

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUHAHI**

**[2020] NZEmpC 60
EMPC 85/2018**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application to withdraw as counsel
AND IN THE MATTER	of an application for substituted service
AND IN THE MATTER	of an application to join third parties for cost purposes
BETWEEN	ROBERT NOBLE Plaintiff
AND	BALLOONING CANTERBURY.COM LIMITED Defendant

Hearing: 19 March 2020, and subsequent memoranda

Appearances: A Toohey, counsel for defendant
R Towner, counsel for Goldstein Ryder Limited, J Goldstein and
L Ryder

Judgment: 7 May 2020

**INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL
(Applications for withdrawal, substituted service and joinder of third parties
for costs purposes)**

Introduction

[1] Three interlocutory applications are before the Court which arise in the context of an application for costs brought by Ballooning Canterbury.com Ltd (BCL) against Mr Robert Noble; the costs application was filed after I dismissed Mr Noble's

challenge on a preliminary point, reserved costs, and indicated that these should follow the event.¹

[2] Two applications have been brought by the law firm which is on the record for Mr Noble, Goldstein Ryder Ltd (GRL), and counsel who appeared on his behalf at the hearing, Mr Goldstein and Ms Ryder. First, they seek a declaration from the Court declaring that counsel have ceased to be on the record since Mr Noble has not responded to any requests for instructions on the application for costs. Second, they seek directions for substituted service of that application; this was stated to be necessary because whilst the firm held a telephone number and email address for Mr Noble, he had declined to provide a physical address in the United States of America (USA) where he resides.

[3] The third application is brought by BCL against GRL and/or counsel, that they be joined as parties for cost purposes.

[4] Each of these applications are opposed.

First application: declaration for withdrawal

[5] There are no specific provisions in the Employment Relations Act 2000 (the Act), or the Employment Court Regulations 2000 (the Regulations), which deal with declarations for withdrawal. Accordingly, the High Court Rules (HCR) apply via reg 6 of the Regulations.

[6] Rules 5.40 and 5.41 of the HCR relevantly state:

5.40 Change of representation or address for service

- (1) A party must file and serve on every other party to the proceeding a notice of change of representation if—
 - (a) the party has acted in person and appoints a solicitor to act for that party; or
 - (b) the party wishes to change that party's solicitor; or
 - (c) the party for whom a solicitor has acted wishes to act in person.

¹ *Noble v Ballooning Canterbury.com Ltd* [2019] NZEmpC 98 at [128]–[129].

- (2) If the party's address for service after the change of representation will be different from that which applied before the change, the party must also serve a copy of the notice at the address that was, immediately before the change, the party's address for service.
- (3) The notice—
 - (a) must be signed by the party personally or by the party's attorney; and
 - (b) in the case of a notice under subclause (1)(a) or (b), must contain the information about the new solicitor required by paragraphs (b) to (e) of rule 5.44(1); and
 - (c) in the case of a party referred to in subclause (1)(c), must state that the party's intention is to act in person.
- (4) For the purpose of the proceeding, the change of representation takes effect on the filing of an affidavit proving service in accordance with subclause (1) and attaching and verifying a copy of the notice served.

...

5.41 Withdrawal of solicitor who has ceased to act for party

- (1) If the solicitor on the record for a party to a proceeding has ceased to act for the party, the solicitor may apply to the court for an order declaring that the solicitor has ceased to be the solicitor on the record for the party in that proceeding and the court may make the order.
- (2) It is not necessary to make an application if—
 - (a) the party has effected a change of solicitor in accordance with rule 5.40; or
 - (b) the party—
 - (i) has filed a notice stating that the party intends to act in person and the party's new address for service; and
 - (ii) has served a copy of the notice on the solicitor on the record and on every other party to the proceeding who has given an address for service; and
 - (iii) has filed an affidavit proving that service and attaching and verifying a copy of the notice served.
- (3) Unless subclause (2)(a) or (b) applies, the solicitor on the record for a party to a proceeding, for the purposes of that proceeding, is the solicitor on the record for that party until the final conclusion of the proceeding unless and until the solicitor—
 - (a) obtains an order under subclause (1); and
 - (b) serves on every party to the proceeding who has given an address for service a copy of the order obtained under that subclause; and
 - (c) files an affidavit proving that service.
- (4) Every application under subclause (1) must be made by interlocutory application and must be supported by an affidavit giving the grounds of the application.

