs; and

b) a "steely approach" is required.

[36] I proceed on the basis of these principles. In my view r 14.11(3)(a) of the High Court Rules applies to the offers made by LSG on both 31 March 2015 and 30 June 2015. In two instances, LSG, as Party A, offered a sum of money to Ms Alim, as Party B which exceeded the amount of $1,500 which she ultimately obtained.

[37] The first of these offers was for a sum significantly in excess of the sum which Ms Alim was ultimately awarded.

[38] The main objection raised on behalf of Ms Alim was that there was an unresolved recusal challenge. Former Chief Judge Colgan had explained some months earlier that the challenge had been stayed because the Court was required to rehear all matters de novo. What the Authority had done was, in those circumstances, of little or no importance as far as Ms Alim's claims were concerned.[17] It is obvious LSG could not be held to account for the Authority Member's determination not to recuse himself. The Court said that if, at that stage, the existence of the Authority's determination was a genuine problem, the issue could have been resolved by the common practice of the parties agreeing that a consent judgment be issued which would have the effect of setting aside the substantive determination, as permitted by s 183 of the Act.

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16 At [18] and [20].

17 *Nisha v LSG Sky Chefs New Zealand Ltd* [2014] NZEmpC 160 at [18].

[39] A further objection was that the offer was insufficient to provide Ms Alim with "personal vindication". Given the amounts involved, I do not accept that this provided a reasonable basis for rejecting an entirely appropriate offer. I accept the submission that this particular issue was well capable of resolution.

[40] Adopting a steely approach, I conclude there was no reasonable justification for Ms Alim to reject LSG's offer.

[41] The same conclusion must be reached with regard to the subsequent offer of 30 June 2015. Again, it significantly exceeded the judgment which Ms Alim ultimately obtained.

[42] By that stage, Ms Alim's lawyers were raising issues as to costs. The amount of $5,000 plus GST was fair and reasonable, having regard to the modest success ultimately achieved.

[43] Again, the apparent problem over the expression of regret should not in the circumstances have amounted to an impediment to resolving Ms Alim's claim. If this was really a problem, it could have been discussed. It is reasonable to conclude that such a problem could have been resolved.

[44] As before, the unresolved recusal challenge should not have been a problem, for the reasons discussed earlier. I also find that the advancing of the offer two months before the hearing was not, in the circumstances, unreasonable.

[45] Again, adopting a steely approach, it was not reasonable for Ms Alim to reject LSG's further offer.

Interlocutory matters

[46] Because so many costs issues arise from the multiple interlocutory judgments, it is necessary to deal with each separately.

[47] Mr France, counsel for PRI, submitted that guidance as to quantum was provided by the Costs Guidelines, in the provisions relating to interlocutory

applications. As Ms Wendt, counsel for Ms Alim submitted, however, that would have resulted in a flat rate applying to each interlocutory judgment; in some instances, having regard to actual costs and other factors, the sum so produced would have been inadequate; and in others, there would have been a windfall. It is inappropriate to deal with the interlocutory judgments on such a basis. I turn to deal with each one separately.

Preliminary judgment A of 14 March 2014: application for leave to extend time to file a challenge[18]

[48] Ms Alim's legal advisors attempted to file her challenge one day after the expiry of the 28-day period provided in s 179 of the Act for doing so. The error was that of her legal advisors, and not Ms Alim. Leave to file late was sought.

[49] The application was opposed, but leave was granted subject to the stay issue which is referred to in the next section. Costs were reserved.

[50] For Ms Alim, it was argued that costs should follow that event, and indeed should be increased, on the basis that the application was plainly meritorious, and LSG's opposition merely delayed its resolution.

[51] For LSG, it was submitted that the application has to be considered in light of the ultimate outcome in the Employment Court. It is argued that LSG's ground for opposing the application for leave was legitimate, and that considerable costs could have been avoided if the application had not been pursued.

[52] With regard to this particular application, the costs issue should focus on the position as it was known at that stage, and not on the particular application, rather than the entire proceeding. I decline to award costs to Ms Alim, since the application was due to fault on the part of her legal advisors. Nor is it reasonable to conclude that LSG should receive costs for unsuccessfully resisting the application. I decline to make any order for costs.

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[18] *Nisha v LSG Sky Chefs New Zealand Ltd* [2014] NZEmpC 41 (Preliminary judgment A).

Preliminary judgment B of 14 March 2014: Ms Alim's application for stay of costs determination [19]

[53] On the same day, the Court issued a second judgment in respect of Ms Alim's application for stay of execution of the costs determination. It was opposed by LSG. The Court granted the stay, but on condition that Ms Alim pay half of the sum involved, that is, $10,500, to the Registrar of the Court within 21 days.[20] Costs were reserved.

[54] It appears Ms Alim's legal advisors intended that the costs submissions which were made in connection with the application for leave would apply to this application also.

[55] For LSG, it was argued that its position with regard to the application for stay was reasonable. LSG's primary position was that the stay should not be granted. In the alternative, it sought an order with conditions. It was explained that Ms Alim had not disclosed the fact of her residence outside of New Zealand, which was only discovered after LSG attempted to enforce the costs awarded it had obtained in the Authority; at that point she refused to provide a residential address. In the course of the application for stay, she had declared herself to be impecunious.[21]

[56] In all these circumstances, the Court was persuaded that an order of stay should be conditional.

[57] The amount claimed by LSG is $3,028. The quantum of costs is fair and reasonable. In view of the fact that LSG succeeded to some extent, and having regard to the circumstances giving rise to its opposition which led to the condition being imposed,[22] I fix an award in LSG's favour of $1,500, net of GST.

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19 *Nisha v LSG Sky Chefs New Zealand Ltd* [2014] NZEmpC 42 (Preliminary judgment B).
20 At [19].
21 As referred to at [19].
22 At [11].

Interlocutory judgment (No 1) of 2 September 2014: application to determine which challenge should be heard first[23]

[58] By September 2014, Ms Alim had filed two challenges – the non-recusal challenge, and the challenge to the substantive determination of the Authority. An issue arose as to which should be heard first. As already mentioned, the Court was concerned that the non-recusal challenge was redundant, since Ms Alim had by then filed a de novo challenge to the Authority's substantive determination. The judgment ruled that the non-recusal challenge should be stayed until disposition of the substantive challenge or further order of the Court.[24]

[59] Ms Alim has made no application for costs in respect of this judgment. LSG has: it submits that it incurred costs of approximately $1,800, and seeks a contribution of 80 per cent.

[60] Chief Judge Colgan clearly rejected Ms Alim's assertion that the non-recusal challenge should be heard first. He also commented that the issues raised by the non-recusal challenge amounted to "interlocutory skirmishing"; such a strategy was significantly delaying the progress of the substantive proceeding. He also said that these steps were no doubt incurring substantial fees. All of these observations were, with respect, prescient.

[61] The Court accepted the submissions made for LSG as to which challenge should be heard first. It is entitled to costs.

[62] But given the relatively early stage of the proceeding, I am not persuaded that there should be an uplift above 66 per cent. I allow $1,188, net of GST.

Interlocutory judgment (No 2) of 4 December 2014: application as to disclosure[25]

[63] This judgment resolved issues as to documents. A broadly phrased notice of disclosure had been served on LSG by Ms Alim. The Court identified three issues for resolution. The first related to the selection of suitable search terms to be used by

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23 *Nisha v LSG Sky Chefs New Zealand Ltd* [2014] NZEmpC 160 (Interlocutory judgment No 1).
24 At [24].
25 *Nisha v LSG Sky Chefs New Zealand Ltd (No 2)* [2014] NZEmpC 224 (Interlocutory judgment No 2).

LSG so as to comply with Ms Alim's notice of disclosure; the Court confirmed some search terms, but not all that Ms Alim sought. Secondly, the Court did not accept that the search for the documents should extend beyond the defendant's computers and databases to smart phones and its telephone systems. Thirdly, it did not agree that an independent consultant needed to undertake the search, as had been proposed for Ms Alim. On one point, LSG was ordered to file a more detailed affidavit than it had already provided, and an affidavit as to the obtaining of records of ex-employees.[26] Costs were reserved.

[64] For Ms Alim a claim is made for $28,628.55, on an indemnity basis – essentially it was argued that LSG's position had been wholly unreasonable. For LSG, costs of $4,309.25 had been incurred; 80 per cent of those were sought, being $3,447.40.

[65] It is to be noted that in the course of the judgment, Chief Judge Colgan said:[27]

> Given the modest monetary remedies claimed by the plaintiff, the costs which must have been incurred in pursuing this and other interlocutory issues, not to mention associated litigation in this and other courts involving LSG and PRI, mean that this case on its own must now be uneconomic and that there are bigger issues at play between these two corporate entities.

[66] It is evident that even the Court continued to be concerned at the way in which interlocutory processes were being pursued, even at this relatively early stage.

[67] There is certainly no basis for concluding that Ms Alim succeeded to the point where she is entitled to an award of costs in respect of her claims: the outcome was mixed. I conclude that costs should lie where they fall.

Interlocutory judgment (No 3) of 25 February 2015: application as to preliminary question of law[28]

[68] An application was made on behalf of Ms Alim that the Court hear and determine a preliminary question of law, namely the interpretation of the phrase

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26 At [85].
27 At [16].
28 *Nisha v LSG Sky Chefs New Zealand Ltd (No 3)* [2015] NZEmpC 22 (Interlocutory judgment No 3).

"immediately before" as it appears in s 69I(2)(b) of the Act. The Court ruled that it would be inappropriate to do this in a factual vacuum, and that for this and other reasons, the application should be declined. Costs in favour of LSG were ordered.

[69] LSG states that its actual costs were $2,616.25; it seeks $2,093.20, being 80 per cent.

[70] For Ms Alim it is argued that costs should be reduced "to acknowledge the merits of the plaintiff's reasonable attempt to reduce the overall cost of the proceeding and expedite the proceedings"; it is proposed that LSG's costs should be reduced by 50 per cent.

[71] I do not agree. Nor am I persuaded there should be an uplift. I award LSG 66 per cent of its actual and reasonable costs, being $1,726, excluding GST.

Interlocutory judgment (No 4) of 25 February 2015: application as to timing of challenge to objection of disclosure[29]

[72] An issue arose as to the timing of a challenge brought by LSG to Ms Alim's objection to disclosure of certain documents. The Court was satisfied that time should be extended, but ordered that no order for costs should be made in the circumstances.

Interlocutory judgment (No 5) of 15 May 2015: applications for further orders regarding disclosure[30]

[73] On 20 February 2015, Ms Alim sought a range of further orders relating to disclosure, including a renewed application to appoint a computer forensics expert to conduct a repeat of a search which LSG had undertaken on the basis of search terms identified by the Court; an order for disclosure of unredacted copies of documents; and that LSG file a detailed list of privileged documents. Submissions were filed between 6 and 27 March 2015. There was a mixed outcome. No expert was appointed, and no order was made that LSG should provide access to unredacted

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[29] *Nisha v LSG Sky Chefs New Zealand Ltd (No 4)* [2015] NZEmpC 23, [2015] ERNZ 97 (Interlocutory judgment No 4).

[30] *Nisha v LSG Sky Chefs New Zealand Ltd (No 5)* [2015] NZEmpC 64 (Interlocutory judgment No 5).

documents. LSG was, however, ordered to list privileged documents in accordance with directions given by the Court.[31]

[74] The Court also said:[32]

> Questions of document disclosure in this case have reached the point where it is necessary to stand back and reclaim a sense of proportion … I have no doubt that the parties' interlocutory costs have already exceeded very substantially the most that the plaintiff might be able to obtain if she is wholly successful. This judgment needs, therefore, to represent a balance between reasonable and fair document disclosure necessary for the prosecution and defence of the grievance, and the entitlement of the defendant to answer the claims against it and have these decided.

[75] The submissions filed for Ms Alim recorded that her actual costs were $11,238.75 plus GST. It was submitted that whilst both parties were partially successful, Ms Alim's application was necessary because of LSG's failure to acknowledge or respond to previous correspondence. Sixty-six per cent of those costs were sought.

[76] For LSG it was submitted that the substantive portions of the judgment dealt with the applications which Ms Alim had advanced unsuccessfully. One issue which had been referred to related to the listing of privileged documents; this was described by counsel as a straightforward issue which did not occupy much time. It was accordingly argued that LSG had achieved substantial success. Its actual costs were $1,839.75; counsel submitted that a modest allowance for the issue relating to the privileged documents could be appropriate. As with all its applications for interlocutory costs, LSG sought 80 per cent.

[77] Very soon after submissions were filed, LSG advanced a Calderbank offer which I have previously determined was unreasonably declined. I also note the criticisms made by Chief Judge Colgan as to the way in which interlocutory applications were being advanced on behalf of Ms Alim.

[78] But for the issue as to the listing of privileged documents, I would have awarded 80 per cent of LSG's costs, which were fair and reasonable, particularly

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31 At [25] and [26].
32 At [24].

when compared with those which were incurred for Ms Alim. However, because of the point on which Ms Alim succeeded, 66 per cent is appropriate, being $1,214.24 net of GST.

Interlocutory judgment (No 6) of 15 May 2015: LSG's challenge to Ms Alim's objection to disclosure[33]

[79] Ms Alim objected to disclosure of certain categories of documents, including those which would evidence an agreement regarding support or funding of Ms Alim's claim against LSG; a challenge to that objection was brought by LSG.

[80] The Court ordered that some, but not all, documents for which disclosure had been sought should be given. It also ordered that as both parties had been successful and unsuccessful in part, there was to be no order for costs.

Interlocutory judgment (No 7) of 24 June 2015: application for an unless order[34]

[81] Ms Alim sought unless orders based on an alleged failure by LSG to comply with disclosure obligations in connection with previous searches. The Court ordered LSG to file further affidavits setting out the steps taken in complying with its discovery obligations, but was not satisfied that an unless order was appropriate. Indeed, the Court said that it was satisfied that LSG, having regard to the decisions and reasoning set out in interlocutory judgments (No 5) and (No 6) and its compliance with the Court's directions, would have met its reasonable obligations to make disclosure to Ms Alim:[35]

> … in this otherwise unremarkable personal grievance case in which modest monetary remedies are sought.

[82] The Court reiterated that interlocutory preparation needed to be proportionate to the matters at issue and the remedies claimed. Chief Judge Colgan said that the increasingly frequent interlocutory applications must take account of this, and that he had recently directed that any more must have leave to be heard – as recorded in a

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33 *Nisha v LSG Sky Chefs New Zealand Ltd (No 6)* [2015] NZEmpC 65 (Interlocutory judgment No 6).

34 *Nisha v LSG Sky Chefs New Zealand Ltd (No 7)* [2015] NZEmpC 97 (Interlocutory judgment No 7).

35 At [24].

minute issued by the Court on 19 June 2015. The application for "unless" orders was adjourned.

[83] For Ms Alim it was argued that costs of $3,189 had been incurred, and that because of a refusal by LSG to follow through on its previous assurances, there should be an award of 75 per cent of those costs.

[84] For LSG it was argued that the costs with regard to the judgment (as distinct from the disclosure exercise) amounted to $789. Ms Meechan submitted that a needlessly aggressive approach had been adopted, a submission which I accept.

[85] Ms Alim achieved modest success, so that some reduction should thereby be acknowledged from the 80 per cent sought by LSG. I award 66 per cent, being $520.74 net of GST.

Interlocutory judgment (No 8) of 7 July 2015: application for leave to file three further interlocutory applications[36]

[86] On 25 June 2015, Ms Alim sought leave to file three further interlocutory applications. Leave was granted to bring an application to challenge LSG's claims to privilege (although this was ultimately unsuccessful). Leave was not granted for Ms Alim's application to vary disclosure orders, or alternatively, orders requiring particular disclosure of documents by LSG. Leave was granted to recall interlocutory judgment (No 7), it being alleged that the Court had not dealt sufficiently with several issues raised at that stage.

[87] Ms Alim sought 50 per cent of her actual costs of $4,942.35. LSG sought 80 per cent of its actual costs of $1,130.

[88] Given the mixed outcome, I decline to make any order as to costs.

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[36] *Nisha v LSG Sky Chefs New Zealand Ltd (No 8)* [2015] NZEmpC 106 (Interlocutory judgment No 8).

Interlocutory judgment (No 9) of 9 July 2015: application for non-party disclosure[37]

[89] An application for an order that the union of which Ms Alim had been a member disclose documents was dealt with by way of a telephone conference call. Counsel for Ms Alim, LSG, and the union all took part. Limited document disclosure was ordered. Costs as between Ms Alim and the union were reserved.

[90] Although LSG incurred costs of $550, and now seeks 80 per cent of these essentially on the grounds that it was required to take part in the telephone hearing, in light of the order as to reservation of costs which was made by Chief Judge Colgan, which contemplated that costs issues would be between Ms Alim on the one hand and the union on the other, I decline to award LSG any costs in respect of this particular application; it did not take an active part in the hearing of the application, which was largely resolved by a consensus being reached between Ms Alim and the union.

Interlocutory judgment (No 10) 0f 13 July 2015: application for recall of interlocutory judgment (No 7)[38]

[91] The Court dealt with an application brought by Ms Alim that the Court should recall interlocutory judgment (No 7), on the basis that a particular issue had not been dealt with. However, that issue was overtaken by the filing of an affidavit which dealt with the matter which the Court had intended, but had omitted, to deal with in interlocutory judgment (No 7).

