IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 228
EMPC 112/2015

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	NEW ZEALAND MEAT WORKERS UNION INC Plaintiff
AND	SOUTH PACIFIC MEATS LIMITED First Defendant
AND	MICHAEL ANTHONY TALLEY Second Defendant

Hearing:	By memoranda of submissions filed on 30 September, 27 October, 6 and 27 November, and 14 December 2015
Appearances:	P Churchman QC, counsel for plaintiff G Malone, counsel for defendants
Judgment:	16 December 2015

COSTS JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] This is a rare example of an apparently unsuccessful party seeking not only an order for costs, but an order for indemnity costs against the apparently successful party. In determining costs, however, the judgment necessarily examines broad questions of obligations of parties and lawyers to disclose relevant documents to the Court and the Employment Relations Authority on grounds of privilege against self-incrimination. Whether there remains such a privilege in penalty proceedings before the Authority has been determined by the primary judgment in this case delivered by the Court on 7 August 2015.[1]

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[1] *New Zealand Meat Workers Union Inc v South Pacific Meats Ltd* [2015] NZEmpC 138.

[2] The circumstances in which this has occurred are remarkable, if not unique. In essence, the defendants, facing claims for penalties in the Employment Relations Authority, asserted that they were entitled to claim privilege against self-incrimination in some documents relevant to the proceeding in that forum. The Authority appears to have been, and the plaintiff was, under the impression that the assertion of such a claim meant that such documents did exist: why, logically, would a party assert a privilege in relevant documents if they did not exist, or claim privilege in irrelevant documents? In these circumstances, the Authority referred the question, whether privilege might be asserted in these circumstances, to the Court for its conclusion of law under s 177 of the Employment Relations Act 2000 (the Act).[2]

[3] The Court determined that a party facing claims for a penalty may assert that relevant documents are privileged if the contents of these are self-incriminatory. It is not the purpose of this costs judgment to revisit that question of law. Rather, the events surrounding its hearing and decision, and the propriety of the defendants' conduct and differing advice to the Court and the Authority on these questions, affect whether the plaintiff should have costs and, if so, indemnity costs as it has claimed.

[4] To determine this question of costs, it is necessary to identify the parties and, in the case of the defendants in particular, their relationships to several lawyers acting for them.

[5] The plaintiff is a union. Its lawyer is Mr P Sara of Dunedin who is not otherwise involved in the matters that have led to this judgment. Counsel instructed by Mr Sara for the plaintiff is Mr P Churchman QC.

[6] The matter is a little more complex affecting the defendants. South Pacific Meats Limited (SPML) is a limited liability company which owns and operates meat works in the South Island. Mr Michael Talley, the second defendant, is a senior executive of SPML, whom the plaintiff alleges had and holds primary managerial responsibility for the conduct of SPML's employment relations. The Union alleges that Mr Talley was a party to breaches by SPML, as employer, of statutory rights of entry to its plants by union representatives. The Union seeks penalties in the

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[2] *New Zealand Meat Workers Union Inc v South Pacific Meats Ltd* [2015] NZERA Christchurch 54.

Authority against both SPML and, as a party to that company's breaches, against Mr Talley.

[7] In those proceedings currently before the Authority, both defendants were represented by Ms R Webster, an in-house lawyer employed by AFFCO New Zealand Limited, one of the first defendant's associated entities engaged in the meat industry. Ms Webster represented the defendants before the Authority. Ms Webster (led as counsel on occasions by Mr G Malone) continued to represent the defendants in the preparatory stages of this case. However, on the day of hearing, counsel for the defendants was Ms C Pidduck, then as I understand it a lawyer practising in Hamilton who had, nevertheless, undertaken some employment work for SPML's associated companies owned by members of the Talley family.

[8] On 7 July 2015, three days before the substantive hearing, the defendants filed a "Notice of Change of Representation and Address for Service". This notified the Court and the plaintiff that the defendants' solicitor was then to be Mr R Gubb of the Hamilton legal firm Beattie Rickman Legal; and counsel was to be Ms Pidduck, a solicitor employed by that firm. The defendants' address for service was changed to the offices of Beattie Rickman Legal in Hamilton. Ms Pidduck appeared as counsel for the defendants at the substantive hearing in Wellington on 10 July 2015.

[9] As the narrative subsequently relates, when Ms Pidduck was asked a particular question by me in the course of the hearing, she sought and was granted an opportunity to take instructions. She indicated that she was doing so by telephone to Ms Webster who was still involved in the case, although not appearing as counsel in court on that day and despite the recent change of solicitor.