- (5) Unless the court otherwise directs, notice of every application under subclause (1), and a copy of the affidavit in support of the application, must be served on the party for whom the solicitor acted, and that notice must inform the party of the effect that rule 5.42 will have on the party's address for service if the solicitor obtains an order under subclause (1).
- (6) An order made under subclause (1) does not affect the rights of the solicitor and the party for whom the solicitor acted as between themselves.

[7] GRL's application was filed on 15 October 2019. It stated counsel had been unable to obtain instructions, despite making reasonable attempts to do so. A supporting affidavit confirmed that after BCL's application for costs had been brought on 9 September 2019, several emails had been sent to Mr Noble seeking instructions, but no response had been forthcoming.

[8] On 23 October 2019, an affidavit was filed on behalf of GRL stating the application for withdrawal had been served by email. The lawyers also sent a notice to Mr Noble which stated that were the Court to make an order of withdrawal, HCR 5.42 would apply so that his last known address would become his address for service. His last known address was a Christchurch street address.

Second application: directions as to substituted service

[9] On 4 November 2019, an application for directions as to service was filed, since the application for withdrawal had not been physically served. It stated counsel had been unable to contact Mr Noble by telephone or post, and the only feasible method of service was accordingly by email. A supporting affidavit stated Mr Noble had refused to provide a physical address because he had said his wife works for a USA Government department which was described as being highly security sensitive. It was unclear when the refusal to provide this information took place.

[10] BCL filed a notice of opposition to this application, asserting in effect that the requirements of the rules as to withdrawal had not been met. It was submitted that where an application for leave to withdraw is made, there must be an affidavit filed proving personal service on the lawyer's client, pursuant to HCR 6.1 and 5.41, thereby providing the Court and the other party to the litigation an alternate physical address for service. The notice of opposition stated that if the application for service by email

were to be allowed, there would be no proper address for service as required by HCR 5.40. This would amount to a circumventing of the rules; and it would not be possible to enforce any order for costs. It also stated that as a result of information disclosed in the supporting affidavit, consideration was being given to whether there were grounds to apply for costs against GRL and/or counsel.

[11] On 3 December 2019, I issued a minute stating that when considering whether to make an order for substituted service, the Court would need to be satisfied that reasonable efforts had been made to attempt to serve the document, and either treat those attempts as constituting service, or direct further steps for doing so. I also said the Court would need to take into account the circumstances of the application for which substituted service was sought, including the significance of the document which would be served. I noted there was an issue as to whether a sufficient address for service had been provided for the purposes of HCR 5.42(2). The Court had no information as to the owner or occupier of the address which had been provided, and/or the relationship of that person or persons with Mr Noble. Accordingly, some care had to be taken in assessing the application for substituted service by email only. An opportunity was provided for further evidence to be filed, then submissions.

[12] On 20 January 2020, a solicitor from GRL filed an affidavit stating that further efforts had been made to telephone Mr Noble at a number in the USA, a further email had been sent to him, and also a letter addressed to him was posted to the Christchurch address given previously, which was the residence of Mr Andrew Nicholson, an acquaintance of Mr Noble at whose address he had stayed previously.

[13] On 27 February 2020, a further application for substituted service was filed seeking directions that service of GRL's withdrawal application be treated as happening after that application had been personally served on Mr Nicholson, and by email sent to him. This application was supported by an affidavit from Ms Ryder indicating that further efforts had been made to locate and contact Mr Noble. These consisted of speaking with persons in New Zealand known to Mr Noble, including Mr Nicholson. Mr Nicholson had confirmed he was in contact with Mr Noble, and had provided a USA telephone number for him. Ms Ryder had, on three occasions, attempted to contact Mr Noble at the number given. No voice message service was

available on the phone. Mr Nicholson said he knew Mr Noble's address in the USA but was not permitted by Mr Noble to release it.

[14] Mr Nicholson had also confirmed he had received the letter and accompanying documents that had been couriered to his address. He said he had told Mr Noble about the package, who told him to retain it for the time being.