[92] Since the omission had been that of the Court, it was directed that there would be no order for costs with regard to Ms Alim's application for leave, and for recall and reissue of the judgment.[39]

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37 *Nisha v LSG Sky Chefs New Zealand Ltd (No 9)* [2015] NZEmpC 108 (Interlocutory judgment No 9).

38 *Nisha v LSG Sky Chefs New Zealand Ltd (No 10)* [2015] NZEmpC 110 (Interlocutory judgment No 10).

39 At [10].

Interlocutory judgment (No 11) of 15 July 2015: Ms Alim's application for adjournment of fixture[40]

[93] On 7 July 2015, an application was advanced on behalf of Ms Alim to adjourn the fixture, then scheduled for 10 – 14 August 2015. The application was declined. Chief Judge Colgan referred to the previous interlocutory judgment in which he had referred to the need for sensible proportionality, a concept which he said must also apply to the hearing time to be allocated to the case; such time should not be thwarted by the filing of yet further interlocutory applications.[41] He referred to the "plethora of interlocutory applications" made on behalf of Ms Alim since late 2014. Specifically, he said:[42]

> I have to say that the regular, at times daily, receipt by the Court Registry of applications for leave and further interlocutory applications by the plaintiff is the primary cause of any delays about which the plaintiff complains …

[94] It was emphasised that LSG was entitled to expect an end to the litigation into which it had been brought involuntarily by Ms Alim, and the costs to both parties "which must well and truly exceed any best possible substantive outcome either way".[43] The application for adjournment was dismissed.

[95] LSG says that it incurred costs with regard to the application of $847, and seeks 80 per cent.

[96] By this time, LSG's final Calderbank offer had been advanced, and I have found that it was unreasonably declined.

[97] I award LSG 80 per cent of its fair and reasonable costs, being $677.60 net of GST.

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40 *Nisha v LSG Sky Chefs New Zealand Ltd (No 11)* [2015] NZEmpC 113 (Interlocutory judgment No 11).
41 At [7].
42 At [13].
43 At [14].

Interlocutory judgment (No 12) of 20 July 2015: challenge to adequacy of LSG affidavits as to disclosure[44]

[98] On 16 July 2015, Ms Alim sought directions alleging that LSG had not filed adequate affidavits, as directed in interlocutory judgment (No 7). Leave to bring such an application was sought, as required.

[99] The Court dismissed the application, without the necessity of calling on LSG to respond. No issue as to costs arises.

Interlocutory judgment (No 13) of 23 July 2015: Ms Alim's challenge to an LSG disclosure objection, and as to interrogatories[45]

[100] Ms Alim challenged LSG's objection to disclose certain documents. LSG agreed to disclose some; the Court directed that the balance did not need to be disclosed. Further, the Court directed that three of 77 interrogatories only should be answered. It also discussed and reiterated its previous remarks that a sense of proportionality needed to be maintained, even given the substantial claim for penalties.[46]

[101] The Court ruled that LSG was entitled to costs on the document disclosure application, and with regard to the service of interrogatories and the cost of successfully objecting to the vast majority of them.

[102] LSG submits that actual costs of $4,735.50 were incurred, and it seeks an order for 80 per cent of these.

[103] LSG emphasised that the three interrogatories which it was directed to answer was whether Ms Alim had been subject to performance appraisals, which turned out not to be a relevant issue in the evidence at the trial; nor was it one referred to in the submissions of counsel at the substantive hearing.

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44 *Nisha v LSG Sky Chefs New Zealand Ltd (No 12)* [2015] NZEmpC 116 (Interlocutory judgment No 12).

45 *Nisha v LSG Sky Chefs New Zealand Ltd (No 13)* [2015] NZEmpC 118 (Interlocutory judgment No 13).

46 At [39] – [48].

[104] It is submitted that it incurred fair and reasonable costs of $4,735.50.

[105] Having regard to the effect of LSG's final Calderbank offer which I consider it was unreasonable to have declined, I award 80 per cent, being $3,788.40, net of GST.

Interlocutory judgment (No 14) of 23 July 2015: application for recall of interlocutory judgment (No 12)[47]

[106] Leave to file was granted, but the application for recall was refused.

[107] Although the Court recorded that it had not needed to hear from LSG, it accepted that it would no doubt have been served with the relevant applications and given consideration to them.

[108] LSG does not seek costs with regard to this application, and I do not therefore order them.

[109] It is appropriate to record, however, the yet further criticisms of Chief Judge Colgan which are relevant to matters which I will need to consider later:[48]

> … the plaintiff has filed numerous interlocutory applications, most but not all of which relate to document disclosure, and one of which has sought, unsuccessfully, to both adjourn the fixture and extend its duration. More than once, the Court has commented that this interlocutory bombardment is out of all proportion to the nature and (from the plaintiff's point of view) best realistic outcome of the case … The plaintiff's continual barrage of interlocutory applications (and preliminary applications for leave to file these) has now become vexatious.

Interlocutory judgment (No 15) of 29 July 2015: application that LSG defence be struck out and application that computer expert be appointed[49]

[110] Notwithstanding these criticisms, Ms Alim brought a range of further applications seeking orders that LSG's statement of defence be struck out, that a

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47 *Nisha v LSG Sky Chefs New Zealand Ltd (No 14)* [2015] NZEmpC 119 (Interlocutory judgment No 14).

48 At [3].

49 *Nisha v LSG Sky Chefs New Zealand Ltd (No 15)* [2015] NZEmpC 126 (Interlocutory judgment No 15).

computer expert be appointed, and that an independent solicitor be appointed to review documents.

[111] The application was founded on an assertion by Ms Alim's lawyers (then Mr O'Brien and Mr Nicholson) that LSG and its solicitor may not have properly discharged their disclosure obligations, by failing to review LSG's documents before an affidavit of documents was sworn for LSG; and that she failed to advise LSG of the scope of its disclosure obligations and to ensure that this advice was properly and adequately disseminated within LSG. It was submitted that if this concern was correct, the failures would have significantly tainted the disclosure which had been provided.

[112] Ms Meechan was briefed to oppose this application on behalf of LSG, which the Court stated was an appropriate step given the nature of the applications which had been brought.[50]

[113] The applications were all dismissed. Chief Judge Colgan referred specifically to the serious allegations which had been levelled by Ms Alim and her lawyers against LSG and its solicitor, Ms Douglas. He stated that the evidence to support those allegations was at best meagre, and in most instances non-existent. He concluded that LSG was entitled to costs. He said that in view of the seriousness of the unproven allegations against LSG's solicitor, those costs might well be indemnity costs. The quantum of those, however, would need to be part of the wash-up of litigation costs.

[114] The quantum of costs involved in defending the application was $5,442.50, net of GST. I am satisfied that this was a fair and reasonable amount.

[115] Because costs relating to interlocutory judgments are being dealt with separately rather than globally, there are no other factors which I need to take into account.

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[50] At [2].

[116] I respectfully agree and adopt the assessment made by Chief Judge Colgan that the circumstances warrant indemnity costs. Although the threshold for those is high,[51] I am satisfied that the bringing of this application, in the face of numerous statements the Court had made to that point as to the need to deal with interlocutory issues in a proportionate fashion having regard to what was at stake, and on the basis of slender evidence, the high test is met.

[117] I award LSG costs of $5,442.50, net of GST.

Interlocutory judgment (No 16) of 29 July 2015: challenge brought by Ms Alim to LSG's claim for privilege, and as to listing privileged documents[52]

[118] Following the granting of leave in interlocutory judgment (No 8), Ms Alim challenged certain objections made by LSG for privilege and irrelevance of documents it held; and as to the way privileged documents had been listed. The main issue was whether LSG was entitled to assert litigation privilege for documents prepared for the purpose of earlier High Court litigation which had, by the time the application was heard, concluded. In those proceedings LSG's relevant documents were subject to litigation and/or lawyer/client privilege in the High Court proceedings. This Court directed that the documents were protected by litigation privilege. The listing issue fell away because the affidavit filed for LSG for the purposes of the privilege argument in effect dealt with any defects in that regard. Costs were reserved, with Chief Judge Colgan recording that LSG had been successful in the case for litigation privilege, whilst Ms Alim "may or may not originally have been successful in her claim to more precise listing ...".[53]

[119] For Ms Alim it was argued that she should be awarded costs because she was ultimately successful in the substantive proceedings; although the Court had concluded privilege should be upheld, a number of the documents were still discoverable in part (that is, the non-privileged aspects of those documents); that the irrelevant documents should not have been listed by LSG in the first place; and that LSG failed to sufficiently list the documents in which privilege was claimed until

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51 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [27] – [28].

52 *Nisha v LSG Sky Chefs New Zealand Ltd (No 16)* [2015] NZEmpC 127 (Interlocutory judgment No 16).

53 At [102].

shortly before the Court's judgment. It was submitted costs should be increased to 75 per cent of Ms Alim's actual and reasonable costs, which it was stated were $7,026.19 plus GST.

[120] For LSG it was submitted that LSG had succeeded in what were relatively complex and novel arguments with regard to privileged documents in related legal proceedings.

[121] Because Chief Judge Colgan stated that LSG had succeeded, costs should be awarded to that party. Costs, including those of leading counsel, were $10,914.25 plus GST, for which 80 per cent was sought.

[122] I consider that it was reasonable for leading counsel to continue to be briefed in this case, and that the costs incurred by LSG with regard to this particular judgment were fair and reasonable.

[123] I am not persuaded that there should be an uplift above 66 per cent, since the application did result in a small number of documents being disclosed, as well as the filing of an affidavit which dealt with listing issues.

[124] LSG is entitled to $7,203.40, net of GST.

Interlocutory judgment (No 17) of 29 July 2015: application for unless order[54]

[125] On 24 July 2015, Ms Alim applied to the Court for an unless order. On 27 July 2015, Chief Judge Colgan issued a minute indicating that leave had not been sought, a requirement which had been imposed by the Court previously. The proximity of the hearing, however, meant the Court should deal with the matter in a pragmatic way. Memoranda were received on the merits. The issue related to whether LSG should have caused an affidavit from PSG Payroll Ltd to be filed and served. The Court held that the plaintiff had misinterpreted the Court's previous direction on this topic; that the statutory procedure for non-party disclosure should have been adopted in any event; nor was the Court satisfied that payroll documents

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[54] *Nisha v LSG Sky Chefs New Zealand Ltd (No 17)* [2015] NZEmpC 129 (Interlocutory judgment No 17).

from that source were relevant, or of significance, to Ms Alim's case. The application was declined, with costs reserved.

[126] For Ms Alim it was submitted that she should be awarded costs because she was ultimately successful in the substantive proceeding; because LSG had advised Ms Alim that it would provide a payroll audit trial; and because at trial, it was established that relevant documents were retained for seven years and had not been searched. Costs of $3,365.55 plus GST had been incurred, and 66 per cent was sought. Alternatively, if LSG were to be awarded costs, it should be reduced by 50 per cent having regard to the issues raised for Ms Alim's.

[127] For LSG it was submitted that Ms Alim had again demonstrated a cavalier disregard for the Court's procedures, and had adopted a vexatious approach to disclosure issues. Costs were $269.50; an award of 80 per cent was sought.

[128] At the hearing, I dismissed Ms Alim's claim that LSG had failed to provide wage and time records; or that LSG should pay a penalty for not doing so.[55] In my view, costs should take account of that event. Having regard to the clear findings made by Chief Judge Colgan, and the failure to seek leave in the proper way, I award LSG 80 per cent of its costs, being $215.60 net of GST.

Interlocutory judgment (No 18) of 3 August 2015: application by LSG for leave to file application for unless order[56]

[129] LSG sought leave to advance an application for an unless order in respect of a previous disclosure order which the Court made in interlocutory judgment (No 6), which was issued on 15 May 2015. The application came about because a draft affidavit of documents filed for Ms Alim was allegedly non-compliant. The issue related to proper listing of documents for which privilege was claimed.

[130] For LSG it was stated that the documents were necessary to defend the claim, especially as to remedies, and to establish the basis of arrangements made by Ms Alim in relation to the funding and payment of her costs.

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55 Substantive judgment at [247] – [249].

56 *Nisha v LSG Sky Chefs New Zealand Ltd (No 18)* [2015] NZEmpC 133 (Interlocutory judgment No 18).

[131] The Court noted that this request seemed to herald a further interlocutory application, namely one seeking security for costs; it was unclear why such an application had not been advanced previously. The Court ruled that the application for leave had been made too late if the fixture was to be retained. Accordingly, leave to apply was at that point declined, it being noted that LSG could reapply at a later time for costs purposes.

[132] For Ms Alim it was submitted that actual costs were $4,090.50 plus GST; costs increased to 75 per cent were sought.

[133] LSG also sought costs. It was submitted it had incurred $7,765.75. It was observed that the possibility of LSG renewing its request was acknowledged.

[134] Consistent with the approach I have adopted with regard to previous interlocutory judgments, costs should follow the event. That said, it is evident that Ms Alim had not provided the documents which she had been ordered to provide. Accordingly, there is no basis for increasing recovery above 66 per cent. Given the quantum of LSG's costs for this application, I consider those of Ms Alim to be fair and reasonable. I award her $2,699.73, which is to be set off against the total amount of costs and disbursements which is to be paid to LSG.

Interlocutory judgment (No 19) of 10 August 2015: application by Mr Nathan to set aside or amend a witness summons[57]

[135] On 6 August 2015, a witness summons was served on Mr Nathan, a director of PRI, requiring him to attend the Court on 10 August 2015, when the substantive hearing was scheduled to commence. He was not available then, or on any of the later days scheduled for evidence at the substantive hearing. In the result the Court amended the witness summons requiring him to attend on 19 August 2015, the date for which closing submissions were scheduled. The Court was advised that Mr Nathan's evidence would be relevant to the issue as to the genuineness of Ms Alim's terms and conditions at the time of transfer; further, questions would need

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[57] *Nisha v LSG Sky Chefs New Zealand Ltd (No 19)* [2015] NZEmpC 139 (Interlocutory judgment No 19).

to be asked of Mr Nathan as to why Ms Alim was being funded in respect of such a claim. Mr Nathan was to attend with relevant documents. Costs were reserved.

[136] There were several applications for costs in respect of this matter, brought by Mr Nathan and by Ms Alim against LSG. LSG's submissions were primarily focused on why it should not be liable for costs, but it also sought a contribution to the costs which it incurred with regard to this application, of $2,100, net of GST.

[137] Counsel for Mr Nathan, Mr Worthy, submitted that following service of the summons on 6 August 2015, his client immediately took advice to have the document set aside or amended, because of his business commitments. This was followed by an urgent hearing, which resulted in the summons being amended. The attendances for which costs were sought included the urgent preparation of relevant documents, participating in an urgent telephone hearing with the Court on Saturday, 8 August 2015, and receiving and considering the Court's orders, as well as communicating with counsel for LSG. It is argued he was the successful party. It was submitted that his actual costs were $3,200 plus GST.

[138] Second, costs were sought for Ms Alim. Her then counsel, Mr O'Brien, submitted that Ms Alim's actual costs for this interlocutory judgment were $7,356.60 plus GST. It was argued that her involvement in this issue was necessary and appropriate as it concerned the admissibility of documents in the hearing, and also the timetable for evidence being heard during the substantive hearing. For Ms Alim it was argued that she should be awarded 75 per cent of her actual and reasonable costs, being $5,517.45 plus GST.

[139] The issue as to the timing of Mr Nathan's evidence was well capable of discussion between counsel, and it is regrettable that this did not occur. When the Court became involved, a compromise was readily able to be reached as to timing.

[140] It appears that the underlying reason for the decision, initially, to summons Mr Nathan related to the disclosure of documents, as to funding arrangements, which as will be seen later became a contentious and difficult topic. The question of whether Mr Nathan would need to give evidence was not, therefore, straightforward

since, as it will be discussed more fully later, there was consistent unwillingness to provide documents relating to those arrangements.

[141] At the time, Mr Nathan was a director of PRI. I have no doubt that he was aware of the relevant circumstances, and as a director of at least one of the funders of a piece of litigation which clearly arose in controversial circumstances, the possibility of him being called to give evidence was unsurprising.

[142] That he was summonsed arose directly from the stance which the company of which he was a director was taking with regard to Ms Alim's claims, which as I will explain later was for its own purposes. Mr Nathan's reaction to service of the summons was telling. He said "Well, you're not getting anything from me", when asked for relevant documents. I infer that this was intended to protect PRI's positon. In the circumstances, any issues as to Mr Nathan's costs are matters for him and PRI. I dismiss his application.

[143] Turning to the application made on behalf of Ms Alim, I am surprised at the quantum of costs claimed on her behalf. The extent of her lawyer's attendances presumably related to documents they held that might impact on costs issues which could potentially affect PRI and its associated interests – a matter the Court discussed at some length in interlocutory judgment (No 20). Having regard to the non-disclosure by Ms Alim of documents she had been directed to disclose in interlocutory judgment (No 6), I decline to award Ms Alim costs in respect of this application.

[144] LSG did not develop a claim for its costs, whether against Mr Nathan or Ms Alim. In the circumstances, I decline to award it costs in respect of this aspect of the matter.

