IN THE EMPLOYMENT COURT
AUCKLAND

AC 37/08
ARC 79/04
ARC 91/04

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	applications for joinder of parties
AND IN THE MATTER OF	an application for costs
ARC 79/04	
BETWEEN	ORAKEI GROUP (2007) LIMITED (FORMERLY AXIOM ROLLE PRP VALUATION SERVICES LIMITED) Plaintiff
AND	RAHUL RAMESH KAPADIA First Defendant
AND	EQUITY REALTY (1995) LIMITED Second Defendant
AND	ANTHONY JAMES KIDD Third Defendant
ARC 91/04	
BETWEEN	ORAKEI GROUP (2007) LIMITED (FORMERLY AXIOM ROLLE PRP VALUATION SERVICES LIMITED) Plaintiff
AND	PHILIP PURNELL ANDREWS Defendant

Hearing: 28 February 2007
and by memoranda filed on 13 and 23 May, 15 July, 15 and 18 August, and 2 September 2008
(Heard at Auckland)

Appearances: Christopher Patterson, Counsel for Plaintiff
No appearance for Rahul Kapadia
John Katz QC, Counsel for Equity Realty Ltd and Phillip Purnell Andrews

Judgment: 23 September 2008

SUPPLEMENTARY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] Since these proceedings were heard, the plaintiff has twice changed its identity, initially to PRP Auckland Limited and subsequently to Orakei Group (2007) Limited. These changes having been brought to the Court's attention by counsel, I formally amend the entituling to the proceedings accordingly. I am advised that the company is now in liquidation. I will refer to it in this judgment as Orakei Group.

[2] The case began when this Court made an Anton Piller order against the defendant Rahul Kapadia and a non-party, Equity Realty (1995) Limited ("Equity"). Equity objected to execution of the Anton Piller order at its premises and declined to allow the plaintiff and its representatives entry for the purposes of execution. Equity applied for discharge of the orders. Those were discharged following a lengthy hearing by a full Court. That discharge followed a preliminary finding that the Employment Court was not empowered to issue the Anton Piller order. Although Equity also advanced other substantive grounds to set aside the orders, it was unnecessary for the Court to deal with these but I accept that evidence and submissions on those additional grounds were prepared for the hearing.

[3] This judgment deals with four interlocutory applications in this case.

[4] First, I set out my reasons for disallowing Orakei Group's application that certain paragraphs of the affidavit of Philip Purnell Andrews be not read in the proceeding.

[5] Next, Equity, the occupier of premises at which an Anton Piller order was sought to be executed, applies to be joined as a party to the proceeding for the purpose of entitling it to seek costs against the plaintiff.

[6] Third, Equity and Mr Andrews have applied to join as a party Anthony James Kidd, a shareholder in and the sole director of the plaintiff company. This application is also made for the purpose of Equity's claim for costs.

[7] Finally, I determine Equity's and Mr Andrews' application for indemnity costs in the litigation including their costs in preparation for, and attending, the hearing on 28 February 2007 and in subsequent interactions recorded in the entituling.

[8] The plaintiff opposes Equity's applications. As with other aspects of this proceeding dealing with the obtaining and execution of an Anton Piller order, the defendant Rahul Kapadia has played no part in the litigation.

[9] The relevant history of the case is set out in the judgment of the full Court delivered on 4 August 2006. The proceedings between Orakei Group and Mr Kapadia in respect of which Equity is not a party with the file number ARC 79/04, deal with the obtaining by Orakei Group of an Anton Piller order and its subsequent setting aside by this Court in 2006.

[10] The other proceedings under file number ARC 91/04 are proceedings issued by Orakei Group against Phillip Andrews personally alleging that he was in contempt of the Anton Piller order and seeking the imposition of a fine against him of no less than $30,000. Mr Andrews is a director of, and shareholder in, Equity. Immediately after the Court concluded that the Anton Piller order was made without the power to do so and set it aside, the contempt proceedings under ARC 91/04 against Mr Andrews personally were discontinued by Orakei Group.