[15] A second affidavit was filed on behalf of GRL, which attached an email exchange between Mr Nicholson and Ms Toohey, of 27 February 2020. Ms Toohey had sought confirmation that Mr Nicholson was indeed in touch with Mr Noble, and had agreed to pass on material to him in the USA. In response, Mr Nicholson stated he was reluctant to get involved in the dispute, and there seemed to be some confusion over the extent of his contact with Mr Noble. He said he had been in regular contact with Mr Noble in 2019, but the contact had dried up in the last two to three months. He said it had been convenient for Mr Noble to use his address when he was staying with him in New Zealand, but he had never understood his address would be an official address for Mr Noble. He confirmed he had recently been in touch with Mr Noble by telephone, because he had heard about his lawyer's efforts to contact him.

[16] This had led to the discussion as outlined by Ms Ryder in her affidavit. He confirmed he had agreed to pass on documents relating to the application to withdraw as solicitors, but he was not prepared to be a general conduit for future communications. He emphasised there had been a gap in contact which had only resumed in the past few days; and that he had not discussed the content of the lawyer's emails with Mr Noble as he had not seen them, although he was aware they had been sent and he had encouraged Mr Noble to contact his lawyers.

Third application: order of joinder of GRL and/or counsel

[17] On 14 February 2020, BCL applied for orders that GRL and/or Mr Noble's counsel, Mr Goldstein and Ms Ryder, be joined as parties to the proceeding for cost purposes. In the application it was asserted that costs should be ordered against those third parties because there had been a failure to discharge a duty to obtain a physical address for Mr Noble. This meant that BCL would be unable to enforce a costs order.

A supporting affidavit from Mr Michael Oakley outlined the difficulties which had arisen for BCL because it had incurred substantial legal costs in defending Mr Noble's unsuccessful challenge.

[18] Then Mr Oakley referred to the fact that he had spoken recently to Mr Nicholson who worked for BCL as a maintenance provider. Mr Nicholson had said he had been unaware his address had been used as an official address for Mr Noble, and confirmed that he had not heard from him for some time. He had said Mr Noble had never resided at Mr Nicholson's address, but had stayed there from time to time when visiting New Zealand, and that he did not know where Mr Noble was living, or in which USA state he resided.

[19] A notice of opposition was filed. It asserted under the rules of procedure that the statement of claim as originally filed on behalf of BCL's client had met the necessary requirements as to an address for service for Mr Noble, so there was no breach of duty. Reliance had been placed on the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act), because funds had been remitted by Mr Noble to the firm in payment of an order for security for costs. It had been alleged that a physical address should accordingly have been obtained. The notice of opposition submitted that any non-compliance under that Act could not be a relevant consideration for present purposes. The threshold for egregious behaviour justifying joinder could not be made out in the circumstances.

GRL's applications

Submissions

[20] For GRL, Mr Towner submitted in summary:

- a) The Court should make the directions sought by GRL in its amended application for substituted service, because reasonable efforts had been made to serve the application for withdrawal by other means.
- b) When Mr Noble's statement of claim was filed, the requirements of reg 27 of the Regulations, and of Form 1 which provides the statutory template for a statement of claim, were met. In the intituling of the

statement of claim, GRL's address had been given instead of Mr Noble's address, but his was not an unusual practice.

- c) The steps proposed in the application were likely to bring the withdrawal application to Mr Noble's attention.
- d) The application should be considered under the provisions as to substituted service contained in HCR 6.8, which requires "reasonable efforts" to be made to serve a document. BCL had suggested GRL should engage a private investigator to locate Mr Noble for service purposes, but such a step would be unduly onerous.

[21] For BCL, Ms Toohey submitted in summary:

- a) Insufficient steps had been taken to serve the withdrawal application. All that had occurred was the sending of emails which had not been acknowledged, phone calls had been made which either resulted in an engaged signal or no answer, and two friends of Mr Noble had been phoned more recently.
- b) The use of Mr Nicholson's address for substituted service would not be appropriate because of the restrictions placed on him by Mr Noble as to disclosure of his USA address.
- c) To permit substituted service of an application which proposes Mr Nicholson's residential address would become Mr Noble's address for service, when he is not authorised to reveal that address, would mean that Mr Noble had successfully manipulated the Court's processes. Since Mr Nicholson is not prepared to be involved further in the issues between the parties, his residential address could not be a sufficient address for service for Mr Noble.
- d) Because GRL chose to use its own address in the intitolment of the statement of claim, it should have held a physical address in case it needed to make an application for a withdrawal when personal service

would need to take place. This was particularly the case, since the client resides overseas.