Disclosure costs

[145] For LSG it is argued that the foregoing applications for costs which have been considered to this point do not take account of the extensive expense incurred in dealing generally with disclosure issues, including compliance with interlocutory judgments. It was submitted that LSG had thereby incurred substantially more

significant costs than would normally be appropriate in a case of this type, essentially one which was a personal grievance and arrears of wages claim of an individual employee.

[146] The amounts sought are as follows, net of GST:

a) Prior to August 2013: $3,420.

b) Compliance with interlocutory judgment (No 2), including reviewing results of a computer search which produced thousands of irrelevant documents: $10,617.75.

c) Compliance with interlocutory judgment (No 5), listing privileged documents, including from counsel's file: $8,552.50.

d) Compliance with interlocutory judgment (No 7), preparing additional affidavits: $3,118.50.

e) Compliance with interlocutory judgment (No 13), disclosing manuals, preparing an affidavit to respond to a remaining interrogatory: $1,438.25.

f) Review by Ms Meechan of discovery issues: $2,450.

[147] An additional amount is sought in respect of invoiced costs from an external provider who gave litigation support. That will be dealt with later, when considering disbursements.

[148] The Court has received no detailed response on behalf of Ms Alim to this application.

[149] I consider that some, but not all, of LSG's claims are merited; it is necessary to deal with each of the above categories individually:

a) I disallow recovery of costs incurred prior to August 2013, as that occurred before the challenge was instituted.

b) As regards compliance with interlocutory judgment (No 2), which included viewing results of a computer search, I take into account this was a result of an application made by Ms Alim who sought a computer search in broad terms. As it transpired, such a search involved a consideration of thousands of irrelevant documents. All of this led the Court to conclude that on several occasions an approach was adopted for Ms Alim which was not proportionate to the issues in the case. Having regard to these factors, I award 75 per cent of the amount claimed, being $7,963.31, net of GST.

c) In interlocutory judgment (No 5), the Court held that Ms Alim was entitled to require LSG to identify relevant documents in which privilege was claimed. Such a requirement is important, because it means that other parties and the Court can have confidence in the fact that counsel for a party has responsibly and diligently inspected and listed a document. The Court will not normally go behind compliance with these ethical obligations.[58] In this case, I am satisfied that that obligation was met. It is demonstrated by the fact that when privileged documents were in fact inspected by the Court, practically every claim for litigation privilege was upheld: interlocutory judgment (No 16).

In my view, the costs that were incurred in meeting these obligations need to be assessed both in the context that Ms Alim was advancing multiple interlocutory applications on a disproportionate, and at times vexatious basis, and as I shall later amplify with the intent of creating undue expense, if not frustration, for LSG. Having regard to these factors, I award 75 per cent of the sum claimed, being $6,414.38, net of GST.

d) Two further affidavits were prepared for LSG, so as to confirm the completeness of the search for documents which had previously been

[58] *Yu v Zespri International Ltd* [2017] NZEmpC 146 at [37] – [39].

undertaken. The same comments as were made with regard to the earlier disclosure issues apply here. I award 75 per cent of the sum claimed, being $2,338.88, net of GST. As a result of the application which led to interlocutory judgment (No 13), counsel for LSG agreed to make available certain policy manuals and standard operating procedures relating to the HR department's reporting to LSG's management team or equivalent. The costs of providing these, and of providing answers to certain interrogatories about performance appraisals, were sought. This work arose because Ms Alim's lawyers were adopting an approach that was not proportionate to the issues. I award 75 per cent of the costs involved to LSG, being $1,078.69 plus GST.

e) Given the criticisms that were made of counsel for LSG, the review of disclosure matters by Ms Meechan when she ultimately became involved, incurring costs of $2,450, was entirely appropriate. I award 75 per cent of the costs involved being $1,837.50, net of GST.

[150] The total award to LSG for the various disclosure attendances is accordingly $19,632.75.

Substantive hearing

[151] Each of the primary parties claim costs against the other. Ms Alim says that the actual costs incurred in representing her at the hearing were $216,094.10 plus GST. She says an appropriate award is two-thirds of that sum, together with an uplift of $5,000, totalling $149,062.73.

[152] LSG asserts that its actual costs relating to preparation and attendances of counsel at the substantive hearing totalled $118,302,[59] exclusive of GST; it seeks an award of 80 per cent of that sum, which is $94,641.60, plus GST.

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[59] Appendix A to Memorandum of Counsel for LSG dated 26 November 2015, at p 36; as totalled correctly.

[153] Both parties assert that they were successful. I will outline the details of their respective assertions shortly. Mr France submitted that the Court should conclude that Ms Alim was partially successful, and that it might be appropriate to conclude the outcome was mixed and that the Court should decline to make any order for costs. This, he said, would assist PRI.

[154] I accordingly summarise dicta from the leading case which discusses the correct approach when there is a mixed measure of success.

[155] In *Elmsly*, the Court of Appeal said this:[60]

> [39] It is not usual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made. The reluctance to assess costs on an issue by issue basis probably stems from the reality that in most cases of partial success it is not practical to separate out from the total costs incurred by the parties what was incurred in relation to the individual issues before the Court.
>
> [40] The result of the present case was that Dr Elmsly was awarded relief and it would appear (given that there was no *Calderbank* letter) that he had to go to Court to receive that relief. Conventional practice (probably influenced by the way in which the old payment in rules used to operate) has been to regard a plaintiff in this situation as having an entitlement to costs. While this is no doubt a simplistic and not entirely logical approach, it is reasonably straightforward to apply. Further, it is not unjust to defendants, providing judges are prepared to react appropriately where there has been a *Calderbank* offer. In any event, whatever the merits of the current costs practice, there is nothing out of the ordinary in the conclusion of the Judge that Dr Elmsly was entitled to costs.[61]

[156] In considering this dicta, it is necessary to have regard to the factual circumstances which were before the Court. Dr Elmsly had claimed $137,000 for breaches of his employment contract, but had recovered only $15,000.[62] His costs were approximately $72,000 (including a modest disbursement of about $1,300). The Employment Court had awarded him approximately half of his actual costs, which were rounded to $36,000. The Court of Appeal concluded that whilst it would have been open to conclude that each party be left to pay their own costs, the implicit

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60 *Health Waikato Ltd v Elmsly*, above n 8.

61 To similar effect are the earlier statements of the Court of Appeal in *Packing In Ltd (in liq) v Chilcott* (2003) 16 PRNZ 869 (CA) at [5] – [6].

62 *Health Waikato Ltd v Elmsly*, above n 8, at [20].

conclusion of the Employment Court that the plaintiff had sufficient success at trial to warrant an award of costs was also open to it.

[157] However, later in the judgment, the Court of Appeal stated that the trial Judge had concluded that at least a majority of the hearing time had been associated with issues on which the plaintiff had failed. The Court said that whilst New Zealand courts did not usually award costs on an issue-based basis, the failure of a "successful party" on so large a scale could not properly be ignored.[63]

[158] It was decided that the trial Judge had not assessed the plaintiff's relative lack of success at trial correctly; he had been awarded a contribution to costs on issues in which he had failed, which was plainly wrong.[64] The Court of Appeal fixed $30,000 as the proportion of the costs reasonably incurred by the plaintiff in relation to the issues in which he succeeded; two-thirds recovery of that figure was awarded, being $20,000.[65]

[159] I bear these conclusions in mind when considering whether it could be said there was a mixed outcome, or that one party actually succeeded overall.

Submissions on issue of mixed success

[160] The original submissions which were filed for Ms Alim on this issue were advanced by her previous counsel, Mr O'Brien. He submitted in summary that the primary principle was that costs should follow the event. He said that in this case, the Authority's determination had been overturned, and a primary finding which it had made to the effect that there was an interim arrangement between Ms Alim and LSG to pay her at a particular rate, was not upheld by the Court. It was argued that Ms Alim had successfully established a personal grievance for unjustifiable action due to LSG's delay in resolving the issues of Ms Alim's entitlements; this was based on paragraphs which had in fact been pleaded, albeit in support of a dismissal grievance. Counsel then argued that LSG's pleaded defence, based on the assertion which had succeeded in the Authority that there was an interim arrangement entered

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63 At [44], at para 3.
64 At [44] and [45].
65 At [48].

between Ms Alim and her union representatives on the one hand, and LSG on the other, was unsuccessful, because Ms Park, who was responsible for HR matters at LSG, had admitted that the arrangement was unilateral and was not in fact agreed.

[161] In short, it was asserted that Ms Alim had achieved a "significant measure of success", and that LSG's defence based on an interim arrangement was not upheld in its entirety therefore she should accordingly receive reasonable costs.

[162] At the costs hearing, Ms Wendt adopted these submissions. She also submitted that Ms Alim had effectively obtained just under 10 per cent of the quantum she sought, excluding penalties. Because a penalty is prima facie payable to the Crown, penalty claims should be put aside for costs purposes. The 10 per cent assessment reflected, counsel submitted, practical pleading considerations and was within the range of average success rates. In any event, even if success was limited in economic terms, that alone would not be decisive of costs issues.

[163] Mr France, counsel for PRI, and Mr Scampion, counsel for Mr Hay, supported the thrust of the submission advanced for Ms Alim that she had succeeded and that costs should be awarded to her on that basis.

[164] In the submissions presented for LSG, it was submitted that Ms Alim's assertion that she had succeeded was unrealistic and untenable, given the Court's key finding that there had been a sham.

Discussion

[165] While it may have been arguable that each party had some success, for the following reasons I am satisfied that the interests of justice clearly require the Court to conclude that LSG was the successful party, and that costs should follow that event. On any view, the extent of Ms Alim's success was almost insignificant. LSG faced a complex factual and legal claim which centred on a controversial interpretation of the applicable provisions of Part 6A of the Act; various causes of action as to the way in which Ms Alim's entitlements were dealt with over some 11 months, were also raised. As well as seeking orthodox remedies, a very substantial claim for penalties was raised and pursued.

[166] LSG successfully resisted each pleaded cause of action. The only matter on which Ms Alim succeeded was due to an intervention by the Court, which resulted in a finding on a basis that had not been pleaded. As I said in the substantive judgment, Ms Alim was as a result awarded modest compensation.

[167] In considering this question, it is worth referring to the application for leave to appeal the judgment which was subsequently advanced for Ms Alim. Three points were raised on the application: whether there was a sham contract, whether s 69I of the Act had been correctly interpreted, and whether LSG had, in effect, taken a unilateral approach to Ms Alim's remuneration arrangements.[66] These grounds all related to important and key findings which the Court had made in favour of LSG.

[168] In the course of its judgment, the Court of Appeal described the one matter on which Ms Alim had succeeded as being a "vestigial claim for disadvantage". That characterisation, with respect, reflects my own assessment.

[169] The debate as to whether Ms Alim succeeded to the extent of 10 per cent of her claim (which appears to relate to the sum which was awarded prior to the Court's assessment of contributory conduct under s 124), or five per cent (which is a figure based on the actual amount awarded), does not in either instance reflect the realities of the outcome.

[170] Mr France argued that the claim for penalties could have been ignored because Ms Alim was never going to be awarded $600,000 for penalties. In my view, the tenacity with which Ms Alim's various claims were brought meant that a potential exposure for penalties could not be ignored. The issue of quantum was a separate and subsequent matter.

[171] It was also argued that from Ms Alim's point of view she felt that her claim had succeeded. Whilst that may be so, the Court must make an assessment from an objective standpoint. The broader picture suggests a rather different answer, as just discussed.

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66 *Nisha v LSG Sky Chefs New Zealand Ltd* [2016] NZCA 21, [2016] ERNZ 65 at [9] – [17].

[172] I am satisfied that this is a case where the Court must conclude that LSG succeeded on practically every claim that was advanced against it. In one modest respect, Ms Alim succeeded. That outcome, however, could not possibly outweigh the fact that all the pleaded claims were dismissed. The small success which was achieved could be recognised by an adjustment, so that LSG is not awarded contribution on the matter on which it did not succeed.[67] Any adjustments, however, must also take account of the Calderbank offers, as I explain below.

Fair and reasonable costs?

[173] LSG's claim for costs is based on invoices which it has provided to the Court.

[174] As far as the substantive hearing is concerned, four lawyers were involved, on a range of hourly rates. They were:

- Ms Nelson, $200 per hour plus GST;
- Ms Douglas, $275 per hour plus GST;
- Ms Borchardt, $250 per hour plus GST (but her invoice was also reduced); and
- Ms Meechan QC, $700 per hour plus GST.

[175] These rates are entirely reasonable, given the circumstances. I particularly refer to Ms Meechan's hourly rate. In my view, the briefing of a Queen's Counsel, which resulted in a charge-out rate commensurate with the seniority of a member of the inner Bar, was justified; I also note that work was undertaken by juniors, where appropriate.

[176] The invoices disclose the hours incurred by each author. The invoiced sum for preparation for the hearing was $62,948.25, (excluding GST). In respect of the hearing itself, Ms Meechan and Ms Douglas appeared; the amount claimed for that event is $55,353.75, (excluding GST), for 6.5 days.

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[67] *Health Waikato Ltd v Elmsly,* above n 8, at [45].

[177] Ms Wendt submitted that it can be useful to consider the amount incurred per hearing day, an approach which was undertaken by Judge Travis in *Richardson v Board of Governors of Wesley College*.[68] At that time the appropriate range was between $3,800 to $6,400 per hearing day on the basis of a review of comparatively recent first instance cases in the Employment Court. This approach was cited with approval by the Court of Appeal subsequently.[69] Ms Wendt submitted that a per hearing day range is consistent with the principle that costs awards should be predictable. She then advanced a submission based on the costs incurred not only for the substantive hearing, but all the interlocutory judgments. In this particular case, that produces an artificially high sum, since I have concluded that each interlocutory step must be considered separately and on its merits.

[178] The per day rate, based on costs claimed for the preparation and appearance at the substantive hearing, is approximately $9,100 allowing one day of preparation for each hearing day. Although high, given the plethora of issues which were raised on behalf of Ms Alim by her lawyers, I do not regard it as unreasonable.[70] Indeed, a comparison of the costs claimed by those lawyers for the equivalent preparation and hearing attendances was over $100,000 more than the amount incurred by LSG, which puts its costs in perspective.

[179] Sometimes it can be of assistance to compare the amounts involved with a scale assessment under the Court's Costs – Guideline scale. However, no submissions were made to the Court with regard to the substantive hearing.

[180] Mr France submitted that the Court could be assisted by referring to the costs awards in other long-running cases.[71]

[181] In the result, I am satisfied that the information provided to the Court establishes that the invoiced sums provide a fair and reasonable starting point for cost purposes.

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68 *Richardson v Board of Governors of Wesley College* [1999] 2 ERNZ 199 (EmpC).

69 *Transmissions and Diesels Ltd v Matheson* [2002] 1 ERNZ 22 (CA) at [24].

70 In fact, the figure is less than that which was approved in *McCulloch v NZ Fire Service Commission* EmpC Wellington, WC61B/98, 23 November 1998: $9,375 per hearing day.

71 *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 96; *The Commissioner of Salford School v Campbell* [2015] NZEmpC 186 and see *Elmsly,* above n 8 at [50].

What is a reasonable contribution to LSG's costs?

[182] Under the authorities, the next step is to consider the level which should be regarded as a reasonable contribution to LSG's costs, as the successful party.

[183] As the Court of Appeal stated in *Binnie,* 66 per cent is generally regarded as helpful in ordinary cases.[72]

[184] There are several factors which should then be considered. The first relates to the speculative nature of Ms Alim's claims; the second relates to LSG's final Calderbank offer; the third requires an assessment of costs with regard to the disadvantage grievance on which Ms Alim succeeded.

[185] First, I consider whether the running of many speculative and unsuccessful claims justifies an uplift from 66 per cent.

[186] High Court Rule 14.6 provides for increased costs and indemnity costs. The latter are not sought, and in any event, I do not think this case requires such a conclusion, because I would not have been persuaded that the running of Ms Alim's claims demonstrated the high threshold of "exceptionally bad behaviour": *Bradbury v Westpac Banking Corp*.[73]

[187] The more appropriate question is whether increased costs are justified. In *Bradbury*, the Court of Appeal said in summary that increased costs may be ordered where there is a failure by the paying party to act reasonably,[74] that is in the conduct of the proceeding as opposed to the events giving rise to the proceeding.[75] In my view, the claims which were advanced for Ms Alim were, in the main, speculative and wholly misconceived. At the centre of the claim was a sham, and an obvious one. Compounding this problem was the fact that penalties were sought at an extraordinary level. Finally, the case was run in a tenacious and at times vexatious fashion.

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72 *Binnie v Pacific Health Ltd*, above n 7, at [14].
73 *Bradbury v Westpac Banking Corp*, above n 51, at [28].
74 At [27].
75 *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) at [160].

[188] These factors demonstrate a deliberate strategy which was adopted in advancing Ms Alim's claims, which I find was to inflate LSG's costs and disbursements.