[10] When Ms Pidduck answered the Court's inquiry, she did so by indicating that those were her "instructions". I infer that those were Ms Pidduck's instructions from Ms Webster, whom she had said she would contact, and were in the nature of instructions from a lawyer (albeit formally a client's former lawyer) to another lawyer acting as counsel in the proceeding.

[11] When the propriety of Ms Pidduck's advice to the Court (and Ms Webster's earlier advice to the Authority), and affecting advice subsequently given on behalf of the defendants to the Authority, became an issue in the matter, Mr Malone, either a sole practitioner or the principal in a legal firm based near Nelson, was instructed to represent the defendants. Mr Malone is an independent practitioner although is well known to the Court as representing, in employment matters, Talley-owned employers including AFFCO. As already noted, Mr Malone was previously involved in the case with Ms Webster.

[12] The foregoing is a detailed but necessary description of the legal representation of the two defendants in these matters. There is no question that, at each stage, both defendants had been represented by the same lawyer or lawyers.

[13] Matters relevant to this decision began in the proceedings before the Authority. The plaintiff applied in writing to the Authority on 7 April 2015 for a document disclosure direction or order pursuant to s 160(1)(a) of the Act which invests the Authority with broad powers to make such orders.

[14] After setting out the background to the plaintiff's application, the Union, through counsel, sought an order in the following terms:

> … that, forthwith, the respondents [now the defendants] provide copies of all documentation including letters, emails, memoranda and notes of telephone conversations between the directors of the first respondent and managers of the first respondent in relation to the exercise of statutory rights of access by the applicant.

[15] The Authority dealt originally with that request by SPML and Mr Talley as follows:

> [4] … by application filed in the Authority on 9 April 2015, the Union sought a direction under s.160(1)(a) of the Employment Relations Act 2000 (the Act) requiring both respondents to forthwith provide copies of all documentation between the directors of the Company and the managers of the Company relating to the exercise of the Union's statutory rights of access to the named workplaces of the Company.
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> [5] That application was resisted by the respondents, essentially on the footing that the disclosure in question would be likely to expose a party to a penalty.

[16] After recording the fact of a further telephone directions conference held on 14 April 2015, the Authority referred to the Court the following question of law at [12] of its determination of 30 April 2015:

> [12] The particular question at issue is the question whether in an application by a party for orders seeking the disclosure of documents which would appear to be pertinent to a proceeding in the Authority, such an order can be granted even although it appears that the granting of such an order may have the effect of putting before the Authority material which could support an application against the party providing the documents, for the imposition of a penalty.

[17] It appears that SPML and Mr Talley had not addressed the Authority's requirement for document disclosure in the conventional way, that is by identifying particular documents which they submitted were privileged. Rather, SPML and Mr Talley appear to have persuaded the Authority to determine a legal question in very general terms which may or may not have related to the particular documents they held, if any.

[18] It was in those circumstances that, as I recorded in the Court's judgment of 7 August 2015, I inquired of counsel for the defendants whether there were in fact such documents in existence, as everyone else appeared to have assumed to that point, but the existence and identity of which were not disclosed directly by the defendants. In those circumstances, as the judgment records, counsel for the defendants advised the Court that there were such documents in existence in which privilege was or would be asserted, although the self-incriminatory nature of them would not be in relation to any criminal liability. I assumed from this, as did senior counsel for the plaintiff, that there were and are documents in which privilege was and is asserted against self-incrimination in the penalty proceedings currently before the Authority.

[19] Because it forms material evidence in the claims and counterclaims about the defendants' conduct over this incident, I now set out the transcript of the relevant exchanges in court on 10 July 2015 affecting this matter:

> **THE COURT:** If we take the morning adjournment if that's a convenient time to divide up your submissions, and just so that we can clarify this. You're going to attempt to establish whether there are in fact any documents to which claim to privilege is asserted because of self-incrimination, and as a

subset of that whether any documents may be subject to privilege for criminal consequences as well as for pecuniary penalty self-incrimination consequences. Do you know if you require any more time than 15 minutes to do that? You can't tell until you try to ring people I know but -

MS PIDDUCK: I do have information that Mrs Webster is eager to hear from me at every opportunity so I don't expect there will be any problems getting through to her.

THE COURT: She may not be so eager to hear from you with this particular inquiry.