Analysis

[22] In considering the amended application, it is necessary to focus on the nature of the documents for which substituted service is sought, and the consequence of making such an order.

[23] The notice given by GRL to Mr Nicholson under HCR 5.41 stated Mr Nicholson's address was Mr Noble's last known address and would become the address for service. I find that address is not Mr Noble's usual business or residential address, but one which he has stayed at temporarily when visiting New Zealand. Moreover, Mr Nicholson has made his position plain. He is not willing for his address to be used as Mr Noble's address for service on an ongoing basis, a position which is hardly surprising in the circumstances.

[24] Accordingly, were substituted service to occur as sought, obvious problems would arise. There would be a dysfunctional address for service. Further, Mr Noble would in effect have circumvented the intent of the rules, which is to provide an effective means of service for all purposes in a proceeding.

[25] It is asserted that all reasonable steps have been taken to effect service. In a situation where GRL has allowed its own address to be used in lieu of Mr Noble's address in the intituling of the statement of claim, the obligation to take reasonable steps if an order for substituted service is subsequently sought, is more onerous.

[26] I am not satisfied reasonable efforts have been made to serve the document. As Ms Toohey submitted, GRL must have information relating to Mr Noble's bank account, and possibly other information which could facilitate the giving of proper instructions to a private investigator who could be instructed to attempt to ascertain his residential address. This step has not been explored.

[27] At the hearing, the Court was told Mr Noble is a New Zealander; he wished to visit family members when in the country.² There is no evidence of any effort to trace or contact them.

[28] It is not for the Court to speculate what other options might be open to GRL to ascertain Mr Noble's whereabouts for the purposes of serving its withdrawal application, either physically or by a satisfactory means of substituted service.

[29] At the hearing, there was discussion as to whether a witness summons should be served on Mr Nicholson, requiring him to attend Court and to disclose Mr Noble's physical address. As neither counsel had instructions on the point, supplementary submissions were filed as to this possibility.

[30] Mr Towner later advised that GRL was willing to issue a witness summons to Mr Nicholson, although it would prefer to do so pursuant to a direction of the Court.

[31] Ms Toohey submitted that this would be a work-around for non-compliance with procedural requirements. She said there were a number of problems with this possibility. The first was that under a lockdown situation, it could be some time before this could realistically occur. Second, there would be no verification available that the address Mr Noble had provided to Mr Nicholson was in fact correct. The details as to what Mr Nicholson had been told were scant and did not justify taking this step. Significant credibility findings against Mr Noble had been made, and it was now abundantly clear he did not intend to honour the repercussions of his unsuccessful challenge by meeting a costs order. It was highly unlikely he would therefore have provided Mr Nicholson with his correct residential address. Ms Toohey also told the Court that there was an ongoing business relationship between Mr Nicholson and BCL, and that a step of this kind would therefore be inappropriate.

[32] For the reasons given by Ms Toohey, I am not persuaded that a witness summons should be issued. Mr Nicholson has acted in good faith, and I am not persuaded he should be drawn into the present dispute any further.

² *Noble v Ballooning Canterbury.com Ltd*, above n 1, at [39].

[33] On 3 April 2020, I issued a minute indicating that, amongst other things, I would decline the application for substituted service of the application for withdrawal, in its present form. I sought confirmation as to whether, in those circumstances, GRL would maintain its application for a declaration of withdrawal. I said that if so, it would need to reconsider substituted service options. If not, I would dismiss the application on the basis there was not satisfactory evidence as to effective service of the notice on Mr Noble.

[34] On 9 April 2020, Mr Towner stated that GRL wishes to maintain its application for a declaration of withdrawal, and that it does not want to remain on the record when it has not had instructions from Mr Noble for a considerable time. It was hoped that the Court's judgment would provide the firm with some insight into what additional efforts could be made to try to serve Mr Noble.

[35] I am prepared to give GRL a further, but limited period, to take such steps as it sees fit in light of the findings reached by the Court.

[36] I will review the position as to substituted service of the application for withdrawal, initially at a telephone directions conference to be held with counsel on 25 June 2020.