[189] The context of the claims cannot be ignored. One of Ms Alim's funders was PRI. In related litigation, the High Court held that PRI's inflation of leave balances and pay rates of numerous members of the transferred staff was undertaken, out of commercial spite for having lost a catering contract,[76] a conclusion with which I agreed in interlocutory judgment (No 22).[77]

[190] A further contextual matter related to Ms Alim's position. Her claim was speculative, but she was also caught up in the anti-competitive behaviour of her supporters. As I shall explain more fully later, it is inherently unlikely that she realised that her case was being managed and advanced in a most unusual fashion. She was not paying the invoices. Had she been responsible for her own legal fees, I am confident that she would not have permitted the claim to be advanced on the scale that it was.

[191] All of this meant that LSG faced a most unusual set of circumstances where the costs incurred in prosecuting Ms Alim's claims were apparently unlimited, and it had no choice but to resist the range of claims made against it.

[192] These comments apply to a number of the interlocutory steps, but also to the substantive hearing itself. In my view, the advancing of claims on a speculative and wholly misconceived basis was unreasonable conduct that warrants a finding that costs should be increased.

[193] Secondly, I refer to the final Calderbank offer made by LSG. As already discussed:

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[76] *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2015] NZHC 685 at [14].

[77] *Nisha v LSG Sky Chefs New Zealand Ltd (No 22)* [2016] NZEmpC 166 at [123] and [127] (Interlocutory judgment No 22).

a) An amount was offered which exceeded the sum for which Ms Alim obtained judgment. Under HCR 14.11(3), LSG is entitled to costs on steps taken thereafter in the proceeding.

b) The offer recognised that the majority of Ms Alim's claims were wholly misconceived.

c) As found earlier, it was unreasonably declined.

d) There should accordingly be an uplift above 66 per cent to reflect the unreasonable refusal.

[194] Third, I consider Ms Alim's modest success. Some allowance should be made for this factor. But for this factor, I would have awarded LSG 85 per cent of its costs in respect of the hearing. Taking this element into account, I award 80 per cent, that is, $94,641.60.

[195] Later in this judgment I will consider the issue of whether there should be a reimbursement of disbursements, and GST. I will also consider separately the complex issue of who should pay.

Interlocutory judgments for costs purposes

[196] Following the substantive hearing, a number of issues arose which required the Court to issue no fewer than five judgments, before the costs hearing itself could proceed. It is now necessary to deal with the cost issues relating to each of those decisions.

Interlocutory judgment (No 20) of 20 June 2016: application by LSG for disclosure orders[78]

[197] LSG sought disclosure orders for cost purposes against Ms Alim, PRI and Mr Nathan, the latter two being at that stage, non-parties. I ordered Ms Alim to file a supplementary affidavit of documents, and PRI to file and serve an affidavit of

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[78] *Nisha v LSG Sky Chefs New Zealand Ltd (No 20)* [2016] NZEmpC 77 (Interlocutory judgment No 20).

documents; I deferred the making of such an order against Mr Nathan as director,[79] indicating that it would be preferable for PRI itself to disclose the documents which were sought.[80]

[198] I reserved costs with regard to the application.[81] Pursuant to that reservation, LSG and Mr Nathan both seek costs.

[199] LSG has provided its invoices with regard to post-judgment attendances.[82] Analysis of these reveals attendances relating to Ms Alim's application for leave to appeal to the Court of Appeal, and for preparation of the costs submissions which were advanced in late 2015. The former are not claimable in this Court, and the latter I put to one side at the moment. It would appear that the applicable costs are those of Ms Douglas totalling $4,867.50;[83] the applicable fee for Ms Meechan was $16,588.48.[84] The total costs invoiced to LSG for present purposes is therefore $21,455.98, net of GST.

[200] For LSG, Ms Meechan submitted:

a) A labour intensive and costly exercise had to be undertaken to obtain an effective remedy.

b) The extent of post-judgment interlocutory activity was extraordinary.

c) The Calderbank offers which had been made were still relevant; it was to be noted that at no stage had any offer for costs been made, save for Ms Alim who proposed that her liability for costs in the Court and the Authority be limited to $10,500 in total.

[201] For Ms Alim, Ms Wendt submitted:

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79 Until 23 February 2016 when he resigned, after the application against him for joinder had been filed and served.
80 Interlocutory judgment No 20, above n 78, at [123] and [124].
81 At [127].
82 Annexed to Mr Bryant's affidavit.
83 Invoices of 26 February, 31 March and 29 April 2016, net of disbursements and GST.
84 Invoice of 29 April 2016.

a) that the plaintiff should not be liable for any post-judgment costs, given her limited means; and

b) the steps that were taken in the post substantive judgment phase largely concerned LSG's application for joinder of others, in respect of which Ms Alim took a neutral position.

[202] For PRI, Mr France submitted:

a) If the Court was minded to award costs against PRI with regard to the applications for disclosure and joinder, there was no necessity to increase those costs from a 66 per cent starting point.

b) As a non-party, PRI was entitled to oppose the applications and reasonably did so given the potential consequences to it.

c) Further, PRI should not be liable for issues that did not concern it.

[203] For Mr Nathan, Mr Worthy submitted:

a) His actual costs with regard to the application were $1,744 plus GST, which related to the filing of documents, and the attendance of counsel at the hearing when oral submissions were given on behalf of Mr Nathan.

b) In the event, the Court did not order Mr Nathan to provide non-party disclosure, as had been sought by LSG. Mr Nathan was accordingly the successful party.

c) Although leave was reserved for LSG to bring that application back on, but it never did so.

d) Sixty-six per cent of actual costs was accordingly sought.

Discussion

[204] LSG succeeded in obtaining the orders it sought against Ms Alim and PRI. Costs should follow that event.

[205] As in all aspects of the costs phase, the issues which were considered in interlocutory judgment (No 20) were complex. For Ms Alim, there was a continued strategy of disclosing as little information as possible regarding her funding arrangements. PRI adopted a similar stance.

[206] In those circumstances, LSG's costs were fair and reasonable and should be used as a basis for an assessment of costs.

[207] Turning to Mr Nathan's position, Mr France appeared for PRI and Mr Nathan; the submissions that were presented with regard to disclosure applied to both those non-parties. In the result, I deferred making an order against Mr Nathan, on the basis that it would be preferable for the company of which he had been a director at all material times to give that disclosure; the option of an order being made against Mr Nathan, however, was left open. I find that he could have provided the relevant documents but adopted the positon that he would not assist. He was thereby the author of the difficulties in which he found himself. I do not accept that he could not have facilitated the provision of documents evidencing funding arrangements for Ms Alim. In these circumstances, I do not accept the submission that Mr Nathan is entitled to costs.

[208] I agree with Ms Meechan that Mr Nathan's personal costs arose because he had at all material times been a director of PRI, so that in the circumstances of this case, his costs should be a matter between him and the company.[85] I decline his application for costs with regard to interlocutory judgment (No 20).

[209] I accept Ms Meechan's submission that the final Calderbank offer which had been made and rejected should continue to be relevant at the costs stage. Had the offer not been unreasonably rejected, the post judgment costs would not have been incurred. This factor justifies an uplift from a 66 per cent starting point, as does the fact that LSG was required to go to such lengths to obtain information in support of its applications for joinder, to 80 per cent.

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[85] In my view, the discussions as to indemnity of employees in *Marshment v Sheppard Industries Ltd* [2012] NZEmpC 93 at [20], and *Evolution E-Business Ltd v Smith* [2012] NZEmpC 58 at [11] relate to wholly different circumstances, and are not applicable here.

[210] I award LSG $17,164.78, net of GST.

Interlocutory judgment (No 21) of 10 August 2016: application by LSG for further and better particulars[86]

[211] On 5 August 2016, LSG filed an application for five orders. The first was a request that the Court deal urgently with LSG's previous application to join PRI to the proceeding for costs purposes. The Court was asked to make an order for joinder on the basis of papers already before it, with leave reserved for PRI to apply to set aside the order on notice. This was because PRI had applied to the Registrar of Companies to be removed from the Companies' Register (the Register), which could potentially occur before the Court could determine questions of joinder. Other orders were also sought against Ms Alim (alleging she had failed to comply with previous interlocutory orders made by the Court) against Mr Hay (joining him as a party for cost purposes) and against Kensington Swan (seeking production of documents in its possession, as lawyers for Ms Alim).

[212] On 8 August 2016, after a telephone conference with counsel, I declined to make the urgent orders sought, but indicated that a prompt hearing at which all parties could be heard could be conducted on 25 August 2016.

[213] Two days later, on 10 August 2016, LSG renewed its request that the Court proceed on an urgent basis to make an order for joinder, as there was a concern that the Registrar of Companies was about to remove PRI from the Register. It emerged that the objection procedures of the Companies Act 1993 would preclude such a possibility. Accordingly, I declined the application to deal with the joinder of PRI on the urgent basis proposed by LSG.[87]

[214] The affected parties for the purposes of this application were LSG and PRI. LSG did not succeed in its application. However, PRI took a pre-emptive step, without notice to LSG, the Court, or even its own counsel, to be removed from the Register so that it could circumvent any potential liability for costs in the

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86 *Nisha v LSG Sky Chefs New Zealand Ltd (No 21)* [2016] NZEmpC 98 (Interlocutory judgment No 21).

87 At [34].

proceeding, even at the stage when there were live applications before the Court for joinder and then resolution of costs issues.

[215] Accordingly, costs should lie where they fall. I decline to award costs in respect of this interlocutory judgment.

Interlocutory judgment (No 22): an application for joinder[88]

[216] In this judgment, PRI and Mr Hay were joined as parties. The path to the making of that order was complicated, as the judgment demonstrates. Subsequently, Mr Hay applied to the Court of Appeal for leave to appeal against the order for joinder made against him, which was declined.[89]

[217] Costs were reserved with regard to the various applications dealt with in the judgment. LSG seeks such costs. Again, it has not isolated those so that it has been necessary for the Court to examine the relevant invoices in order to identify the costs incurred.

[218] For present purposes, Ms Douglas' relevant costs were $4,592.50, and Ms Meechan's relevant costs were $11,921.70;[90] these total $16,514.20, net of GST.[91]

[219] Each relevant party essentially relied on the submissions which I recorded earlier as to interlocutory judgment (No 20).

[220] However, by this stage Mr Hay, a former director of PRI and one closely associated with it, was represented and heard for the purposes of the interlocutory judgment. Through counsel, he strongly resisted the orders sought. Mr Scampion submitted that Mr Hay's conduct had been reasonable at all times. He said that there should not be a disproportionate focus on his opposition to being joined as a party.

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88 (Interlocutory judgment No 22, above n 77).

89 *Hay v LSG Sky Chefs New Zealand Ltd* [2017] NZCA 153.

90 Both invoices are dated 31 August 2016, net of GST.

91 Some of the invoices placed before me clearly relate to costs incurred elsewhere, such as in the High Court, and these of course cannot be dealt with in this Court. They have not been considered.

[221] Turning to Mr Nathan, the application for joinder which had previously been brought was not pursued by LSG. He sought 66 per cent of his costs as to the joinder. In his supporting affidavit, he said that those costs were incurred in November 2015 ($800 plus GST) and December 2015 ($3,100 plus GST). The nub of the submissions filed on his behalf was that at some later point, LSG decided not to proceed with the application for joinder, on his advice that despite being the only New Zealand-based director he did not in fact have any knowledge or involvement in the proceedings so that LSG did not pursue its application against him. It was accordingly submitted that he should be regarded as a "successful party" with regard to the application for joinder which was not pursued.

[222] I record that at the costs hearing of 6 September 2017, I dismissed LSG's application for joinder of Mr Nathan.

Discussion

[223] LSG succeeded in obtaining orders for joinder, in the face of considerable difficulties. Costs should follow that event.

[224] LSG's costs are fair and reasonable.

[225] I am not persuaded that any allowance should be made for Mr Nathan's costs in respect of the application of joinder. He incurred costs when he was a director of PRI, and those should be a matter between him and the company.

[226] The comments I made earlier as to the continued application of the Calderbank offer made by LSG apply to this judgment; a further consideration relates to the significant difficulties LSG faced in advancing its costs applications. Those factors justify an 80 per cent award.

[227] LSG is accordingly entitled to costs of $13,211.36, net of GST.

Other attendances by LSG to this point

[228] LSG placed material before the Court relating to other costs incurred in the post substantive judgment phase – particularly with regard to the preparation of

memoranda as to costs before any interlocutory applications were filed.[92] An analysis of the relevant invoices discloses that some of the invoiced attendances relate to Ms Alim's application for leave to appeal the Court's substantive judgment to the Court of Appeal. Costs for those attendances cannot be recovered in this Court.

[229] It is apparent that considerable time was devoted to the preparation of the initial application for costs, Ms Park's affidavit in support, and two subsequent memoranda in reply.[93]

[230] Given the ultimate outcome of LSG's application for costs, some allowance should be made for these attendances. Costs should follow that successful event.

[231] Since only indirect assistance is available from the invoices which have been filed, it is my assessment that LSG should receive a contribution to its costs in respect of that aspect of the costs exercise, in the sum of $5,000.

Interlocutory judgments (No 23)[94] *of 4 August 2017 and (No 24)*[95] *of 28 August 2017: application by Mr Hay against LSG for disclosure; and for joinder of LSG Asia*

[232] Not long before the commencement of the two-day hearing that had been set down for determination of cost issues, Mr Hay advanced two applications. One was for what was described as further and better discovery against LSG with regard to its costs in the proceedings, and as to the funding of its defence of the proceedings. The application was declined. The other was an application for joinder of LSG Asia. That application was also declined.

[233] LSG also brought an application to strike out Mr Hay's applications. Since the application for discovery was dismissed in interlocutory judgment (No 22), it

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92 Appendix A to LSG's memorandum of 26 November 2015, and invoices attached to Mr Bryant's affidavit of 13 July 2017.

93 Dated 26 November 2015 and 15 December 2015.

94 *Nisha v LSG Sky Chefs New Zealand Ltd (No 23)* [2017] NZEmpC 96 (Interlocutory judgment No 23).

95 *Nisha v LSG Sky Chefs New Zealand Ltd (No 24)* [2017] NZEmpC 105 (Interlocutory judgment No 24).

was unnecessary to consider the application for strikeout, which could only apply to the application for joinder. As that application was also dismissed, it was unnecessary to consider the possibility of strikeout in interlocutory judgment (No 24).

[234] Costs were reserved in both instances. Subsequently I received submissions from counsel for LSG and Mr Hay, who dealt with the costs implications of the two interlocutory judgments together. I do likewise.

[235] For LSG, Ms Meechan sought indemnity costs of $20,410 excluding GST, or alternatively an uplift on scale costs in defending these applications.

[236] For Mr Hay, Mr Scampion submitted that Mr Hay had acted reasonably, but if costs were to be awarded, they should be on a scale basis. Using costs assessed with regard to the classifications of the High Court Scale, on a Category 2, Band B basis, he said that costs should "be less than $9,700.50".

[237] Mr Scampion developed his submissions for Mr Hay by arguing that LSG's claim for costs was excessive in the circumstances, that Mr Hay's applications were not frivolous, vexatious or doomed to fail – rather they were a legitimate attempt to ensure the real parties were before the Court when it considered the issue of costs. Nor was Mr Hay entirely unsuccessful, in that LSG did give discovery of invoices of an external provider after Mr Hay issued his application, which had not been provided previously. In short, he submitted that there was no reasonable basis for awarding either indemnity or increased costs; and/or the Court should take into account the lack of merit of LSG's strikeout application which was unnecessary.

[238] LSG successfully resisted Mr Hay's applications. Costs must follow that event. Its strikeout application was a minor matter. The only real issue is quantum.

[239] Mr Scampion referred to costs under the High Court Scale; in fact, the applicable scale is that of this Court, although it is a guideline only; and does not necessarily apply to this case since most of the relevant activity took place before it was introduced.

[240] For what it is worth, an assessment under the correct scale, using the steps relied on by Mr Scampion, but allowing for second counsel as is appropriate, is $9,968 on a 2B basis.

[241] Recourse to the scale does not necessarily provide an accurate cross-check, since there were two separate hearings, with the submissions for the second requiring a consideration of the conclusions of the Court in interlocutory judgment (No 23).

[242] Both hearings were conducted under urgency, so as to maintain the long-established fixture for the substantive costs hearing. Mr Scampion argued that there was nothing sacrosanct about the dates which had been fixed for that hearing, but given the difficulties in bringing the costs applications on, I do not agree. Allowance must therefore be made for the urgent nature of the applications. I also consider that each application advanced for Mr Hay was ambitious.

[243] In my view, the actual costs incurred for LSG were fair and reasonable. There should be an uplift from 66 per cent. I award 80 per cent, being $16,328, net of GST. Mr Hay is to pay this sum to LSG.

GST

[244] In the various materials that I have been required to consider, LSG has framed some of its claims as being GST inclusive, and some of them on a GST exclusive basis.

[245] As the Court of Appeal stated in *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC*, a losing party is not paying for a service provided to it by the successful party or its lawyers.[96] Consequently, GST is not an element of a costs award. It can, however, be a relevant matter for the exercise of the Court's discretion if the successful party has paid GST, but is not able to recover it.[97]

[246] Although no direct information has been provided to the Court on the topic, I infer that as a substantial corporate entity, LSG will be registered for GST; it will

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96 *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282, (2016) 23 PRNZ 260.

97 At [12].

therefore have been able to recover the GST elements of the invoices rendered to it by its lawyers.

