FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v DARNA PTY LTD & ANOR *[2015] FCCA 709*

Catchwords:
INDUSTRIAL LAW – Penalty hearing – determination of penalty – established contravention of s.716(5) of the *Fair Work Act 2009* (Cth) by First and Second Respondent – pecuniary penalties imposed on First and Second pursuant to s.546(1) of the Fair Work Act – costs order made against Second Respondent pursuant to s.570 of the Fair Work Act.

Legislation:
Fair Work Act 2009 (Cth), ss.12, 550, 539(2), 546(1), 546(3)(a), 546(3)(c), 716, 716(5),
Commonwealth Crimes Act 1914 (Cth), s.4AA
Federal Circuit Court Rules 2001 (Cth), r.15.06, Sch 1, 21.15

Cases cited:
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560
Fair Work Ombudsman v Darna Pty Ltd & Anor [2014] FCCA 595
Kelly v Fitzpatrick [2007] FCA 1080
Mason v Harrington Corp Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7
Secretary, Dept of Health & Ageing v Pagasa Australia Pty Ltd [2008] FCA 1545

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	DARNA PTY LTD (ACN 135 545 069)
Second Respondent:	YOAV OREN
File Number:	MLG 932 of 2013
Judgment of:	Judge Hartnett
Hearing date:	5 February 2015
Delivered at:	Melbourne

Delivered on: 27 March 2015

REPRESENTATION

Counsel for the Applicant:	Ms Casey
Solicitors for the Applicant:	The Office of the Fair Work Ombudsman
The First Respondent:	No appearance
The Second Respondent:	In person

THE COURT ORDERS THAT:

(1) Pursuant to s.546(1) of the *Fair Work Act 2009* (Cth) ('FW Act') a pecuniary penalty of $17,850 be imposed on the First Respondent in respect of its contravention of s.716(5) of the FW Act.

(2) Pursuant to s.546(3)(a) of the FW Act, the First Respondent pay the pecuniary penalty to the Commonwealth within 28 days of this Order.

(3) Pursuant to s.546(1) of the FW Act a pecuniary penalty of $4,590 be imposed on the Second Respondent in respect of his contravention of s.716(5) of the FW Act.

(4) Pursuant to s.546(3)(a) and (c) of the FW Act, the Second Respondent pay the pecuniary penalty within 28 days of this Order as follows:-

    (a) the amount of penalty up to a total of $4,479.48 to Mr Moshe Ittah; and

    (b) the balance of the penalty after the amount in paragraph 4(a) is deducted, if any, to the Commonwealth, save that interest shall accrue on any amount of the sum outstanding to be paid by the Second Respondent to Mr Moshe Ittah pursuant to paragraph 4(a) at a rate of 8.5 per cent ongoing for so long as the default remains.

(5) The Court certifies, pursuant to r.21.15 of *the Federal Circuit Court Rules 2001* (Cth), that it was reasonable for the Applicant to employ an advocate at the hearing on 25 September 2014.

(6) Pursuant to s.570 of the FW Act the Second Respondent pay the Applicant's costs of the liability hearing of 25 September 2014, in the amount of $7,483.50 within 28 days of this Order.

(7) The parties have liberty to apply on seven days' notice in the event that any of the above orders are not complied with.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 932 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

DARNA PTY LTD (ACN 135 545 069)
First Respondent

YOAV OREN
Second Respondent

REASONS FOR JUDGMENT

1. These proceedings have a long history. They concern the First and Second Respondents' failure to comply with a statutory notice requiring the payment of outstanding wages to an employee of the First Respondent. Those outstanding wages included under payment of penalty rates and overtime; non-payment of any wages for one week; and non-payment of annual leave and notice entitlements upon termination of employment.

2. Fair Work Inspector Pronk ('FWI Pronk') issued a Compliance Notice on 28 May 2013 ('Compliance Notice') requiring the First Respondent to pay to a Mr Moshe Ittah the amount of $4,222.05. This amount represented moneys owing to Mr Ittah in respect of his employment by the First Respondent over a period of slightly less than three months. There was no response to that Compliance Notice in the sense that Mr Ittah did not receive and, despite subsequent order of this Court, has still not received, that money.