BCL's application

Submissions

[37] With regard to BCL's application for joinder, Ms Toohey submitted in summary:

- a) The application should be considered under s 221 of the Act which provides for the joinder of parties. Relevant to such an application if it relates to joinder of a lawyer, is the premise that costs may be awarded if there has been a "serious dereliction of the solicitor's duty to the

court”: *Harley v McDonald*.³ It was accepted that “exceptional circumstances are required”: *Blue Water Hotel Ltd v VBS*.⁴

- b) There were several relevant breaches by GRL and/or counsel. The first related to the fact that the heading of a statement of claim requires the place of residence of the plaintiff to be stated. This was the effect of Form 1 of the Regulations, reinforced by HCR 5.11(1)(g). This obligation had been breached.
- c) Second, there was a breach of the duty owed by a lawyer under r 13 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (CCC Rules). Counsel referred to CCC r 13.2 which provides that a lawyer must not act in a way which undermines the processes of the Court; and should treat others involved in the Court processes with respect. This obligation was particularly important in a case such as the present, where the fact Mr Noble’s address was unknown had been referred to by the Court when making an order for security for costs at an earlier stage of the proceeding.⁵ In all these circumstances, there was a duty to obtain Mr Noble’s address.
- d) Third, GRL held obligations under the AML/CFT Act, when receiving an international wire transfer, and remitting those funds to the Registrar as security for costs, or in payment of the costs of that application, as directed by the Court. Specifically, ss 11(1)(a) and 15(1)(d) of that Act requires a reporting entity such as a lawyers’ firm to conduct enhanced due diligence. This included a duty to verify the identity of the customer and obtain that person’s address. Section 31(1) requires a law firm to conduct ongoing customer due diligence. These obligations applied in the circumstances. GRL had breached its statutory obligations. A reporting entity not conducting customer due diligence could be liable to civil, or criminal, proceedings. A breach of these significant obligations would also have ethical implications: CCC r 11 provides a lawyer’s

³ *Harley v McDonald* [2002] 1 NZLR 1 (PC) at [45]–[49].

⁴ *Blue Water Hotel Ltd v VBS* [2019] NZEmpC 24 at [9]–[18].

⁵ *Noble v Ballooning Canterbury.com Ltd* [2018] NZEmpC 97 at [37].

practice must be administered in a manner that ensures that the duties to the Court, and to existing prospective and former clients are adhered to, and that the reputation of the legal profession is preserved.

- e) These obligations operated independently and together to impose a duty on counsel to protect the parties to the litigation from an international resident acting in bad faith. The breaches in this case amounted to a serious dereliction of duty, so that the law firm/counsel would be properly amenable to the Court's jurisdiction as to costs.

[38] Mr Towner submitted in summary:

- a) In *Harley*, the Privy Council had highlighted that the jurisdiction to order costs against solicitors was both compensatory and punitive in nature.⁶ In *Aarts v Barnardos New Zealand*, Chief Judge Colgan, as he was then, stated that this Court does not have “the ... function of the High Court of overall supervision of the conduct of enrolled barristers and solicitors” which therefore “eliminates” the punitive function of a High Court order for costs when made against a party's lawyer.⁷
- b) That meant the compensatory aspect of the jurisdiction must focus only on wasted costs arising from a failure of duty: *Harley*.⁸
- c) In *Aarts*, the Court also emphasised that it must be very careful to ensure that a claim for costs against a representative was not an attempt to ensure a greater likelihood of payment by spreading the costs burden more widely than on an impecunious party.⁹
- d) Turning to each of the asserted breaches, it was submitted that HCR 5.11(1)(g) does not apply to the format of a statement of claim in this Court. The applicable provisions are regulations 27, and in this case, Form 1. Mr Noble's address was care of his lawyers: the law firm had

⁶ *Harley*, above n 3, at [49].

⁷ *Aarts v Barnardos New Zealand* [2013] NZEmpC 145 at [30]–[31].

⁸ *Harley*, above n 3, at [49].

⁹ *Aarts*, above n 7, at [34].

adopted a not unusual practice. It could not be said there had been a breach of duty.

- e) With regard to the asserted breach of CCC r 13, the lawyers had not treated BCL disrespectfully. Moreover, until this stage of the proceeding, well after the Court had issued its security for costs judgment, no issue had been raised about Mr Noble's physical address.
- f) It was not accepted that there was a breach of the AML/CFT Act. That legislation contains its own detailed enforcement provisions. Compliance or non-compliance with the obligations of that Act could not be a relevant consideration when exercising the s 221 discretion.
- g) Accordingly, a failure to obtain a physical address for Mr Noble in the present circumstances, could not constitute the sort of egregious behaviour which would meet the very high threshold required for joinder.
- h) At the hearing, I granted leave to both parties to file further submissions on the AML/CFT Act issues. It was only then that GRL filed an affirmation from an office administrator, saying that payments made by Mr Noble to the firm had been made by credit card. It was submitted that such payments were not international wire transfers as defined in the AML/CFT Act.