[247] Accordingly, it is not necessary to allow for GST in the costs award made in favour of the first defendant.

Disbursements

[248] LSG also seeks reimbursement of disbursements if incurred.

[249] As was noted by the Court of Appeal in *Alton-Lee*, "it is conventional where costs are fixed for the award to include 100 per cent recovery in relation to disbursements reasonably incurred".[98]

[250] I deal with these as follows:

a) Office expenses sought: no explanation is given as to what these are for, and they are disallowed.

b) Document support has been obtained from an external provider, Goodwin Yallop, for what was described as "discovery support". In LSG's submissions, it was stated that the additional resource was necessary due to the volume of applications which were filed close to the substantive hearing. These attendances were in the nature of legal attendances, and I allow 66 per cent, being $5,760.

c) Document support was also given by the same provider for costs purposes, in the sum of $4,298.33 plus GST. This was described as necessary to prepare a hyperlink and indexed electronic document set of pleadings, of more than 400 documents, to be served on Mr Hay in accordance with directions of the Court.

   Although Mr Scampion was critical of the way in which documents were made available to Mr Hay after he was joined, these criticisms have to be assessed in the context of the description of steps taken, as

[98] *Victoria University of Wellington v Alton-Lee*, above n 6, at [60].

evidenced in Ms Douglas' letter to Mr Scampion of 22 June 2017. In light of that description, I am satisfied that a responsible effort was made to comply with the Court's directions.

It is unsurprising that there were difficulties in ensuring that all documents in the proceeding were supplied. These attendances were in the nature of legal attendances. I allow two-thirds, being $2,836.89. As submitted by Mr France, this is a liability which should fall on Mr Hay alone.

d) A claim is made for "NZLS Research", at $905. It appears that this too was in the nature of services which might be undertaken by a lawyer, and I allow 66 per cent being $597.

e) There are other miscellaneous disbursements such as filing fees, process service fees, printing, copying and taxi, for which no narrative is given; they are disallowed accordingly.

[251] In summary, Mr Hay is to pay LSG disbursements of $2,836.89; I will discuss liability for the remainder, totalling $6,357, shortly.

Liability for costs

[252] I have concluded, to this point, that LSG is entitled to costs and disbursements totalling $198,625.86. Ms Alim is entitled to costs of $2,699.73. The balance due to LSG is accordingly $195,926.13. Who should pay?

[253] LSG says that Ms Alim, PRI and Mr Hay should be jointly and severally liable for all costs to which it is entitled. Each of those parties denies any liability for those costs.

[254] Different issues arise in respect of the potential liability of Ms Alim as the original party on the one hand, and in respect of PRI and Mr Hay who have been joined because of funding issues on the other. I will accordingly deal with the position of each sequentially.

Ms Alim

[255] For LSG, the following was submitted as to whether Ms Alim should be liable for costs:

a) She adopted and perpetrated a sham.

b) She allowed her claim to be escalated, and run in a way that was entirely disproportionate to the amount of any realistic claim, and the merits of the case.

c) She failed to establish clearly the basis of funding arrangements with PRI, via her then lawyers who should have undertaken this on her behalf.

d) She failed to comply with orders that would have enabled LSG to prove the true position in relation to funding. She had recently filed an affidavit in answer to a concern that she had not listed any privileged communications in which she said that her lawyers did seek instructions from her in relation to her case, and updated her; and that she had not listed privileged documents because she did not believe the communications of this type would fall within the category of what she was directed to disclose. The implication of the submission was that this assertion was unbelievable and unreliable.

e) She asserted that claims were pursued as a matter of principle, and must now pay for that "principled" approach.

f) She could not now shield behind protestation of impecuniosity in circumstances where she had allowed herself to be used for sham purposes, and where Calderbank offers had not been unreasonably rejected.

[256] For Ms Alim, it was submitted that if the Court were to conclude LSG was the successful party for costs purposes, she could not pay more than the $10,500 already paid into Court. It was submitted that a higher award would be an exercise

in futility, and would be punitive and contrary to authority particularly if a large costs order were to lead to Ms Alim being bankrupted.[99]

[257] Ms Wendt submitted that the proper exercise of the Court's costs discretion, in accordance with its equity and good conscience jurisdiction, would require Ms Alim's liability to be restricted to the sum already paid into Court by her, which could be paid to LSG. Alternatively, if the Court were to make a joint and several order, her liability should be limited to $10,500.

[258] Ms Alim has filed several affidavits with regard to her financial circumstances.[100] On the basis of the evidence which was before the Court at the time of interlocutory judgment (No 22), 14 December 2016, I concluded at that stage that Ms Alim was at all material times, in effect, insolvent.

[259] For the purposes of the present hearing, a further affidavit was filed. In it, Ms Alim outlined her financial circumstances, which remain difficult. Her income is modest. She has a KiwiSaver account and some savings which she proposes to apply to an upcoming medical procedure; and she has significant debts. She remains, in effect, insolvent.

[260] I also record that at the hearing Ms Wendt conceded that an intended medical procedure had been delayed; and that delay would allow her to save a little more.

Discussion

[261] I have already referred briefly to the contextual factors which related to Ms Alim's position. As observed earlier, her claim was supported because of commercial spite between PRI and those allied with it on the one hand, and LSG on the other. I have already found it was inherently unlikely she realised her case was being managed and advanced in a most unusual fashion, and that had she been responsible for her own fees, she would not have permitted the claim to be advanced on the scale that it was. She was plainly vulnerable. Although she said instructions

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99 This submission was made with reference to cases such as *Koia v Attorney-General (No 2)* [2004] 2 ERNZ 274 (EmpC), *Kaipara v Carter Holt Harvey* [2012] NZEmpC 92, [2012] ERNZ 395 and *IHC New Zealand Inc v Fitzgerald*, EmpC Wellington WC7/07, 28 February 2007.

100 Summarised in interlocutory judgment (No 22), above n 77, at [115] – [120].

were sought from her, it is probable that others conceived of the strategy which she was asked to approve and which was adopted. Whilst she can be criticised for having gone along with a claim that was advanced on a wholly disproportionate basis, it is unlikely that she would have been able to fully understand that the case was being run in a manner which the Court ultimately described as vexatious.

[262] In August 2016, when LSG's applications for joinder of PRI and Mr Hay were being considered, Mr O'Brien sought leave to withdraw as Ms Alim's lawyer on the record, on the ground that a conflict of interest had arisen. It was asserted that his firm, Kensington Swan (KS), could no longer act for Ms Alim due to the conflict, the nature of which was said to be privileged.[101]

[263] The evidence which subsequently came before the Court, however, established that there were clear links between PRI, Mr Hay and KS.

[264] It is clear from the totality of the evidence which was adduced that Ms Alim's lawyers had acted extensively for PRI, and that Mr Hay had been actively involved in those proceedings. KS were lawyers on the record for PRI (and Pacific Flight Catering Ltd) in the Court of Appeal and Supreme Court proceedings against LSG.[102] In this proceeding, the KS invoices regarding Ms Alim's claims, and its trust account records also confirm an association between KS and PRI/Mr Hay, as I have found previously.[103]

[265] I shall return to factors such as these when considering the positions of PRI and Mr Hay shortly, but for present purposes I find that given the context, a conclusion that Ms Alim did not control her claims is entirely unsurprising given the significant professional relationship her lawyers had with PRI and Mr Hay.

[266] I was surprised to be told there was no documentation regarding Ms Alim's fee arrangements in light of her potential costs liability. In the course of the costs hearing, the question arose as to the nature of the funding arrangements. At that

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101 At [7].

102 *Pacific Flight Catering Ltd v LSG Sky Chefs New Zealand Ltd* [2013] NZCA 386, [2014] NZLR 1; *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2014] NZSC 158, [2016] 1 NZLR 433.

103 Interlocutory judgment (No 22), above n 77, at [101].

hearing, it was agreed between Ms Meechan and Ms Wendt that the following statement would be made to the Court:

> There is no formal indemnification agreement between Ms Alim, PRI and/or any other party; LSG does not dispute that this is the case.

[267] At the substantive hearing, when asked about her understanding as to who would receive any remedies awarded in her favour, Ms Alim said she did not know much about that, but her lawyers did. The trust account records of her then lawyers suggest that in fact she did receive the sum of $1,500 which LSG was directed to pay her, but her answer reinforces the conclusion that she was only vaguely aware of the specifics of the financial arrangements of her claim.

[268] The absence of a written agreement with a funder, although also surprising, is a matter between Ms Alim and her former lawyers. The significance of this fact for present purposes is that it goes some way to explaining why Ms Alim did not fully understand the arrangements; and that she placed significant reliance on her lawyers. Her costs liability must be considered in this context.

[269] I also observe that whilst Ms Meechan is correct to say that Ms Alim adopted and perpetrated a sham, I am at present concerned primarily with issues pertaining to the way in which her claims were advanced, rather than the merits of those claims. Costs orders should not be used as a means to punish a party, as is well established.[104]

[270] I turn to the issue of means to pay. In *Tomo v Checkmate Precision Cutting Tools Ltd*, Judge Inglis, as she then was, stated:[105]

> … While the approach to undue financial hardship in this jurisdiction is said to be based on the broad discretion conferred on the Court, supported by the statutory imperative that the Court exercise its powers consistently with equity and good conscience, there is a risk that the countervailing interests of the successful party (who might also be financially stretched) and broader public policy considerations become marginalised. The principles of equity

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[104] See *New Zealand Air Line Pilots' Assoc IOUW v Registrar of Unions* (1989) ERNZ Sel Cas 304 (LC).

[105] *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, [2015] ERNZ 196 at [16] (footnotes omitted); and see the further discussion of those factors in *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105 at [38] – [39] and in *Vince Roberts Electrical Ltd v Carroll* [2015] NZEmpC 161 at [12].

> and good conscience must transcend the interests of simply one party. A broader approach is required.

[271] It is clear that consideration of ability to pay is inevitably a case-specific exercise. There are examples such as those to which Ms Wendt referred in her submissions where the Court has seen fit to take account of the impecuniosity of an unsuccessful party; a yet further example is found in *Snowdon v Radio New Zealand Ltd*, where a significant costs liability of $585,160, was reduced to $490,000 on this ground.[106]

[272] The present case is unusual, because when assessing Ms Alim's circumstances, it is necessary to take into account not only her vulnerability and her limited ability to pay, but also that the Court is able to consider the possibility of imposing orders for costs against those who were actually involved in funding and/or controlling the proceeding.

[273] The result is that whilst it is appropriate for Ms Alim to contribute in part to costs incurred by LSG, having regard to the Court's equity and good conscience provision I consider that this should be for an amount which she is able to pay and on a basis that may mean bankruptcy is not necessarily inevitable.

[274] Ms Wendt submitted that Ms Alim's liability should be restricted to the sum which has already been paid into Court, $10,500. That payment was directed as a condition of granting a stay of execution of the Authority's costs determination, now challenged by Ms Alim. Since the sum so paid relates to that challenge, I do not consider it appropriate to regard it as being available for costs arising from Ms Alim's largely unsuccessful substantive challenge.

[275] I have no doubt that a personal liability which involves further sums having to be paid may well give rise to hardship for Ms Alim. However, she must accept some responsibility for her participation in the proceedings. From a relatively early point, Chief Judge Colgan pointed out that the proceeding was not cost effective. This should have been explained to Ms Alim. If it was not, any failure to do so is an issue between Ms Alim and her then lawyers. The numerous statements of concern

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106 *Snowdon v Radio New Zealand Ltd* [2014] NZEmpC 180 at [78].

by Chief Judge Colgan should have rung alarm bells, at least to those lawyers. Although it is not appropriate to make Ms Alim fully accountable for the continued prosecution of uneconomic and largely misconceived claims, she must bear some responsibility for this.

[276] In all the circumstances, a just approach is to order Ms Alim to pay LSG $10,000 as a contribution to LSG's costs as determined earlier. I direct that this payment is to be made at a rate of $500 per month.

PRI/Mr Hay

[277] The question of whether either of PRI or Mr Hay should be liable for LSG's costs is more complex.

[278] I begin by discussing the relevant evidence. Apart from a late affidavit filed by Mr Hay to which I shall make reference shortly, most of the information which has been provided to the Court regarding funding was adduced for the purposes of the joinder applications.[107] Reference can be made to that evidence, as set out in interlocutory judgment (No 22).

[279] It is fair to say that such evidence as has been filed with regard to these issues concentrated more on who was funding Ms Alim's claim, and rather less on the extent to which those involved with funding in fact controlled the litigation.

[280] Dealing with the evidence as to funding, for much of the present proceeding it was asserted that PRI was the funder. This was the position before the Authority, which recorded that Ms Alim had been financially backed by PRI.[108] The Court, in one of its first interlocutory judgments, recorded that there was no denial of LSG's assertion that Ms Alim's proceedings were being funded by her former employer, PRI; it was noted that there was a strong inference from those submissions that it was promoting her litigation as:[109]

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[107] I put to one side the evidence filed on behalf of Mr Hay and LSG for the purposes of interlocutory judgments (No 23) and (No 24), since that evidence did not relate to the funding of Ms Alim's claim, but rather the funding of LSG's defence.

[108] *Alim v LSG Sky Chefs New Zealand Ltd* [2013] NZERA Auckland 472 at [101].

[109] Preliminary judgment A, above n 18, at [11].

> … part of a broader strategy to disadvantage its competitor and successor as holder of the Singapore Airlines contract, LSG. There is more than a suggestion that Ms Alim is a proxy for her former employer in its ongoing battle with LSG.

[281] The Court went on to comment on a statement which had been made by Ms Park that defending Ms Alim's groundless claims had put LSG to considerable expense. Chief Judge Colgan stated:[110]

> I do not doubt that this is so but it must be weighed against the ability of LSG to recover those costs against Ms Alim, particularly if she is supported and funded in the litigation by a substantial commercial entity.

[282] In the following year, in interlocutory judgment (No 18) issued on 3 August 2015, the Court returned to this topic stating that:[111]

> [Ms Alim had] made the defendant aware of the identity of the funder of her litigation on 14 March 2014. She has now confirmed, by her memorandum filed in relation to this matter on 31 July 2015, that her former employer, PRI Flight Catering Ltd, has been and is funding her litigation.

[283] As already mentioned, the evidence which Ms Alim gave at the hearing as to funding was somewhat vague, but it appeared to be to similar effect. Initially she did not want to confirm who was supporting her, but then referred to PRI as the funder going on to say that she did not think there was an agreement about this arrangement, or that she had signed any document pertaining to it. She said she could not "remember much of that". As already mentioned, she appeared to be unsure what the arrangement would be if she was required to meet LSG's costs.

[284] However, on 15 December 2015, PRI filed a notice of opposition to LSG's application for joinder. That notice stated that PRI was "a funder" of Ms Alim's claim, implying for the first time that PRI was not the sole financier of the plaintiff's claim.

[285] Throughout the proceeding in this Court, LSG has attempted to obtain details of the actual funding arrangements. As recorded earlier, Ms Alim was ordered to disclose a wide range of documents relating to the funding or support given to her in bringing these proceedings at various times.

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110 At [15].

111 Interlocutory judgment (No 18), above n 56, at [14].

[286] For present purposes, it is necessary to repeat the relevant history in detail. Initially an order to this effect was made in interlocutory judgment (No 6).[112] Later, in interlocutory judgment (No 20), Ms Alim was ordered to disclose any document evidencing a funding agreement.[113] Those documents were to include communications to and from lawyers acting for her, as well as trust account records and letters of engagement relating to the funding and supporting of her claims. If privilege was claimed for any documents, they were to be identified by date, description of their general nature and details of the spender and recipient where appropriate.[114]

[287] Ms Alim did not comply with these orders. LSG attempted to seek compliance prior to the substantive fixture. This resulted in interlocutory judgment (No 18). The Court considered that the issue related to costs and should be dealt with after the substantive fixture.[115]

[288] In interlocutory judgment (No 20), Ms Alim was again ordered to file and serve an affidavit as to funding issues.[116] A rudimentary affidavit of documents was sworn by her on 23 July 2016. As I recorded subsequently,[117] although filed by her two weeks later, the document had plainly been prepared for Ms Alim by someone with the knowledge of court documents, probably a lawyer. KS was still on the record as her lawyers, and remained so until 18 November 2016. Ms Alim claimed in the affidavit that that there was no single relevant document in any category for which disclosure had been ordered, privileged or otherwise, a possibility which seems most unlikely.

[289] In the same judgment, comprehensive orders of disclosure were made against PRI, requiring it to disclose any document in its possession or under its control or relating to the funding or support given to Ms Alim in bringing her claims, including any documents which related to whether PRI controlled or directed the proceedings, and the reasons why they may have done so; any bank account records evidencing

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112 Interlocutory judgment (No 6), above n 33, at [21].
113 Interlocutory judgment (No 20), above n 78, at [124].
114 At [124].
115 At [13].
116 At [124].
117 Interlocutory judgment (No 22), above n 77, at [37].

payments from PRI to Ms Alim's lawyers in relation to funding or support given to her in bringing the claims; and financial statements of PRI for the years ending 31 March 2014 and 31 March 2015. If privilege was claimed, the relevant documents were to be identified by date, description of their general nature and details of the sender and recipient where appropriate.