Reasons for refusal to exclude evidence

[11] After hearing the arguments of counsel for the plaintiff on this issue, I announced that the plaintiff's application to exclude parts of the evidence of Mr Andrews was refused (without need to hear from Mr Katz for Equity) and that I would give my reasons in this substantive judgment.

[12] Mr Andrews filed two affidavits in support of Equity's applications. The first, sworn on 22 November 2006, has not been objected to. Four paragraphs in the second affidavit, sworn on 12 December 2006, are challenged, paragraphs 9 to 12 (inclusive). In those paragraphs, Mr Andrews relates discussions he had with the plaintiff's Mr Kidd after Equity's solicitors wrote to the plaintiff's solicitors in an undated letter marked "*Without prejudice save as to costs*". Although the letter was undated, it refers to a forthcoming hearing in this Court set down for 30 June to 1 July 2005 and the Court's requirement to file a synopsis of argument by 15 June 2005. Equity's solicitors offered a settlement proposal to the plaintiff to obviate the need for the forthcoming hearing. Subject to acceptance by a specified date, Equity proposed that Orakei Group (then Axiom Rolle) consent to a full discharge of the Anton Piller order made ex parte and a striking out of the separate proceedings in ARC 91/04, being contempt proceedings brought against Mr Andrews. Equity's solicitors further proposed that if their client was no longer concerned in their dispute between Orakei Group and Mr Kapadia and if Orakei Group paid Equity the sum of $38,000 as a contribution to its costs and those of Mr Andrews, the matters between these persons would be settled. The letter confirmed that if Equity's proposals were not accepted and if it was successful in its application to discharge the ex parte orders, it would be seeking full indemnity costs against Orakei Group and would reserve the right to make an application for costs against any entity or individual.

[13] Mr Andrews said in his affidavit of 12 December 2006 that he had discussions with Mr Kidd following receipt of the letter just described and that he did not entertain any doubt that Mr Kidd understood that Equity would seek full indemnity costs against Orakei Group and Mr Kidd and possibly also Orakei Group's solicitors and counsel.

[14] This evidence was given by Mr Andrews to contradict evidence Mr Kidd had earlier given on affidavit on 5 December 2006 to the effect that Orakei Group would be seriously prejudiced if Equity were to be joined as a party more than 2 years after the Anton Piller order was issued. Mr Kidd claimed prejudice because he said he would not otherwise have allowed Orakei Group to become potentially exposed to indemnity costs retrospectively. Further he says he would have decided

not to commit Orakei Group to such a risk had Equity applied to be joined earlier, or at least before any significant costs were incurred. Mr Kidd claims that he understood that Orakei Group could not seek costs against Equity because it was not a party to the proceeding. The corollary of this was said to be that Equity could not obtain costs against Orakei Group.

[15] At paragraph 10 of his affidavit of 12 December 2006 Mr Andrews says that it was never suggested to him that Equity would not have an entitlement to seek costs or that costs could not be sought against Orakei Group. He relates a report from Equity's counsel after a Chambers conference with His Honour Judge Travis on 7 April 2005 that Equity's counsel advised the Court that one of its prime concerns was to ensure that it had status before the Court to be protected in respect of any costs order that might be made in favour of Equity and/or Mr Andrews personally.

[16] Paragraph 11 of Mr Andrews's affidavit of 12 December 2006 refers again to his discussions with Mr Kidd in June 2005 prior to the 3-day hearing before the full Court began and, Mr Andrews says, an endeavour to settle matters directly with Mr Kidd and amicably. Mr Andrews's evidence is that Mr Kidd *"was simply not interested"*. He says that Mr Kidd told him that any earlier settlement offers made were then withdrawn and that the only costs that he would be prepared to pay to Equity totalled $5,000.

[17] Finally, at paragraph 12 of the affidavit of 12 December 2006 Mr Andrews says that Mr Kidd left him in no doubt whatsoever that neither he nor Orakei Group was at all interested in any settlement with Equity and that contempt proceedings against Mr Andrews personally would be pursued.