Relevant principles

[39] A party's solicitor/representative will not be joined to a proceeding in relation to costs, if no costs order should be made against the solicitor/representative: *New Zealand Medical Laboratory Workers Union Inc v Capital Coast Health Ltd*.¹⁰ For this reason, it is therefore necessary to consider the potential merits of an application for costs against GRL, and/or counsel.

¹⁰ *New Zealand Medical Laboratory Workers Union Inc v Capital Coast Health Ltd* [1998] 2 ERNZ 107 at [112].

[40] An order of joinder of a lawyer for cost purposes can only be made if there has been a “serious breach of duty to the Court”, as explained by the Privy Council in *Harley*. A simple mistake or oversight or mere error of judgment is insufficient.¹¹

[41] I also accept the dicta in *Aarts* to the effect that the Employment Court does not have the function possessed by the High Court of overall supervision of the conduct of enrolled barristers and solicitors; the Court cannot exercise a punitive function for costs purposes. The focus in this Court has to be on whether there should be compensation for costs incurred that “would not have been incurred but for the failure in duty”.¹²

[42] Next, I refer to the relevance of any ethical breaches when considering a costs application against a lawyer.

[43] It is a fundamental duty of solicitors not to mislead the Court.¹³ This principle is reflected in CCC r 13, which provides:

The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.

[44] As the Privy Council made clear in *Harley*, it is not appropriate when considering whether or not to make a costs order to rule upon whether, in addition to a breach of the duty to the Court, there has been a breach of the rules of professional conduct. That is because it is a matter which would ordinarily be dealt with by way of a complaint under the applicable disciplinary procedures.¹⁴

[45] Finally, the focus of the jurisdiction in this Court is whether the time of the Court has been wasted, or whether its processes have been abused, which has resulted, as it was put in *Harley*, “an excessive or unnecessary cost to litigants”.¹⁵ In *Dominion Finance*, Whata J referred to a number of examples of conduct which had attracted

¹¹ *Harley*, above n 3, at [55].

¹² At [49].

¹³ *R v Huang* [2009] NZCA 527 at [47]–[50]; *Dominion Finance Group Ltd (in rec and liq) v Sade Developments Ltd* HC Auckland CIV 2009-419-1556, 6 October 2011, at [32]; and *Rondel v Worsley* [1960] 1 AC 191 (HL) at 227.

¹⁴ *Harley*, above n 3, at [51].

¹⁵ At [50].

wasted costs orders against lawyers, including allegations of moral turpitude without any evidence to support them; permitting a client to make an inadequate or false discovery affidavit; a statement of claim being incomprehensible and the causes of action being plainly inarguable; a lawyer swearing an affidavit in support of a petition asserting facts which any competent practitioner must have appreciated could not be established on the available evidence; a clerk standing near the place where the jury assembled, discussing the case with the defendant so that a retrial was necessary; and where lawyers failed to turn up to a hearing.¹⁶

[46] The court went on to refer to examples where wasted cost orders had not been granted, such as a practitioner being precluded from giving a full answer to the application because of legal professional privilege; the filing of an affidavit clarifying an otherwise misleading pleading; a mistake by a law clerk in a legal aid application; a combination of alleged errors, including proceeding in a certain way based on a misunderstanding of law, failing to ascertain there was an error in a crucial fact, and an erroneous assumption that a defendant had been served; and misuse of the statutory demand procedure.¹⁷

Analysis

[47] The allegation which is of primary interest relates to the submission made that there was a procedural breach by the failure to identify Mr Noble's home address in the intulment of the statement of claim. This involves a rule of procedure, the regulation of which is of course a matter for the Court.

[48] There may be occasions where a party's address cannot legitimately be disclosed in an intulment, for instance where there are justified privacy reasons for such a course, and the Court approves the use of non-publication or other protective orders.

[49] Where a practitioner acting for an overseas client in circumstances such as the present does not take such a step, and does not hold the client's physical address, that practitioner runs a risk of significant problems arising, as has occurred here. A prudent

¹⁶ *Dominion Finance*, above n 13, at [33].