[290] In fact, the only documents which were then disclosed were financial year end documents, and a bank account statement. It was claimed there were no documents in existence in any of the other categories, which again seems quite improbable.

[291] I concluded that it was inherently unlikely there were no documents which Ms Alim and/or PRI should have disclosed relating to the funding or support given to Ms Alim, as they had been directed to provide in interlocutory judgment (No 20).[118] I found that there had been a deliberate strategy to avoid the disclosure of documents.

[292] LSG then sought an order directing KS to produce documents which the Court had previously directed should be produced by Ms Alim and PRI, being documents relating to the funding arrangements, including trust account records. In interlocutory judgment (No 22), I directed the firm to provide these documents to counsel only, and then provided an opportunity for submissions to be made to the Court about them for the purposes of the joinder argument.[119]

[293] Provision of this information led to the Court concluding that not only was PRI a funder, but so also was the allied company Pacific Rim Investments Ltd (Pacific Rim).

[294] Turning to the evidence relevant to control of this proceeding, notwithstanding the elaborate disclosure processes which were initiated by LSG no documents were disclosed which clarified who was controlling the proceeding, either on an open or privileged basis.

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118 Interlocutory judgment (No 20), above n 78.
119 Interlocutory judgment (No 22), above n 77.

[295] The Court has had to rely on other evidence when considering that topic. The evidence received by the Court on this aspect of the matter was summarised and analysed for joinder purposes in interlocutory judgment (No 22).[120]

[296] The findings that were made on that occasion are relevant for the present issues as to liability. Although lengthy, I reproduce them in full:

> [92] There is a range of factors to be considered for the purposes of this assessment. I refer first to the finding made by Woolford J in the High Court litigation which took place between LSG on the one hand and Pacific Flight and PRI on the other. The focus of the proceeding related to the circumstances of transfer of employees from PRI to LSG on or about 23 February 2011; those circumstances were also central to Ms Alim's claim.
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> [93] At issue was whether pay records had been altered to increase the leave balances and hourly pay rates of employees shortly before transfer. Woolford J received evidence that it was Mr Hay who made the relevant decisions, as recorded in this passage:[121]
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> > Ms Gorgner acknowledged that there were some pay rises and adjustments in the annual leave balances but said she was not privy to the decisions made around those adjustments. She said that the decisions were taken by Mr Terry Hay, one of the owners of Pacific and although she was the Human Resources Manager and Acting General Manager, she was not consulted. Ms Gorgner acknowledged that there would be additional costs for LSG but could not see it as having a big impact because LSG was so much larger than Pacific.
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> [94] The Court went on to observe that it was unfortunate Mr Hay had not given evidence for PRI/Pacific Flight regarding his reasons for giving pay rises to and increasing the leave balances of the staff who were about to transfer.[122] Although the High Court decision was appealed, there is no evidence that this finding was challenged.[123]
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> [95] The next contextual matter to which I refer is the evidence of Ms Alim that after resigning from LSG in early January 2012, she attended PRI and worked there for a few hours. Ms Alim stated that on the following day when she returned to PRI, she was told that she could not stay because "Mr Hay said so". She did not know why this occurred. This evidence was confirmed by Mr Cyril Belk when he gave evidence to this Court; he was PRI's Production Sous-Chef. He stated that he received a telephone call from Mr Hay instructing him to tell Ms Alim to leave the premises. He then told Ms Alim that he had been directed to "send you home".
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> [96] I do not accept Mr Scampion's submission that Ms Alim's evidence is inadmissible on a hearsay basis. This Court may consider such evidence

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120 At [52] – [58].

121 *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2012] NZHC 2810 at [12].

122 At [13].

123 *Pacific Flight Catering Ltd v LSG Sky Chefs New Zealand Ltd* [2013] NZCA 386, [2014] 2 NZLR 1 and *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2014] NZSC 158, [2016] 1 NZLR 433.

having regard to the jurisdiction bestowed upon it under s 189 of the Act. Moreover, it is confirmed by Mr Belk's evidence, and I find that the events he and Ms Alim described occurred. Again, Mr Hay exercised control over circumstances arising from the transfer of staff to LSG.

[97] The next contextual matter to which I refer arises from Mr Hay's involvement in other litigation. First, Mr Hay made reference to the fact that during the Supreme Court proceedings between LSG and PRI, LSG sought a stay of execution of a costs order which had been made by the Court of Appeal. This occurred in late 2013. At issue was the then solvency of PRI. A memorandum was placed before the Court of Appeal which attached a letter from Mr Stewart QC on behalf of PRI to Mr Skelton QC on behalf of LSG. Annexed was a document with a handwritten note endorsed by Mr Hay stating that after the maturity of a fund held by PRI of some two million dollars which would occur on 6 January 2014 "it is the intention of PRI Flight Catering to keep bank balance exceeding $1,000,000 through April 2015". This evidence confirms a key role with regard to financial matters affecting PRI, and that Mr Hay held himself out as having the authority of the company to make representations of this kind.

[98] Next, I refer to other proceedings in this Court which also involve the circumstances of transfer, those that have been brought by Mr Matsuoka against LSG. I have already alluded to the evidence given by Ms Park to the effect that at a hearing in those proceedings, Mr Stewart QC stated that Mr Hay was assisting with Mr Matsuoka's costs. For LSG it was submitted that this evidence had not been challenged by Mr Hay. In response, Mr Scampion submitted that this was an unfair submission because Ms Park had presented inadmissible hearsay evidence, to which Mr Hay had therefore not responded. Counsel also stated that he understood Ms Park had not been present at the hearing in any event, although I observe there is no evidence to that effect. Ms Park's evidence is admissible in this Court.

[99] I also note from various judgments issued in the *Matsuoka* proceeding that the Court was informed Mr Matsuoka's claim was being funded.[124] It would be unsurprising if, as Mr Stewart QC told the Court, Mr Hay himself became the primary funder. I accept Ms Park's evidence as being reliable. Mr Hay's involvement in the funding of the *Matsuoka* proceeding is a yet further contextual factor which, in my view, it is appropriate to consider.

[100] Relevant findings concerning Mr Hay's involvement in PRI were made in *Matsuoka*. In particular, Judge Travis found that after Mr Hay had departed for Hawaii some time in 2008, Mr Matsuoka continued to report to him throughout that period to February 2011, and that Mr Hay was in daily contact with PRI. This finding confirms a significant management role to at least that date.[125] Other evidence shows that it continued thereafter.[126]

[101] Turning to issues relating to the conduct of this proceeding, there are a variety of factors to be considered. The first is that Mr Hay is named on KS's trust and office account records as being the person to whom invoices

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124 *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2012] NZEmpC 219, [2012] ERNZ 595 at [41] – [45]; *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 96 at [13].

125 *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2011] NZEmpC 44, [2011] ERNZ 56 at [21].

126 For example, as above at [92] – [95] of this quotation.

for legal services rendered for the purposes of the proceeding should be sent. As to this, Mr Hay said as I have already mentioned that he was simply assisting PRI and that he was there to "open the mail". However, he then stated that he would forward invoices to the "contract accountant who would look after payment". I infer from this evidence that he approved the invoices for payment; otherwise there would have been no necessity for his involvement. I also infer that he would not have approved those invoices unless he was satisfied the legal services had been performed as required. At the very least, he had knowledge of these.

[102] When referring to this issue, Mr Hay stated that he "understood" legal fees were paid using money that was left in the business after the catering operation was sold on the documentation which has been placed before the Court. It is evident that PRI had substantial equity as at 31 March 2014, but modest equity only at 31 March 2015. From the invoices which are before the Court it is clear that after March 2015 invoices were rendered for sums well in excess of that equity and in excess of the modest cash held by the company. Furthermore, costs were paid by Pacific Rim directly to KS as recently as July 2016. On the evidence before the Court, it is not correct to say that legal fees were paid by PRI from money left in the business. The evidence from Mr Hay that they were so paid is unreliable, and casts doubt on his credibility as a witness.

[103] When Mr France became involved initially, he sent an email to other counsel, on 23 November 2015, which inter alia stated he had met with Mr Hay, "the Director and CEO of the company" a few days previously. In a subsequent memorandum, he told the Court that Mr Hay had met with his firm and instructed it to seek an extension of time for the filing of relevant documents for PRI. For his part, Mr Hay asserted that he had been asked by PRI directors to meet with Mr France to seek an extension of time.

[104] In a later hearing in this Court, Mr France advised that he had been mistaken in his email of 23 November 2015 when he referred to Mr Hay as a director. That was an appropriate correction, since the Companies Office records confirm Mr Hay's resignation as a director some years previously. However, with regard to his interaction with Mr France, I accept the submission made for LSG that Mr Hay must have held himself out as being a PRI director, which is why he was described as such.

[105] Next, it is necessary to consider the position of those persons who are recorded in Companies Office records as being directors.

[106] Mr Nathan denied that he was involved in controlling or managing the litigation. Despite his status, he did not inform the Court in either of his affidavits as to why PRI advanced substantial funding for the purposes of Ms Alim's claims or what the funding arrangements were. Mr Nathan was served with a summons to attend the substantive hearing in this Court in August 2015, and to disclose PRI documents. When served he stated "Well, you're not getting anything from me". Mr Nathan applied to set aside the summons to avoid attending the hearing. Ultimately he was not called on to do so. Soon after, an application was served on him for joinder as a party for costs purposes, he resigned as a director of PRI in February 2016. I infer from all the circumstances that the resignation was in response to the application to join him. Subsequently he stated that he had been a director because he understood the company needed a director who was a New

> Zealand resident. The full extent of his role in the governance of PRI is unclear, but I accept there is an absence of any evidence to suggest that he could be described as a "guiding mind" of this litigation.
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> [107] According to the company office records which have been produced to the Court, the other director of PRI is Mr William Drake. Those records state that his residential address is 18 Viaduct Harbour, Auckland; this is the address of KS. However, he also signed the affidavit of documents for PRI in this proceeding, stating there that he resides in Hawaii. The implication in the Companies Office records, therefore, that he resides at the offices of KS is inherently unlikely and misleading. That said, no party or non-party has provided any other evidence to suggest that Mr Drake has been actively involved in this litigation, except for the signing of PRI's affidavit of documents. I do not regard that fact as supporting the proposition that he provided instructions to KS for the purposes of the litigation in the absence of any other evidence that he did so. The signing of that affidavit by him meant that it would not need to be signed by anyone else on behalf of PRI; it is likely that this occurred for strategic reasons.

[297] Subsequently, Mr Hay filed several affidavits.[127] In his affidavit of 4 September 2017, he outlined the development of PRI and its associated investment company, Pacific Rim. He also gave brief evidence as to the circumstances of transfer of staff from PRI to LSG in 2011. Then he said that for years PRI had funded the litigation, but it could not be said that it had been controlling it, or that this entity would benefit from the litigation. He said he was not the "guiding mind" behind the litigation. He said his "legal and actual association" with PRI was as a shareholder in the investment company.

[298] Mr Hay emphasised that he had retired from PRI in 2008. He said that the remaining directors, Mr Nathan, Mr George and Mr Drake actively ran the company, assisted by Ms Gorgner, the general manager. In particular, he stated that Mr Nathan was the managing director, a position he had held from 1996 to 2016, and not just on a nominal basis. Mr Hay said Mr Nathan oversaw day to day operations. He said Mr Nathan's contribution was "management, operations, legal and leading the group". He also described the expertise of Messrs Drake and George as experienced directors. Then he stated that no director operated alone.

[299] The final section of this affidavit related to Mr Hay's views as to the running of the litigation. Notwithstanding the findings already made by the Court on this topic, he expressed his opinion that Ms Alim and LSG were the "guiding minds" of

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[127] Dated 24 July 2017, 17 August 2017 and 4 September 2017.

their own litigation, but with close direction from lawyers. He repeated that such a description could not be applied to him.

[300] The thrust of this evidence appeared to be that Ms Alim controlled her own claims; and that the formally appointed directors of PRI controlled the steps which were undertaken on behalf of the company, whether that related to employment issues at the time of the transfer of staff from PRI to LSG, or the advancing of funds for Ms Alim's case.

[301] That evidence must of course be assessed alongside such other evidence as has been provided to the Court as summarised in the extract from interlocutory judgment (No 22) above, which in my view paints a rather different picture.

[302] The only evidence filed by those associated with PRI was from Mr Nathan and Mr Hay. No evidence was filed on this topic by Mr Drake or Mr George or any other relevant witness. In summary, both denied any hands-on involvement in the conduct of the litigation. They provided no evidence as to who did; they implied that Ms Alim controlled the proceeding.

[303] The Court is thus invited to conclude that not only was Ms Alim capable of controlling the highly complex procedural steps that were taken – which I have earlier found she was incapable of doing – but that PRI and its associated interests were quite happy to pay hundreds of thousands of dollars so that she could advance her uneconomic and speculative claims, as she saw fit. I must consider this proposition in more detail against the applicable authorities and submissions of counsel, to which I now turn.

Authorities regarding imposition of costs of non-parties

[304] I reviewed the relevant authorities as to the potential liability of funders in interlocutory judgments (No 22)[128] and (No 23).[129]

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128 Interlocutory judgment (No 22), above n 77, at [72] – [84].
129 Interlocutory judgment (No 23), above n 94, at [65].

[305] The leading UK authorities are the Privy Council judgments in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)*;[130] and the subsequent English Court of Appeal judgments of *Goodwood Recoveries Ltd v Breen*[131] and *Systemcare (UK) Ltd v Services Design Technology Ltd*.[132]

[306] I also refer to the New Zealand Court of Appeal decision of *Kidd v Equity Realty 1995 Ltd*.[133] Although *Kidd* focussed on the circumstances in which it would be appropriate to join a non-party, as was stated in the subsequent Court of Appeal decision, *Hay v LSG Sky Chefs New Zealand Ltd*, it affirmed the applicable principles which govern the imposition of costs on such a joined party.[134] The following statement in *Kidd* summarises those principles with regard to the possibility of personal liability of a company director:[135]

> [15] The core features of the present case are routine. Mr Kidd was the guiding mind of Axiom and in this way was responsible for the litigation strategy it pursued. By the time costs came to be fixed Axiom was insolvent.
>
> [16] We think it clear that those factors do not in themselves warrant an award of costs against Mr Kidd personally. Something more is required. In the present context, the requirement for "something more" might be satisfied if:
>
> (a) there was any relevant impropriety on the part of Mr Kidd; or if
>
> (b) Mr Kidd was relevantly acting not in the interests of Axiom but rather in his own interests and was thus the real party.

[307] I have already discussed these authorities in previous judgments. The short point is that once a non-party has been joined according to the criteria outlined in *Kidd*, the question of whether that person or entity should be liable for costs is one to be determined under the broad discretion vested in the Court under cl 19 of sch 3 of the Act as well as reg 68 of the Regulations, as discussed in the leading authorities relating to that discretion.

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130 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, 205 1 NZLR 145.
131 *Goodwood Recoveries Ltd v Breen* [2005] EWCA Civ 414, [2006] 1 WLR 2723.
132 *Systemcare (UK) Ltd v Services Design Technology Ltd* [2011] EWCA Civ 546, [2012] 1 BCLC 14. A judgment which I considered in some detail in interlocutory judgment (No 24).
133 *Kidd v Equity Realty (1995) Ltd* [2010] NZCA 452.
134 *Hay v LSG Sky Chefs New Zealand Ltd*, above n 89.
135 *Kidd v Equity Realty (1995) Ltd*, above n 133 (footnotes omitted).

[308] In the end, "the Court must make a judgment which does justice to all concerned".[136] The ultimate consideration must be the interests of justice. I proceed accordingly.

PRI

[309] The essence of Ms Meechan's submissions in support of the proposition that PRI should be liable were:

a) PRI was not an arms' length commercial funder.

b) It created false pay and leave records, and perpetuated the sham on which Ms Alim's claim was founded; it had an incentive to keep the truth from coming out, and in doing so supported Ms Alim in a fictitious claim.

c) It had attempted to avoid responsibility, for instance by applying to the company's office to be struck off. Significantly, it did not inform counsel representing it that such a step was being taken.

d) The circumstances here were not to be compared with those of an arms-length litigation funder causing a claim to be brought for professional reasons; here PRI was integrally involved in the circumstances of the claim.

e) It had not provided information and/or documents to illuminate the position – all it gave were heavily redacted financial records, and not a single email relating to the control of the proceeding.

f) No officer has said on oath why PRI funded the case, or the terms on which it was prepared to commit to that burden.

[310] For PRI, Mr France submitted on the liability question:

a) No costs were necessary against PRI in circumstances where:

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136 *Binnie*, above n 7, at [29].

i. it was merely a funding mechanism for the payment of legal fees;

ii. it does not trade, has no assets and will not benefit from the litigation;

iii. it was not the guiding mind of Ms Alim's proceeding;

iv. the Court had found that the guiding mind was Mr Hay and costs orders could be made against him if appropriate.

b) Joint and several liability was not appropriate given the differing positions of the plaintiff, PRI and Mr Hay.[137]

[311] It was also asserted that PRI acted as funder by virtue of its status as Ms Alim's former employer. This was, in my view, an attempt to portray PRI's involvement on a somewhat altruistic basis.