[18] The plaintiff's grounds for excluding these passages from Mr Andrews's affidavit just described include that they are argumentative and opinion evidence. They are also said to contain inadmissible hearsay evidence that is itself controversial and should be disregarded or at least given little weight. The evidence of what are claimed to have been without prejudice discussions are said by counsel, Mr Patterson, to be *"gratuitous, egregious and provocative"*.

[19] On 9 February 2007 Mr Kidd swore an affidavit in support of his company's application that these passages of Mr Andrews's affidavit not be read. Mr Kidd says, in effect, that Mr Andrews did not mention or suggest that Equity would seek indemnity costs against Orakei Group or Mr Kidd but, rather, as Mr Kidd recalls it, Mr Andrews wanted to know whether Orakei Group's offers were the best that would be made. Mr Kidd says that he did not give Mr Andrews any basis upon which he, Mr Andrews, could possibly have believed that Mr Kidd considered that there was ever a risk of indemnity or indeed any costs being awarded against him or Orakei Group. Mr Kidd says that the issue of indemnity costs did not arise during those discussions.

[20] Further, Mr Kidd says that the discussions referred to by Mr Andrews in paragraphs 11 and 12 of Mr Andrews's affidavit of 12 December 2006 took place by telephone between the two men and again consisted of Mr Andrews asking whether the offers that had been made were the best that Orakei Group was willing to make. Mr Kidd says that he was annoyed that significant costs had been incurred since the last attempt to settle matters and reiterated what he says was his advice that the previous offer of $15,000 was more than reasonable. Mr Kidd denies Mr Andrews's suggestion that he, Mr Kidd, was not interested in settling matters and attributes the failure to the fact that the gap between them was too wide. Finally, Mr Kidd denies ever suggesting that Orakei Group or he would pursue the contempt allegation, saying this was simply never raised.

[21] Although of limited relevance to the costs application I have to decide, I found Mr Andrews's evidence is not inadmissible on the grounds advanced by the plaintiff. It responded to similarly relevant evidence raised by Mr Kidd and indeed Mr Kidd has subsequently replied to it in substance even before its admissibility has been determined. It will be taken into account on the remaining issues dealt with in this judgment.

The application to join Equity as a party

[22] This application is governed by s221 of the Employment Relations Act 2000. That provides, materially, that in order to enable the Court to more

effectually dispose of the matter before it according to its substantial merits and equities, it may at any stage of the proceedings direct parties to be joined or struck out. That is a broad discretionary power but must meet the test of more effectually disposing of the proceeding according to its substantial merits and equities.

[23] The defendant, Mr Kapadia, played little or no part in the proceedings in this Court. Equity was the business whose premises were the subject of the Anton Piller order. It was not only entitled to challenge the making of an order affecting its business but, in the circumstances, had no alternative but to apply to the Court to set aside the order and to carry the burden of the argument that prevailed at the hearing that it was made without jurisdiction.

[24] Orakei Group's grounds for opposing Equity's joinder include that Equity delayed unreasonably its application to be joined for a period of 2 years and one month after it became involved in the proceeding on 11 October 2004 when Orakei Group attempted but failed to execute an Anton Piller order at Equity's premises. Orakei Group says that Equity has not explained this lengthy delay. It says it would be unreasonable to permit it to be subjected to costs more than 2 years after the failed attempt at execution of the Anton Piller order.

[25] Orakei Group says that Equity's presence as a party will not more effectually dispose of any matter before the Court according to the substantial merits of the case. Orakei Group says that Equity's only interest can be a commercial interest in the outcome of the litigation between the plaintiff and the defendant. In any event, Orakei Group says that even if Equity were to be joined, it would have no right to seek costs retrospectively. Penultimately, Orakei Group says that any dispute between it and Equity was resolved by Orakei Group waiving its right to further attempt to execute the Anton Piller order and/or when Orakei Group indicated that it would not oppose Equity's application to discharge or vary the Anton Piller order.