MS PIDDUCK: And it might be an 'on' inquiry that needs to be made but I will certainly do –

THE COURT: Yes, it looks like she's been - as in-house AFFCO solicitor, she's been there from the start as compared to other lawyers so that may be a good point for contact.

MR CHURCHMAN: Just on that sir, you asked me for that email.

THE COURT: Oh that email of the 13th of –

MR CHURCHMAN: The 12th it was and my client has brought me two email chains. The first one just follows from the teleconference that I told you about. It's an email chain between myself and Ms Webster and the second last email on it is my email of 10.04 am on 9 March to Ms Webster just asking when she was going to have the documentation to me and the last email is her response saying she thought she'd have it within 10 working days. The next email chain, it follows on from my email of 9 March at 10.04 but is her reply of 12 March and this is where she says the documents are not going to be provided. So it was quite a sudden about-face if I could –

THE COURT: Well show Ms Pidduck those.

MR CHURCHMAN: Yes I've got multiple copies.

THE COURT: I mean if you're happy to summarise that for me I don't think it advances the matter much except to confirm, you would say, your impression of the fact that there are documents.

MR CHURCHMAN: Yes.

THE COURT: Well let's take the morning adjournment and we'll deal with it –

MR CHURCHMAN: You don't want copies of these?

THE COURT: Not at the moment thank you, no. I might come back to that but I think you should let Ms Pidduck have a chance to look at them first.

MORNING ADJOURNMENT TAKEN AT 11.33 AM
RESUMED AT 11.49.25

THE COURT: Ms Pidduck what have you been able to ascertain?

> **MS PIDDUCK:** My instructions are that there are some documents in existence and they are unlikely to give rise to criminal liability.
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> **THE COURT:** There are some documents for which privilege against self-incrimination is claimed?
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> **MS PIDDUCK:** Yes sir, that privilege against self-incrimination is asserted and that those documents are unlikely to give rise to criminal liability and the basis of that was as we discussed, the ambit of the proceedings in the Authority pertaining to access, alleged breaches of access under the provision in the Act.

[20] The defendants were successful in their assertion that there remains a common law privilege against self-incrimination by production of documents to the Authority in penalty proceedings.

[21] The matter having returned to the Authority for further investigation after the Court's judgment was issued, the plaintiff renewed the application which it had made on 9 April 2015 to the Authority, that the defendants disclose documents as follows:

> The applicant seeks an order that, forthwith, the respondents provide copies of all documentation including letters, emails, memoranda and notes of telephone conversations between the directors of the first respondent and managers of the first respondent in relation to the exercise of statutory rights of access by the applicant.

[22] That was the request which had prompted the defendants, originally, to take up with the Authority its power to direct disclosure of self-incriminatory documents. The Authority made the directions originally sought by the plaintiff. On 23 September 2015 the defendants (through counsel Ms Pidduck) filed a memorandum with the Authority asserting that they had no documents covered by the Authority's direction nor, in particular, any in which privilege was asserted.

[23] It was this assertion by counsel for the defendants which appeared to conflict with the advice Ms Pidduck had given the Court about the existence of relevant documents, which provoked the plaintiff's claim for indemnity costs.

[24] Because it is at the heart of this case and it is rare for there to be opportunities to comment on privilege in document disclosure issues in employment cases, I make the following observations for the assistance of parties' representatives and Authority Members.

[25] Disclosure of documents to courts or tribunals, let alone to opposing parties, and asserting legal privilege in relevant documents, is a difficult but crucial part of litigation. Parties are naturally reluctant to provide what have, until then, been those parties' documentary records and especially if their disclosure may strengthen the case against them. Questions of resisting disclosure on grounds of privilege are technical and often not well understood by those who are not lawyers. These circumstances are a prime example of where lawyers' (including counsel's) obligations to the client must yield to their obligations to the Court if there is any conflict between those obligations.[3]

[26] The proper conduct of litigation by a lawyer will not leave it to the client to make document disclosure decisions alone and particularly not decisions about whether documents are privileged. In these circumstances, lawyers are bound to ensure for themselves that all relevant documents have been made available by the client to the lawyer and must insist on this even if the client is reluctant to provide those documents to the lawyer by attempting to conceal their existence. If a lawyer knows or reasonably suspects that non-adherence to these practices may mislead the Court, the lawyer's obligation is to cease to act for that client in that litigation. That is sometimes a particularly difficult role for an in-house lawyer to take, but those professional ethical obligations prevail even in those circumstances.