[312] Obviously, PRI's role requires close analysis. A significant factor relates to the information which was provided to the Court. As already summarised, when it first became involved directly in late 2015, it stated in its notice of opposition only that it was "a funder", without confirming what other entity might have been involved.[138] The affidavit of documents which was ultimately filed shed little light on the position; as I previously concluded, there was a deliberate strategy to avoid the disclosure of documents.

[313] I agree that the attempts by PRI to have itself removed from the register were also significant. This occurred at a point when there was an outstanding application for its joinder. This was because it foresaw the possibility of that occurring, and it wished to avoid responsibility and/or the possibility that it might become liable for a contribution to LSG's costs, with the potential for complex issues of enforcement, involving, at least, its directors.

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137 PRI also made submissions on topics considered earlier, particularly that the plaintiff was the successful party and is entitled to costs; and that the amount of costs incurred by LSG was not reasonable, and no uplift is warranted. Those submissions were considered earlier.

138 Interlocutory judgment (No 18), above n 56, at [14].

[314] For LSG, it was submitted that PRI might well have been used as a front by Mr Hay, but it had allowed itself to be used in that way and had to bear the consequences of having done so. Mr France frankly conceded that PRI was open to a criticism that it had allowed Mr Hay "to do what he chose to do".

[315] Mr Nathan said he did not initiate Ms Alim's litigation, and did not control or manage it, although he was generally aware of important developments in the case such as the issuing of judgments. Despite the very significant sums expended by PRI on the case, he did not explain the real nature of PRI's involvement in the case, or who was controlling it; these were all, no doubt, matters about which he was well informed.

[316] The clear inference to be drawn from the evidence is that the directors of PRI allowed the company to shield Mr Hay's involvement in the litigation, in all likelihood with the object of protecting him from a personal liability as to costs. It also allowed him to use the company as a conduit for funding Ms Alim's claim.

[317] Mr France submitted that PRI ceased to fund the litigation in March 2015, which he argued was "before the case went completely off the rails". The difficulty with that submission is that support was given not only financially, but also by the continued representation that PRI was the sole funder. If it was thought by the directors that the case had gone off the rails, they took no steps to dissociate the company from that development.

[318] The tenacious prosecution of Ms Alim's claim in a manner which was disproportionate to the modest issues that were actually at stake, was commented on by Chief Judge Colgan on several occasions. He said that the "interlocutory bombardment" had become "vexatious". When it moved to the substantive stage, it became evident that the claim was in fact speculative and in the main, misconceive. It was based on a sham. These factors are relevant to the question of liability for costs. There is no evidence that the directors of PRI did anything to reign in the case, notwithstanding the obvious criticisms of the way it was being advanced by the Chief Judge.

[319] In *Dymocks*, Lord Brown confirmed that the pursuit of a speculative claim could lead to a costs liability. He said:[139]

> The authorities establish that, whilst any impropriety or the pursuit of speculative litigation may of itself support the making of an order against a non-party, its absence does not preclude the making of such an order.

[320] Subsequently in *Goodwood Recoveries Ltd*, Rix LJ noted that "the pursuit of speculative litigation" was put into the same category as "impropriety".[140] This point was also noted by the New Zealand Court of Appeal in *Kidd*.[141]

[321] PRI's support of an obviously misconceived and speculative claim, which was advanced in a disproportionate fashion, is yet a further factor which supports the making of a costs order against it.

[322] In summary, I am well satisfied that PRI was not merely a conduit for funding. It actively supported, and allowed itself to be seen as supporting Ms Alim's plethora of interlocutory applications, as well as the prosecution of her misconceived and speculative claims through to the substantive hearing. It attempted to shield Mr Hay from a personal liability by allowing him to use PRI to control the proceeding. Following the substantive hearing, it vigorously opposed the orders for disclosure which LSG reasonably sought against it; and it strongly opposed the application for joinder which again LSG reasonably sought. I find that these post judgment steps were undertaken in the hope that liabilities which could foreseeably affect the company, its directors, and Mr Hay, might be avoided.

[323] Accordingly, PRI must be liable for LSG's costs, in an amount to which I shall refer later, for all aspects of the proceeding up to interlocutory judgment (No 22).

[324] I will deal with the issue of joint and several liability shortly.

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139 *Dymocks*, above n 130, at [33].
140 *Goodwood Recoveries Ltd*, above n 131, at [59].
141 *Kidd*, above n 133, at [20].

Mr Hay

Submissions

[325] For LSG, it was submitted:

a) There is no evidence before the Court that anyone other than Mr Hay was responsible either for the sham which was the subject of the litigation, or "calling the shots" in the litigation. Mr Nathan, the longstanding New Zealand-based director, had been at pains to distance himself from the control of the litigation.

b) Mr Hay had attempted to insulate himself from cost consequences by using PRI as a front to notionally fund Ms Alim to pursue speculative litigation at a significant cost over a six-year period. The findings already made by the Court, at the time of joinder, should be at the forefront as the Court now considered the fairness of awarding costs against Mr Hay.

c) The Court had previously made critical findings with regard to Mr Hay's reliability as a witness, and his failure to be open with the Court. He had shown scant regard for the Court's processes, resisting service and indeed providing misinformation in relation to where he could be served with the application for joinder. He had failed to be upfront and open about the funding arrangements, and his role.

d) Mr Hay's role in the proceeding was not borne of altruism. The way in which the litigation had been conducted in fact exposed Ms Alim to a significant costs award. In all the circumstances, it would be just that Mr Hay now be accountable for costs.

[326] For Mr Hay, it was submitted:

a) To impose liability on Mr Hay would effectively involve lifting the corporate veil. The circumstances where it is appropriate to do so are very limited, and for present purposes confined to situations where the

company involved is a mere device, façade or sham: *Prest v Petrodel Resources Ltd*.[142]

b) Reliance was placed on the findings made by the Court in interlocutory judgment (No 22), which joined Mr Hay as a party. On the basis of those findings, Mr Hay acted at all times in his capacity as a director of PRI; the company had been properly formed for a legitimate purpose in 1995; Mr Hay's involvement occurred after its formation. Mr Hay owed no personal duty to LSG; and there was no other relevant rule of law which would permit the Court to pierce the corporate veil.

c) The necessary elements for the imposition of a costs liability in respect of a funder, as described by the Privy Council in *Dymocks*, do not apply in the present case. It is evident that in every case that involves a company who it is alleged controlled the proceedings, the company will have exercised control through a director or an agent. To make the director liable for costs would erode the principle of separate corporate identity, which should not occur. Where a director is acting other than for the benefit of the funding company so that he could be said to be acting in his own interests, and is thus the real party, personal liability can be considered. But here, the evidence establishes that Mr Hay was acting in the interests of PRI, as found by the Court in interlocutory judgment (No 22). At all material times, PRI had three directors, and on the Court's findings, an additional de facto director, running PRI and making strategic decisions. Consequently, there was no basis for making an award of costs against Mr Hay personally.

d) LSG has taken no steps to seek security for costs; it could have protected itself against the risk that PRI might not be able to meet a costs award. Consequently, any concerns now as to PRI's ability to pay cannot be determinative.

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142 *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 at [34] and [35] per Lord Sumption JSC.

Discussion

[327] I do not accept the submission that the doctrine of separate corporate personality is applicable in this particular case. At the hearing, there was some debate as to whether the analysis of Lord Sumption JSC, when reviewing the corporate veil doctrine in 2013 in *Prest*, in effect overrode the earlier dicta of the Privy Council in *Dymocks*. Notwithstanding the comprehensive review of a wide range of cases in Lord Sumption's speech in *Prest*, no reference was made to *Dymocks* or the type of analysis that would be appropriate when considering the liability of third parties for costs; Lord Sumption did not suggest that this doctrine is relevant to such an application.

[328] After the hearing, Mr Scampion filed a memorandum which referred to a judgment of Fogarty J in *Edel Metals Group Ltd v Geier Ltd*.[143] There, the question was whether the sole director of an unsuccessful plaintiff, a company, should be liable for costs in his personal capacity. The High Court was required to consider whether the corporate veil would protect the director, having regard to the conclusions expressed in *Prest*.

[329] The Judge referred to the principles which apply to such costs applications, as found in the dicta of Millet LJ in the United Kingdom Court of Appeal in *Metalloy Supplies Ltd v MA (UK) Ltd*[144] in a passage which has often been relied on in post-*Dymocks* judgments;[145] because it provides a convenient summary for present purposes I repeat it:[146]

> The Court has a discretion to make a costs order against a non-party. Such an order is, however, exceptional, since it is rarely appropriate. It may be made in a wide variety of circumstances where the third party is considered to be the real party interested in the outcome of the suit. It may also be made where the third party has been responsible for bringing the proceedings and they have been brought in bad faith or for an ulterior purpose or there is some other conduct on his part which makes it just and reasonable to make the order against him. It is not, however, sufficient to render a director liable for costs that he was a director of the company and cause it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are brought bona fide and for the benefit of the company,

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143 *Edel Metals Group Ltd v Geier Ltd* [2017] NZHC 225.
144 *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613 (CA).
145 *Systemcare*, above n 132, at [29]; *Kidd*, above n 132, at [16].
146 *Metalloy Supplies Ltd*, above n 144, at 1620.

> the company is the real plaintiff. If in such a case an order for costs should be made against the director in the absence of some impropriety or bad faith on his part, the doctrine of the separate liability of the company would be eroded and the principle that such orders should be exceptional would be nullified.

[330] On the basis of this passage, Fogarty J emphasised that impropriety or bad faith would be necessary for liability to be imposed on a director; and that in such a case relief would be obtained without piercing the corporate veil. He went on to discuss the judgments of Lord Sumption JSC and Lord Neuberger P in *Prest*, as to the circumstances in which it is appropriate to disregard the separate personality of a company.[147]

[331] Lord Sumption had said that there was no general doctrine of abuse of rights that allows breaches of the corporate veil, but there were a variety of specific principles which would achieve the same result in some cases. He said:[148]

> … One of these principles is that the law defines the incident of most legal relationships between persons (natural or artificial) on the fundamental assumption that their dealings are honest …

[332] Lord Sumption also emphasised that:[149]

> ... There is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control ...

[333] He went on to conclude that there is:[150]

> ... a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company ...

[334] Lord Neuberger reached a similar conclusion, also emphasising that there are limited cases where the piercing of the veil can be properly invoked.[151]

[335] In his analysis of *Prest*, Fogarty J said:

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147 *Edel Metals Group Ltd*, above n 143, at [33] – [34].
148 *Prest*, above n 142, at [18]; see also the speech of Lord Walker of Castingthorpe, at [106].
149 At [35].
150 At [35].
151 At [81] – [82].

> [34] As I read the judgments of Lord Sumption JSC and Lord Neuberger P in *Prest v Petrodel Resources Ltd*, the ability of a Court to pierce the corporate veil arises only in strict circumstances and in the absence of an already established common law remedy by which the veil will not in fact be recognised. That principle was recognised by Elias J in *Premier Soft Goods Ltd v Warnock*,[152] where Her Honour said that to hold a director or major shareholder of a company liable for costs would cut across basic principles of corporate personality and would be inappropriate "in the absence of a compelling reason", such as bad faith on the part of the director. Fisher J agreed in *Arklow Investments Ltd v McLean*.[153]
>
> [35] In the presence of impropriety, therefore, the person making the call will be responsible for the consequences.
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> [36] Accordingly, I am of the view that [the director's] argument that I cannot "pierce the corporate veil" is misguided. *It is not necessary for this Court to pierce the veil, because this is not the sort of case in which [the director] can rely on the veil.* [The director] had no *genuine* commercial reason for the call. The call on the shares by [the director] was opportunistic, deliberate, unfair and unprincipled. It was an abuse of his fiduciary obligations as a director, as he held himself out to be. It was not a bona fide exercise of his duties as a director, assuming in his favour that he was lawfully a director. It was improper. …
>
> (Emphasis added)

[336] The English Court of Appeal has considered and reached similar conclusions, albeit on the basis of a similar but not identical costs jurisdiction. In *Threlfall v ECD Insight Ltd*,[154] the Court was required to consider the discretion relating to non-party costs orders. Lewison LJ said:[155]

> If a non-party costs order is made against a company director, it is quite wrong to characterise it as piercing or lifting the corporate veil; or to say that the company and the director are one and the same. As Mr Shaw has demonstrated, the separate personality of the corporation, even a single member corporation, is deeply embedded in our law but its purpose is to deal with legal rights and obligations. By contrast, the exercise of discretion to make a non-party costs order leaves rights and obligations where they are. The very fact that the making of such an order is discretionary demonstrates that the question is not one of rights and obligations of a non-party, for no obligations exist unless and until the court exercises its discretion. Moreover the fact that the discretion, if exercised, is exercised against a non-party underlines the proposition that the non-party has no substantive liability in respect of the cause of action in question.

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152 *Premier Soft Goods Ltd v Warnock* (1996) 10 PRNZ 150 (HC).

153 *Arklow Investments Ltd v McLean* HC Auckland CP49/97, 19 May 2000 at [20].

154 *Threlfall v ECD Insight Ltd* [2013] EWCA Civ 1444.

155 At [13]. This conclusion was cited with approval in the subsequent Court of Appeal decision of *Grizzly Business Ltd v Stena Drilling Ltd* [2017] EWCA Civ 94 at [56](3). Significantly, both these judgments were issued by the Court of Appeal after the Supreme Court had issued its judgment in *Prest*.

[337] As already mentioned, Mr Scampion submitted on the basis of *Prest* that the making of a costs order against Mr Hay would be tantamount to piercing the corporate veil, and that this could only occur in very rare situations, for instance where the director was acting in bad faith towards the company itself, and where the director was acting individually rather than in his company's interests.

[338] However, it is clear from both New Zealand and English authorities that Mr Hay cannot rely on the presence of the veil since this is not the sort of case to which that doctrine applies.

[339] The real question is whether Mr Hay should be personally liable because there has been relevant impropriety on his part. As it was put by Millet LJ, could it be said that Mr Hay has "been responsible for bringing the proceedings … [or whether] in bad faith or for an ulterior purpose there is some other conduct on his part which makes it just and reasonable to make the order against him"? If so, then the issue of corporate personality does not arise.

[340] When dealing with the interlocutory issue of joinder of Mr Hay, I reviewed the evidence which was then before the Court; my findings have already been reproduced in this judgment. I was satisfied that there was a sufficient foundation of evidence to support the proposition that Mr Hay was directly involved, not only in the initial transfer of employees from PRI to LSG, but also at multiple stages of the extensive litigation about those events which has followed, whether in the courts of general jurisdiction or in this Court. I found that the totality of the evidence pointed strongly to Mr Hay being the "guiding mind" for the purposes of this proceeding. That is, that he was instrumental in controlling the proceeding by ensuring it would be pursued in a tenacious way. I noted that this conclusion was endorsed by the fact that there was a proper opportunity for Mr Hay to explain both why Ms Alim's proceeding was funded, and who managed and controlled the litigation, but that he had chosen not to do so.[156]

[341] I have already recorded that notwithstanding these findings, Mr Hay subsequently made broad assertions to the effect that he was not the "guiding mind"

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[156] Interlocutory judgment (No 22), above n 77, at [108].

of the litigation. He did not state, expressly, who was. With regard to the management of PRI, he has only provided information as to the background circumstances of PRI's directors, but he did not provide any reliable information as to the conduct of the proceedings. He obviously knew what the correct position was, but chose not to provide any explanation. In my view, this was a significant omission.

[342] In interlocutory judgment (No 22), I also found that there was an absence of any evidence to suggest that Mr Nathan could be described as a "guiding mind" of the litigation. Nothing that Mr Hay has said subsequently provides a reliable basis for concluding otherwise.[157] A similar conclusion must be reached with regard to the other directors; simply because Messrs Nathan, Drake and George were experienced directors does not mean they must have controlled the proceeding.

[343] Mr Hay's evidence, and his opinion as to who was the guiding mind, is unreliable. I confirm my earlier findings, and hold that he controlled the litigation and was its guiding mind.

[344] In my view, an award of costs against Mr Hay is warranted in this case because:

a) He was instrumentally involved in arranging for funds from PRI to be utilised for Ms Alim's claims, when that entity had no genuine commercial reason for being involved in it.

b) He was also instrumentally involved in causing further funding to be provided by Pacific Rim to support that litigation.

c) The evidence establishes that the only person who provided the relevant instructions for the litigation was Mr Hay. Ms Alim was incapable of doing so; and there is no reliable evidence that any of the formally appointed directors of PRI, or anyone else, did so.

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157 At [106].

d) The litigation which Mr Hay controlled was, as discussed earlier, speculative and misconceived. It was advanced on a vexatious basis, to the point where the Court of Appeal stated, as recorded earlier, that the history of the litigation in this Court raised "real concerns about abuse of [the Employment Court's] processes and resources".

[345] With regard to Mr Scampion's submission that LSG could and should have applied for security for costs to protect itself, I have previously found that such a factor can be dispositive when considering applications for costs against "non-parties". However, this is a factor to be assessed alongside all others in determining whether it is just to make such an order.

[346] Whilst I found previously that it is surprising LSG did not advance an application for security for costs, the circumstances of this case are exceptional.