[26] I accept that the s221 test relating to joinder is met in the case of Equity's application to have itself added as a party. It has acted, in effect, as such for a considerable time and to disqualify it from seeking an order for costs having been

entirely successful, on the basis that it is not a party, would be to mean that the issue of costs could not be dealt with according to the substantial merits and equities in the case. It is just that party status for Equity should be retrospective to the date of the attempted execution of the Anton Piller order at its premises, 11 October 2004. Nothing in the statute prevents retrospectiveness of party status. Henceforth the entitulings will show Equity Realty (2005) Limited as the second defendant.

The application to join Anthony James Kidd as a party

[27] The grounds advanced by Equity and Mr Andrews for the joinder of Mr Kidd are that he is the sole director and a shareholder in Orakei Group, the other (majority) shareholding being a solicitors' trust company. Equity says that Orakei Group conducted the proceeding at all times through Mr Kidd and no other person and that he was "*the real plaintiff*". Equity says that there was and remains a doubt that Orakei Group can satisfy any order for costs if one is made against it alone and it is in the interests of justice that it should be able to obtain any order for costs against both Orakei Group and its Mr Kidd jointly and severally.

[28] Equity and Mr Andrews claim costs against Mr Kidd personally (and therefore seek to have him joined to the proceeding formally as a party) on four grounds. The first two grounds are really different sides of the same coin and I propose to deal with them as a single ground. They are that Equity and Mr Andrews say there is a real concern that Orakei Group will not be able to pay any costs awarded against it and, in the circumstances, Equity and Mr Andrews should not be left out of pocket. While I agree that if, as is arguable for the purposes of joinder, Equity and Mr Andrews may be entitled to indemnity costs, then it would not be just to make an order against Orakei Group alone knowing that it will be unable to satisfy all or any of it. There is now substantial evidence to support the stated belief that Orakei Group alone will be unable to meet an award of costs.

[29] As against that, Mr Kidd is entitled to conduct his business affairs through the vehicle of a limited liability company. Although this is not the same exercise as that known as piercing the corporate veil to which courts occasionally have

recourse, the principles underpinning the reluctance to do so except in special cases are similar. Here, however, the evidential threshold has been made out that is appropriate for joinder of a director/shareholder for resource sufficiency purposes.

[30] The third ground advanced by Equity and Mr Andrews to support Mr Kidd's joinder is that they have incurred very substantial costs which they say would not have been incurred but for the active direction and control of the proceeding by Mr Kidd. I accept that is so in the unusual circumstances of this case.

[31] Equity's fourth and final ground for the joinder of Mr Kidd is that he was at all material times the real party as plaintiff rather than his company. I do not agree with such an absolute proposition, but do nevertheless find that he was personally very instrumental in those things done in Orakei Group's name. That was exemplified by the events leading up to, and in, the pursuit of Mr Andrews for contempt but is also well illustrated in earlier events surrounding the obtaining and execution of the Anton Piller order.

[32] Orakei Group points out that as a company it cannot commence proceedings without an authorised representative. It denies that Mr Kidd is the real plaintiff. It says that he properly discharged his duties as a director by obtaining and following legal advice on behalf of Orakei Group. It says the application for, and the execution of, the Anton Piller order were in Orakei Group's best interests and that Mr Kidd's actions on behalf of the company were at all times lawful, proper and consistent and were neither reckless nor improperly motivated. Orakei Group advances the same grounds of opposition by reference to the s221 tests as it has advanced in respect of Equity's joinder. Orakei Group asserts, through counsel, that it can satisfy any order for costs that the Court may make. However, that must, in light of recent apparent events, be very doubtful.

[33] Although it is clear that by 13 October 2004, Orakei Group through Mr Kidd had signalled to this Court and to Equity that it would not oppose Equity's application to the Court to vary or set aside the Anton Piller order, and indeed would consent to that course, the very long hearing before a full Court in 2005 and Orakei Group's strenuous and detailed opposition to the setting aside of the Anton

Piller order are in stark contrast to that position that it signalled on 13 October 2004.

[34] I have concluded that in all the unusual circumstances of the case, it will be a just exercise of the Court's discretion under s221 to join Mr Kidd personally as a party to the proceedings for the purposes of costs. He will also henceforth be a defendant in the case, with effect retrospectively to the time of the obtaining of the Anton Piller order in this Court.