[27] The relevant parts of The Client Care Rules promulgated under the Lawyers and Conveyancers Act 2006 include the following:

> 13.9 A lawyer who acts for a party in a proceeding must, to the best of the lawyer's ability, ensure that discovery obligations are fully complied with by the lawyer's client and that the rules of privilege are adhered to. A lawyer must not continue to act if, to the lawyer's knowledge, there has been a breach of discovery obligations by the lawyer's client and the client refuses to remedy that breach.
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> 13.9.1 A lawyer acting for a litigant must advise the client of the scope of the client's obligations in respect of discovery, including the continuing nature of those obligations up to and including the time of final judgment, and that discovered documents may be used only for the purposes of the litigation and not for any other purpose. The lawyer must, to the best of the lawyer's ability, ensure that the client understands and fulfils those obligations.

[3] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.

> 13.9.2 A lawyer must not claim privilege on behalf of a client unless there are proper grounds for doing so.

[28] The reference to "discovery" in the foregoing rules includes to "disclosure" as that process is termed in the Employment Court Regulations 2000 and, to the extent that a Member of the Authority may direct a party to disclose documents either to it or to the other party, also to that process under the Authority's powers contained in the Act.

[29] This question is also addressed in the High Court Rules at 8.13 ("Solicitor's discovery obligations") which states:

> As soon as practicable after a party becomes bound to comply with a discovery order, the solicitor who acts for the party in the proceeding must take reasonable care to ensure that the party—
> (a) understands the party's obligations under the order; and
> (b) fulfils those obligations.

[30] The leading authority for the high duty of care imposed upon solicitors by r 8.13 is the judgment of the High Court in *Carter Holt Harvey Holdings Ltd v Fletcher Holdings Ltd.*[4] The High Court judgment referred to, but did not apply, the judgment in the more pertinent case in which there had arisen a claim to privilege on grounds of self-incrimination, *Taranaki Co-operative Dairy Co Ltd v Rowe.*[5] Contrary to the approach adopted in *Carter Holt Harvey Holdings*, the Court of Appeal in *Rowe's case* indicated that the Court could exercise a supervisory and inspectorial role, at least in relation to documents in which privilege against self-incrimination was asserted. Affirming the right to assert privilege against self-incrimination, the Court of Appeal concluded, however, that this did not mean that discovery must be refused altogether; rather, the Court required that all discoverable documents be provided in a separate bundle, with a generalised name, from which the appellant could ask the trial Judge to inspect the documents. The Court of Appeal noted:[6]

> ... When a choice must be made between too readily allowing a party to be judge in his own cause (and decide upon his own privilege), on the one hand, and inspecting his documents without disclosing them to the opposite party,

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[4] *Carter Holt Harvey Holdings Ltd v Fletcher Holdings Ltd* [1981] 2 NZLR 613 at 616-617.
[5] *Taranaki Co-operative Dairy Co Ltd v Rowe* [1970] NZLR 895 (CA) [*Rowe's case*].
[6] At 904.

> on the other, the second course may sometimes be preferable in the interests of justice. As is pointed out in *Cross on Evidence*, 3rd ed. 231, the danger that the secret must be told in order that the Court may see whether it ought to be kept may have to be weighed against the worse evil of allowing the matter to depend exclusively on the claimant's word. In deciding whether to exercise the discretion which he has a Judge must simply inquire whether justice requires him to exercise it. It may be that:
>
> > "The privilege must … be violated in order to ascertain whether it exists. … The secret must be told in order to see whether it ought to be kept."

[31] In relation to the conduct of counsel in litigation, the judgment of the New South Wales Court of Appeal in *Re Gruzman* is pertinent to this case.[7] The Court made general comments about the obligations of professional conduct of a barrister in litigation including that:

> Frankness should be one of the main attributes of a barrister. It is his duty to not keep back from the court any information which ought to be before it, and he must in no way mislead the court by stating facts that are untrue, or mislead the judge as to the true facts, or knowingly permit a client to attempt to deceive the court. How far a barrister may go on behalf of his client is a question too difficult to be capable of abstract definition, but when concrete cases arise one can see for oneself whether what he has done is fair nor not.