¹⁷ At [34].

lawyer would take the precaution of obtaining the client's physical address so that all options of contact could be maintained during the proceeding.

[50] The failure to take such a prudent step has facilitated Mr Noble's intention not to disclose his whereabouts, in an apparent attempt to avoid a potential costs liability.

[51] But it is apparent that Mr Noble is the primary author of the problems which have arisen, not GRL or his counsel.

[52] Whilst prudence was not observed, I am not satisfied that this can be regarded as a very serious breach of the rules of procedure warranting joinder.

[53] There is some overlap between the first assertion made for BCL which relates to procedural obligations, and the second, which relates to ethical obligations. Both focus on the failure to obtain a physical address for the purposes of the proceeding. I referred earlier to the fundamental duty of lawyers not to mislead the Court. There is no evidence that a deliberate misleading by BCL or counsel has occurred, although it is arguable the failure to obtain Mr Noble's physical address has led to an undermining of the intent of the rules of Court. But as already observed, that is primarily due to Mr Noble's absence of good faith. I am not persuaded that viewed from the perspective of the CCC Rules, there has been a failure of the overriding duty of counsel to the Court, to the extent that joinder is justified for cost purposes.

[54] Turning to the third asserted breach of duty, I am not satisfied that AML/CFT considerations support the application for joinder.

[55] BCL's submissions on this point proceeded on the basis that Mr Noble had transferred money to GRL by means of an international wire transfer. Section 5 of the AML/CFT Act includes a definition of "wire transfer" which expressly excludes credit and debit card transactions if the credit or debit card number accompanies the transaction. The evidence which is now adduced on the face of it establishes there were two occasions on which monies were transferred to GRL by Mr Noble via credit card.

[56] Although it is of a concern to the Court that this evidence arose very late in the hearing process, when it had been clear from an early point that BCL was assuming there had been an international wire transfer, I must accept this evidence. Accordingly, on the evidence before the Court, enhanced due diligence and identity requirements did not arise under ss 27 or 28 of the AML/CFT Act.

[57] In the face of this late development, Ms Toohey submitted that BCL was unwilling to be put to further expense to research and articulate the law relating to applicable obligations, although she suggested there had been standard due diligence obligations because client funds were being managed; this meant there would have been a duty to obtain a physical address. Since no evidence or submissions were placed before the Court on that possibility, I make no ruling on it.

[58] In any event, I accept Mr Towner's submission that any issues as to compliance or non-compliance with the legislation is potentially a matter to be dealt with elsewhere, such as under the enforcement provisions of the AML/CFT Act.

[59] Finally, I am not satisfied that the absence of Mr Noble's address has resulted in wasted costs, except for the purposes of the interlocutory applications I am currently considering. That expenditure can be considered in the context of any cost issues which may arise from the disposition of these interlocutory applications, which will be between BCL on the one hand, and GRL/counsel on the other.

[60] In summary, I am not satisfied that there has been a serious breach of duty or duties, for cost purposes which could justify a joinder. For all these reasons, I dismiss BCL's application.

Payment out of monies paid into Court

[61] At the hearing, Ms Toohey submitted that the sum paid by Mr Noble into Court as security for costs, should be paid out to BCL, on the grounds that the likely order for costs against him would significantly exceed the sum he paid in.

[62] Mr Towner, after obtaining instructions from GRL, said it was not opposed to this step, albeit it had no instructions from Mr Noble.

[63] When ordering payment of security for costs, I had directed that the sum should be held by the Registrar until further order of the Court.¹⁸

[64] It was accordingly appropriate to consider whether it was in the interests of justice for the sum to be no longer held by the Court, but paid out to BCL, since it successfully resisted Mr Noble's challenge. I accepted the submission that it is likely a costs order will exceed the sum paid into Court. Accordingly, on 25 March 2020, I directed payment out of that sum and accrued interest to BCL or its nominee.

Outcome

[65] GRL's applications are adjourned for initial review at a telephone directions conference, to be fixed by the Registrar on 25 June 2020, if possible.

[66] BCL's application for joinder is dismissed.

[67] I reserve costs and will timetable submissions in that regard at a later stage.

B A Corkill

Judge

Judgment signed at 11.55 am on 7 May 2020

¹⁸ *Noble*, above n 5, at [56].