Applications for costs

[35] Having determined who is entitled to seek costs and against whom they may be made, I now turn to whether Equity and Mr Andrews should have orders and, if so, how much. They have established that their costs of, and associated with, legal representation in this case but excluding for these matters now being dealt with, amount to $94,055.08 including GST and disbursements. Although substantial for an interlocutory application, this was a particularly complex and lengthy hearing for which it was entirely appropriate for them to engage senior counsel. The interlocutory application was determinative of the case. In the circumstances, the fees and disbursements incurred were reasonable.

[36] There is no dispute about the applicable principles that can be extracted from a trio of judgments of the Court of Appeal, *Binnie v Pacific Health Ltd*[1], *Victoria University of Wellington v Alton-Lee*[2], and *Health Waikato Ltd v Elmsly*[3] [2004] 1 ERNZ 172.

[37] First, the Court must determine what costs were reasonably incurred by a party entitled to them. Next, the Court must determine a reasonable contribution towards those costs which, although it may range from nothing to full indemnity, will usually either be set at, or depart from, two-thirds of them. Ability to pay is a relevant factor. So, too, is the fact that the case may be regarded as a test case in

[1] [2002] 1 ERNZ 438
[2] [2001] 2 ERNZ 305
[3] [2004] 1 ERNZ 172

the sense that there is no earlier guidance from the courts on the issue determined and/or that the outcome will benefit parties generally in addition to the particular parties to the case.

[38] Whether a case might be regarded as a test case affects questions of costs, and no less an application for indemnity costs. This case had significant test case elements to it. Until detailed consideration was given by the full Court to comprehensive arguments put forward by Mr Katz on behalf of Equity and Mr Andrews, it had been assumed that the Employment Relations Authority and the Employment Court were empowered to issue an Anton Piller order in appropriate cases. It was arguable on one interpretation of the relevant legislative provisions that this was so. A number of such orders had been made by the Authority and the Court over a number of years. The Authority Member who considered the application for an Anton Piller order, but rejected it on its merits, assumed that he had power to make an order. So, too, did the Judge on appeal to this Court and who employed that power to make the orders the subject of the challenge. It was only after these events that, first, the High Court in *BDM Grange Ltd v Parker*[4]and subsequently this Court in this case, cast doubt upon the existence of the power and then determined otherwise.

[39] The result of the application to set aside the Anton Piller order affects not only these immediate parties but others in the field. It has resulted in not only a cessation of applications for Anton Piller (and perhaps also Mareva) orders to the Authority, but is probably accountable for the upsurge in applications for injunctive relief generally now made to the High Court that would probably have been made previously to the Employment Relations Authority. The legislation has been interpreted and applied and others are the indirect beneficiaries of the expense to which both parties have gone in arguing this case and clarifying the law.

[40] It follows that Orakei Group cannot be criticised for having brought its claims for an Anton Piller order in the Employment Relations Authority and subsequently in this Court. With received wisdom, at least to that point, it said that this was

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[4] [2005] 1 ERNZ 343

appropriate. I make that observation not about the merits of the claim for these orders that have not been determined: rather, it is understandable that the application was made in the forums it was.

[41] These factors together have persuaded me that there should be some discount allowed from indemnity costs to which Equity and Mr Andrews might otherwise be entitled. The extent of that discount must necessarily be somewhat arbitrary although that is consistent with the fixing of a reasonable contribution to reasonable costs on a scale ranging from 0 percent to 100 percent as the Court of Appeal directed in the *Binnie* case.

[42] On the other hand, those entitled to costs are justly entitled to a substantial reimbursement of them commensurate with the seriousness of the orders that were obtained and executed, as it now transpires without an entitlement to do so and for the unsuccessful application to commit for contempt of the orders.

[43] Equity Realty (1995) Limited and Philip Purnell Andrews are entitled to costs against Orakei Group (2007) Limited and, jointly and severally, against Anthony James Kidd. Equity Realty is entitled to costs of $65,000 and Mr Andrews to costs of $10,000.

GL Colgan
Chief Judge

Judgment signed at 11 am on Tuesday 23 September 2008