[32] That passage was adopted by the New Zealand Legal Complaints Review Office (the LCRO) in *CM v RG.*[8] This decision also referred to anothere LCRO determination which considered the positions of practitioners as officers of the court in relation to an alleged breach of r 13.1 of the Client Care Rules.[9] The LCRO concluded that it will need to be satisfied that there is more than an honest error or oversight before professional misconduct may be engaged.[10]

[33] The commentary in Cross on Evidence suggests that a person asserting privilege must offer sufficient evidence to enable the claim to be assessed if it is challenged. The text notes:[11]

> It has never been the case that a mere assertion of the privilege is enough. A witness's assertion, even under oath when there are no grounds to doubt his or her bona fides, is not sufficient.

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[7] *Re Gruzman; Ex Parte Prothonotary* (1968) 70 SR (NSW) 316 at 323.
[8] *CM v RG* [2015] NZLCRO 49 (7 September 2015) at [29].
[9] *OX v PE* LRCO 224/2010 and LCRO 262/2011.
[10] At 20.
[11] Cross on Evidence (NZ) (online looseleaf ed, LexisNexis NZ), at EVA62.4 (Claiming the Privilege).

> The requirement in the section to satisfy the Judge that self-incrimination is "reasonably likely" requires (as did the common law approach) the tendering of such evidence as demonstrates with reference to the ordinary operation of law in the ordinary course of things, something more than a danger of imaginary and insubstantial character, or an extraordinary or barely possible contingency so improbable that no reasonable person would suffer it to influence their conduct. The risk must be real and not fanciful.
>
> In order to satisfy the Court that there are reasonable grounds for his or her fears, a witness may have to disclose some matter of a damning nature, but the danger that the secret must be told in order that the Court may see whether it ought to be kept is inevitably present when a claim to privilege is made, if the worse evil of allowing the matter to depend exclusively on the claimant's word is to be avoided.
>
> If difficulties were to arise in this regard, they could no doubt be overcome by allowing the witness to make a submission or give evidence wholly or partially in camera, or under the protection of an undertaking that no use would be made of the statements outside the proceedings in which they were given. This possibility is envisaged by s 52(4)(a).

[34] I have omitted the numerous footnote references in the foregoing passage from *Cross*.

[35] That appears to deal with claims to privilege which arise during the course of evidence being given. However, there is no reason why, in principle, where a claim to privilege occurs at the pre-trial document disclosure phase, such documents should not be made available to an Authority Member to inspect and rule on, perhaps prudently not the Member who is to conduct the substantive investigation.

[36] Perhaps fortunately, there are practising lawyers representing the parties at all relevant times so that the even greater complexities of a lay advocate or an unrepresented party, not bound by professional ethics and other obligations, do not arise for consideration in this case. It will be for the Authority to decide how it deals with an analogous situation where one or more parties are not represented by a lawyer. It may decide that the best way to do so is to call for all relevant documents, if relevance is itself not a problematic issue, and to determine whether any are privileged.

[37] Particularly with regard to questions about whether relevant documents may be able to be withheld from disclosure on grounds of privilege, represented clients (especially alone) must not determine whether documents are subject to privilege,

including on grounds of self-incrimination. There is a high onus on lawyers (including in-house lawyers) to comply with that obligation to ensure that disclosure obligations are met by their party clients. For that reason, in many such cases (and especially where an in-house lawyer is acting), an independent barrister may be engaged who is not beholden to the client and on whose expert professional judgment and advice the Court can rely.

[38] Although counsel for the plaintiff confirms plainly in his submissions that his criticism of conduct leading to this claim for indemnity costs is not a criticism of the lawyers for the defendants but, rather, of the defendants themselves, I do not consider that this can be categorised quite so neatly and exclusively. That is because when Ms Pidduck, as recently instructed counsel, sought an opportunity to take instructions on a question put to her by the Court, she indicated that she needed to seek those instructions from Ms Webster. Ms Pidduck's reply to that question, after having been given and taken that opportunity, simply indicated that the position was according to her "instructions". There was no indication in that reply that those instructions came other than from Ms Webster, the in-house lawyer for the defendants who was familiar with the proceeding having undertaken it in the Authority and in the Court to that point. The short time taken to obtain those instructions would also seem to indicate that they came from Ms Webster rather than from the defendants themselves.

[39] At paragraphs 14-15 of his costs submissions filed with the Court, Mr Malone, on behalf of the defendants, said that he had "viewed the documents in question and there are some emails relating to the proceedings before the Authority to which privilege applies" and "[t]here were however no documents that the defendants were required to list for the Authority as the emails referred to above do not fall within the scope of those requested."