[347] Such an application against Ms Alim, even if successful, would have resulted only in a modest sum being fixed, for security: the Court is often reluctant to make such an order if it denies an employee access to justice.[158]

[348] Turning to PRI's position, LSG did not possess the information it now has as to the company's financial circumstances until after the substantive hearing, for the simple reason that none of it had been disclosed despite being requested. In fact, the impression which was conveyed to the Court was that PRI was, as it was put by Chief Judge Colgan, a "substantial commercial entity".[159]

[349] Given the tenacious way in which all interlocutory matters were dealt with, I have no doubt that there would have been significant resistance by PRI to such an application. Such a step would have been controversial, time consuming, expensive, and unpredictable given the overall history of litigation in this and related proceedings. I do not consider that this factor is dispositive.

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158 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 373 at [3]; *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288, [2013] NZAR 1017 at [23](b).

159 Preliminary judgment A, above n 18, at [15].

[350] Nor am I persuaded that because the Court has reached the conclusion that PRI should be liable for costs orders, Mr Hay should be absolved from such a liability. My conclusions with regard to PRI are different from those in respect of Mr Hay. In the end, the question is what is just in all the circumstances. I have already noted the distinction between funding and control. PRI's liability is essentially as a result of its role as a funder of a misconceived claim, and because it shielded Mr Hay. Mr Hay's responsibility arises for different and broader reasons.

[351] In the result, I am satisfied that the legal tests are met. There was relevant impropriety on the part of Mr Hay so that he too should be personally liable for costs in this proceeding.

Apportionment issues

Joint and several liability?

[352] Having concluded that it is just for cost orders to be made against PRI and Mr Hay, I must next consider the extent of their respective liabilities.

[353] As mentioned earlier it was submitted for LSG that Ms Alim, PRI and Mr Hay should be joint and severally liable for all its costs.

[354] I have determined that Ms Alim should be solely liable for $10,000 of the costs which it is entitled.

[355] Should PRI and Mr Hay should be jointly and severally liable for the balance of the costs to which LSG is entitled, up to interlocutory judgment (No 22), together with approved disbursements, as sought by LSG? Obviously Mr Hay must be solely liable for the costs to which LSG is entitled in respect of interlocutory judgments (No 23) and (No 24), and the disbursement identified earlier relating to the processes for provision of documents to him.

[356] There is no specific rule with regard to joint and several liability under either the Act or the Regulations. Guidance may be obtained from r 14.14 of the High Court Rules which provides:

14.14 Joint and several liability for costs

> Liability of each of 2 or more parties ordered to pay costs is joint and several, unless the court otherwise directs.

[357] Mr France referred to the discussion of the rule in *Hong v Deliu*,[160] where the Court of Appeal considered the extent to which costs would be ordered not only against an unsuccessful party, but against another who abided the Court's decision in the proceeding. The Court said this:[161]

> … Where there is more than one defendant a court will need to consider how costs should be allocated between them. While the default position under r 14.14 of the *High Court Rules* is joint and several liability among defendants, that is subject to the Court's overriding discretion. In our view, where the case is out of the ordinary in some significant way, consideration must be given to whether to alter that burden.[162] In particular, where costs are not sought against one unsuccessful defendant, it does not follow that the other should be liable for the whole scale measure of costs. Likewise where a defendant has taken a reduced part in opposing judgment such as by abiding the outcome or admitting the cause of action.

[358] These observations assist in a general way. In the particular circumstances of this case, where one party has played no part in issues affecting the other party, that party should not be jointly liable for costs. That is why PRI bears no responsibility for the unsuccessful applications advanced by Mr Hay, which resulted in interlocutory judgments (No 23) and (No 24).

[359] Mr France also suggested that there were other factors militating against a joint and several approach, such as the fact that the joined parties were separately represented, that they had filed separate notices of opposition to LSG's applications and made separate submissions, and that they had taken different approaches since joinder, including, for instance the fact that PRI had not appealed the joinder judgment.

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160 *Hong v Deliu* [2016] NZCA 75, (2016) 23 PRNZ 156.

161 At [24].

162 Gino Dal Pont *Law of Costs* (3rd ed, LexisNexis Butterworth Australia, 2013) at 11.2 – 11.9. Examples were *Narayan v Arranmore Developments Ltd* [2011] NZCA 681, (2011) 13 NZCPR 123 at [53] – [54]; *Commissioner of Inland Revenue v Muir* [2015] NZHC 1573, (2015) 27 NZTC 22-014 at [16] – [18]; *Walker v Gibbston Water Services Ltd* [2014] NZHC 2250 at [16]; and *Pegasus Group Ltd v QBE Insurance (International) Ltd* HC Auckland CIV-2006-404-6941, 24 September 2010 at [46].

[360] As the authorities referred to by the Court of Appeal in the above passage[163] indicate, separate representation and approach is routine where there is more than one party; the default position under r 14:14 is nonetheless applied in such cases. The factors raised by Mr France do not persuade me that joint and several liability is inappropriate.

[361] Rather, the focus must be on the fact that PRI and Mr Hay were jointly involved in the funding and/or control of the proceeding. As already discussed, their respective roles in supporting the proceeding were inextricably linked: PRI was the major funder, and the company provided a façade for Mr Hay who I have found controlled the proceeding.

[362] In these circumstances, they should be jointly and severally liable. There is no basis on which the Court should direct otherwise.

[363] This conclusion must apply to:

a) All pre-hearing interlocutory judgments in respect of which costs have been awarded to LSG, as well as the disclosure costs incurred prior to the substantial hearing.

b) The costs of the substantive hearing to which LSG is entitled; and

c) The interlocutory judgments relating to costs which followed the substantive hearing, to which LSG is entitled, that is interlocutory judgments (No 20) and (No 22). I particularly observe that although Mr Hay was not personally represented for the purposes of interlocutory judgment (No 20), I have no doubt that he was the controlling force in respect of the strong arguments that were advanced to oppose disclosure which resulted in interlocutory judgment (No 20), noting that it was he who provided the initial instructions to Mr France for that purpose.

d) The approved disbursements.

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163 See above n 162.

[364] The orders which I will summarise shortly are made on that basis.

Ms Alim's costs challenge

[365] Ms Alim instituted a de novo challenge to the costs determination of the Authority dated 17 November 2013.[164] In her statement of claim, she alleged that the Authority's order that she pay $21,000 to LSG was excessive and punitive, and that it took into account irrelevant considerations. It was claimed that costs in the Authority should lie where they fall. LSG, in its statement of defence, asserted that the amount awarded was a reasonable contribution to its actual costs.

[366] Subsequently, Ms Alim applied for an order staying execution. As I recorded earlier, the Court ordered her to pay $10,500 into Court; she did so.[165] LSG now seeks payment out of this sum to it.

[367] In its determination, the Authority held that Ms Alim had been "entirely unsuccessful" with her multiple claims against LSG. The Authority recorded that LSG's actual costs, including GST and disbursements, were $40,425, and that of this, $37,047 was sought, being the costs incurred after Calderbank offers were made.[166]

[368] The Authority found that the Calderbank offer of 16 May 2012, for a payment to Ms Alim of $6,000 to cover lost wage and compensation for distress, and which was repeated after the investigation meeting in March 2013, was unreasonably rejected by Ms Alim.[167]

[369] The Authority went on to discuss the funding of Ms Alim's claims by PRI. It recorded that whatever the arrangements were between it and Ms Alim, they were not before the Authority in detail sufficient to allow it to take this factor into account. Accordingly, the Authority proceeded on the basis that Ms Alim was in name and

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164 *Alim v LSG Sky Chefs New Zealand Ltd* [2013] NZERA Auckland 528.
165 Preliminary judgment B, above n 19.
166 *Alim*, above n 164, at [4].
167 At [10] and [13].

substance the applicant, and had therefore put herself at risk of an award of costs being made against her if she was unsuccessful.[168]

[370] With regard to a submission that needless applications had been made along the way, the Authority referred to a request made by Ms Alim for removal, which was described as a spurious one brought for tactical reasons.[169] Similarly, tactics were again to the fore when Ms Alim applied to have Ms Park joined as a party to the claim so that penalties could be sought against her – at a point when they were already statute barred.[170] The Authority was also critical of the way in which the recusal application had been handled.[171]

[371] In light of these factors, the Authority concluded that this was not a case where costs should lie where they fall, as had been asserted for Ms Alim. It went on to conclude that although Ms Alim, on the evidence before it, had no knowledge as to what PRI had done at the time shortly before transfer, once the true picture emerged from the High Court she should have revised her whole approach to the case, instead of hoping the Authority would ignore the background circumstances.

[372] Accordingly, the case needed to proceed on the basis that LSG was the successful party entitled to a reasonable contribution towards its costs. There needed to be an uplift to recognise the unnecessary and unmeritorious interlocutory applications, and a failure to engage more reasonably in the settlement proposals at a level much closer to LSG's offer.[172] The Authority determined that the daily tariff should be doubled, and applied to the three days of the investigation meeting, giving an award of $21,000. The Authority said this would be about two-thirds of actual costs, which was a reasonable contribution to costs. It was also well within the range of awards made in other Authority cases, as referred to by counsel.[173]

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168 At [21].
169 At [24].
170 At [25] and [26].
171 At [28].
172 At [32].
173 At [33].

[373] In her submissions to the Court, Ms Wendt said that Ms Alim's primary position was that she was entitled to an award of costs, since she was ultimately the successful party. I have earlier in this judgment considered this submission and rejected it. For the same reasons as before, I do not accept that Ms Alim was the successful party. Rather, LSG succeeded overall, except on one modest point. Costs in the Authority must follow that event.

[374] Ms Wendt's second submission was that costs should lie where they fall; this submission was a variation of the first, it being argued that the Authority's determination had been set aside, and that the resolution of Ms Alim's claims were treated differently in the Court. I disagree. However Ms Alim's claim was put in the Court as compared with the Authority, LSG's defence succeeded to a significant extent. Costs in the Authority now need to be considered on that basis.

[375] The third submission made for Ms Alim was that the Authority's costs award was excessive and punitive. The Authority had recorded that Ms Alim had suffered real distress given the events following her transfer from PRI to LSG, the root cause of that being the actions of the former employer. Ms Wendt submitted that the Authority did not recognise PRI's role when it doubled the daily tariff to $7,000, awarding $21,000 against her.

[376] There are two points to make regarding this submission. The first is that the Authority recognised that there were a range of other factors which needed to be considered, each of which was an appropriate exercise of the Authority's discretion. The second is that in any event on the findings made by the Court, Ms Alim knew the increases to her hourly rate and leave entitlements were fictional;[174] she was, in part, the author of her own misfortune, as I ultimately determined when considering contribution factors.[175]

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174 Substantive judgment, above n 3, at [154] and [156].
175 At [244].

[377] The final point raised for Ms Alim was that a costs award must take Ms Alim's financial circumstances into account. She said that the Authority did not have clear evidence of the arrangements between PRI and Ms Alim, and so put its support of her to one side. Ms Wendt said that on the evidence which is now before the Court it is clear Ms Alim is impecunious, a factor which should be taken into account.

[378] In response to this submission, it was submitted that Ms Alim had not presented any information on her financial circumstances or ability to pay to the Authority. Moreover, she had pursued her claim aggressively, just as she had in the Court, with little concern for the costs involved or costs consequences if she was unsuccessful.

[379] As mentioned, the costs challenge has been brought on a de novo basis. Consequently, the Court is able to take into account Ms Alim's financial circumstances as described in the affidavit she has filed, and the complex background as already explored in this judgment. In *Metallic Sweeping (1998) Ltd v Ford*, Judge Couch stated when considering a costs challenge:[176]

> Fixing costs requires the exercise of discretion. That must be done judicially and in accordance with principle. One of the key principles applicable to the fixing of costs is that any order made should not cause undue hardship to the party required to pay.

[380] Judge Couch went on to say that in the circumstances of the case before him, it would be both inequitable and unconscionable for the Court to ignore an asserted inability to pay, having regard to the discretion vested in it under s 189 of the Act.[177] He added that this was a well-established principle with regard to the award of costs in the Court, and that it is appropriate to observe a similar principle when fixing costs in the Authority.[178]

[381] I respectfully agree, and consider that Ms Alim's financial circumstances, as known to the Court, must be taken into account.

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176 *Metallic Sweeping (1998) Ltd v Ford* [2010] NZEmpC 129, [2010] ERNZ 433 at [18].
177 At [18].
178 At [52].

[382] No application has been sought by LSG for an award of costs in the Authority against PRI or Mr Hay. The Court must proceed on the basis that the sole candidate for a consideration of a costs liability is Ms Alim.

[383] I have also taken into account that, as it was put by Judge Inglis in *Mattingly v Strata Title Management Ltd*:[179]

> It is not the function of a costs award to address any perceived deficiencies in the relief otherwise awarded to a successful party, much as it is not the function of a costs award to punish an unsuccessful party.

[384] But for the consideration of ability to pay, the conclusion of the Authority could not have been faulted, and I would have independently reached the same conclusion for the reasons given. The failure to accept the Calderbank offer was unreasonable; the interlocutory skirmishing which was evident even then, would have supported the significant uplift; and the amount ordered would have reflected Ms Alim's modest success.

[385] However, I must also take into account the updated financial circumstances, and that Ms Alim will have to face the hardship of the cost award referred to above.[180]

[386] Exercising my discretion under s 189 of the Act, I conclude that costs in the Authority should be confined to the amount paid into Court. I set aside the costs determination of the Authority. I order Ms Alim to pay LSG the sum of $10,500 and such interest as has been earned thereon since it was paid into Court. I direct the Registrar to pay this amount to LSG, which will be in full satisfaction of Ms Alim's costs liability in respect of the Authority's investigation.

Conclusion

[387] In relation to this proceeding I make the following costs orders (as summarised in the attached schedule):

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[179] *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15, [2014] ERNZ 1 at [10] – [13].
[180] Above at para [276].

a) Ms Alim is liable to pay LSG $10,000, in equal monthly payments of $500. The first payment is to be paid on or before 23 March 2018.

b) Mr Hay is liable to pay LSG the sum of $19,164.89.

c) PRI and Mr Hay are jointly and severally liable to pay LSG the sum of $166,784.24.

[388] In relation to Ms Alim's costs challenge:

a) The Authority's costs determination is set aside.

b) Ms Alim is liable to LSG in the sum of $10,500, which will be met by the Registrar paying the sum previously paid by Ms Alim to the Court directly to LSG.

[389] In its application of 13 July 2017, LSG sought an order granting costs in respect of the costs hearing against Ms Alim, PRI and Mr Hay jointly and severally. It asserted this was an appropriate case in which to grant costs on costs, which at the date of the application could not be detailed. This final application must be considered and resolved in light of the findings made in this judgment. Given the Court's knowledge of the context and position of the parties, submissions can be brief. Accordingly, I direct:

a) LSG is to file and serve an affidavit producing the invoices relating to the costs hearing, and a submission of no more than three pages. These are to be filed by 2 March 2018.

b) Each other party is to file a submission in response, also limited to no more than three pages. These are to be filed and served by 16 March 2018.

c) LSG may file and serve a two-page submission in reply by 23 March 2018.

d) The application will be resolved on the papers.

[390] The recusal challenge (ARC 62/13) brought by Ms Alim has been stayed; it has been overtaken by events. However, I request counsel to advise the Court by memorandum filed and served by 2 March 2018 whether there are any outstanding issues with regard to that proceeding. Otherwise, the Court's file will be closed.

B A Corkill
Judge

Judgment signed at 3.00 pm on 23 February 2018

Schedule of costs payable to LSG with regard to Ms Alim's substantive challenge

Order	Judgment No	Amount Awarded to LSG
Preliminary judgment	A	-
Preliminary judgment	B	$1,500.00
Interlocutory judgment	1	$1,188.00
Interlocutory judgment	2	-
Interlocutory judgment	3	$1,726
Interlocutory judgment	4	-
Interlocutory judgment	5	$1,214.24
Interlocutory judgment	6	-
Interlocutory judgment	7	$520.74
Interlocutory judgment	8	-
Interlocutory judgment	9	-
Interlocutory judgment	10	-
Interlocutory judgment	11	$677.60
Interlocutory judgment	12	-
Interlocutory judgment	13	$3,788.40
Interlocutory judgment	14	-
Interlocutory judgment	15	$5,442.50
Interlocutory judgment	16	$7,203.40
Interlocutory judgment	17	$215.60
Interlocutory judgment	18	-
Interlocutory judgment	19	-
Disclosure costs		$19,632.75
Substantive hearing		$94,641.60
Interlocutory judgment	20	$17,164.78
Interlocutory judgment	21	-
Interlocutory judgment	22	$13,211.36
Other attendances		$5,000.00
Interlocutory judgment	23 & 24	$16,328
Disbursements	23 & 24	$2,836.89
Disbursements	All other	$6,357.00
Sub-total		$198,648.86
Less Interlocutory judgment 18 award against LSG	18	$2,699.73
Total Award to LSG		**$195,949.13**

Summary of Orders		
Ms Alim to pay:		$10,000.00
Mr Hay to pay costs in respect of (Interlocutory judgments (No 23) & (No 24): **Disbursements:**	$16,328.00 $2,836.89	 $19,164.89
PRI and Mr Hay to pay (on a joint and several basis):		$166,784.24
Total to be paid to LSG:		**$195,949.13**