[40] Mr Churchman submits that the breadth of the plaintiff's application to the Authority on 9 April 2015, and of the directions that the Authority subsequently made on 18 August 2015, means that the defendants must now disclose details of those documents ("some emails") which Mr Malone has confirmed relate to the proceedings before the Authority but in which privilege is asserted by the

defendants. So, Mr Churchman submits, the defendants have gone from asserting the existence of relevant documents in which privilege is claimed, to denying the existence of any relevant documents, to now again asserting the existence of some documents in which privilege is again claimed.

[41] The relevance of this evidence being, in this proceeding, confined to the question of costs, my view is that it is for the Authority to resume its control of the proceeding before it, which would include its ability to call for and inspect those documents to which Mr Malone has referred. That is to ascertain, first, their relevance to the Authority proceedings and, if those documents are relevant, then the defendants' assertion of privilege in them. The Court has set out the law on this matter and, in the same judgment, has confirmed the Authority's broad powers to give such directions and adopt such procedures as will best achieve the ends of justice under s 160.

Orders prohibiting publication?

[42] The defendants (SPML and Mr Talley) have, in the course of their submissions, applied to the Court for orders prohibiting publication of their identities and those of their lawyers to eliminate or minimise any potential reputational damage to those persons.

[43] The plaintiff opposes making any such orders, emphasising that it has not made allegations of impropriety against Ms Pidduck or any other lawyer for the defendants. In this regard Mr Churchman reiterates what I consider is the doubtful proposition that Ms Pidduck:

> … made it expressly clear that the information that she provided to the Court and the Authority was provided to her by her clients. Her reputation is therefore not at risk of being damaged. There is no basis for the suppression of Counsel's name.

[44] As I have already pointed out, Ms Pidduck's advice to the Court was that she had sought and obtained instructions from Ms Webster. So whilst it may be correct, as Mr Churchman submits, that he makes no allegation of impropriety against Ms Pidduck, it is not the position that the only possible conduct which could be

criticised is that of the defendants themselves. That is not to say, of course, that Ms Webster conducted herself improperly, but simply to point out that Mr Churchman is wrong to assert that the only possible reputational damage that may be suffered would be to SPML and Mr Talley. This judgment makes no findings about the professional propriety of the conduct of any counsel involved in it.

[45] However, I decline to make the non-publication orders sought by the defendants for the following reasons.

[46] This is litigation in which there is significant public interest and in which the identities of the lawyers have already been disclosed publicly.

[47] As already noted, the plaintiff's claims for indemnity costs are made against the defendants themselves and not against their counsel. This judgment does not purport to deal with compliance by lawyers with their professional obligations. If that is an issue, it is dealt with under the process contained in the Lawyers and Conveyancers Act and, if appropriate, in the High Court, which holds the supervisory jurisdiction. That is not, I repeat, to indicate that such attention may be warranted and this judgment does not make any determination of professional propriety.

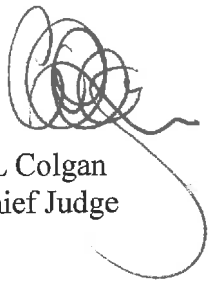
[48] Because the refusal to prohibit public identification of the names of the lawyers concerned is, in practice, an irrevocable step, it is only fair to allow those persons an opportunity to challenge that decision and/or to seek a stay or other interlocutory order preserving their anonymity if it is just to do so. In these circumstances, there is to be no publication of this judgment (including by the Court on its website) beyond the parties themselves for a period of 28 days following its delivery. In the event that there is no challenge to that refusal to prohibit publication, this interim non-publication order will lapse at the end of that period.

Order for costs against defendants

[49] I conclude that the defendants have so conducted themselves in this part of the litigation that it is appropriate to make an order for indemnity costs against them.

Although in normal circumstances, the defendants may have been entitled to costs as successful parties on the question of privilege, their conduct described above (and in particular as described in [22] of this judgment) has not only disqualified them from that, but means that the plaintiff should be compensated for largely wasted costs and delay to its case in the Authority.

[50] I accept that the plaintiff's costs in relation to the substantive proceeding are $7,909.70. Further, I allow the plaintiff the estimated indemnity costs on its costs application of $1,500. The defendants are jointly and severally liable for those costs which total $9,409.70.



GL Colgan
Chief Judge

Judgment signed at 4.15 pm on Wednesday 16 December 2015