3. On 27 May 2014 the Applicant obtained default judgment against the First Respondent, Darna Pty Ltd. The Court declared at that time that the First Respondent contravened s.716(5) of the *Fair Work Act 2009* (Cth) ('FW Act) by failing to comply with the Compliance Notice requiring the First Respondent to pay Mr Ittah the amount of $4,222.05 (gross) by 11 June 2013. The Court ordered the First Respondent to pay Mr Ittah the sum owed together with interest within 14 days of the date of the Order. The Judgment of 27 May 2014 was preceded by an earlier Court hearing wherein the Second Respondent had sought the leave of the Court to appear for the First Respondent corporation. That application was dismissed.

4. On 24 October 2014 the Court found that the Second Respondent, Mr Oren, was involved in the First Respondent's failure to comply with the Compliance Notice within the meaning of s.550 of the FW Act and thus declared that the Second Respondent had also contravened s.716(5) of the FW Act. The Court found Mr Oren, had actual knowledge of the essential facts comprising the contravention and was an intentional participant and/or knowingly concerned in the contravention.

5. The hearing before the Court on 5 February 2015 concerned the imposition of pecuniary penalties on each of the First and Second Respondents in respect of their earlier found contraventions of the FW Act.

History

6. Mr Ittah was employed by the First Respondent as a chef at the Saporitalia Restaurant in Lorne from 1 September to 26 November 2012. The under payments as submitted by the Applicant came about in essence because:-

    a) the First Respondent paid Mr Ittah a flat rate of pay per week which was not sufficient to meet his entitlements to weekend and public holiday penalty rates, overtime and allowances under the Restaurant Industry Award 2010; and

    b) the First Respondent did not pay Mr Ittah any amount in respect of wages for his final week of employment, or his entitlements to

accrued annual leave and payment in lieu of notice upon termination.

7. Since the receipt by the First Respondent of the Compliance Notice, neither the First nor Second Respondent have demonstrated any contrition for the contravening conduct. They have further not undertaken any corrective action and they have failed to cooperate with the Applicant and at times the Court during the currency of these proceedings. The Applicant submits in these circumstances that the penalties approaching the maximum are appropriate and the Court should impose penalties within the ranges of:-

   a) in respect of the First Respondent, $17,850 to $20,400, being 70 to 80 per cent of the maximum penalty that could be imposed; and

   b) in respect of the Second Respondent, $4,080 to $4,590 being 80 to 90 per cent of the maximum penalty that could be imposed.

Materials Relied Upon

8. The Applicant relies upon the following material in support of the Submissions on penalty filed by it on 14 November 2014 and the Reply Submissions on penalty dated 12 December 2014:-

   a) Application and Statement of Claim dated 27 June 2013;

   b) affidavits of Brody Janelle Smith affirmed on 28 August 2014 and 13 November 2014;

   c) Affidavit of Michelle Elise Carey affirmed on 29 August 2014; and

   d) Affidavit of Mitchell Brennan affirmed on 12 November 2014.

9. Pursuant to r.15.06 of the *Federal Circuit Court Rules 2001* (Cth) ('FCC Rules') the Applicant also seeks to rely on the transcript of 13 March 2014 of the hearing of the Second Respondent's Application in a Case filed 7 January 2014 before the Court as a true record of that hearing.

10. The Second Respondent on the penalty hearing relied upon submissions filed by him on 8 December 2014 and 22 January 2015 and an Affidavit sworn by him on 5 December 2014 as to which paragraphs 1, 3 and 4 together with their annexures were struck out by the Court following objection to same by the Applicant. Although in the submissions the Second Respondent sought to represent the First Respondent, the Court notes, and as indicated at the time of hearing to the Second Respondent, that he had earlier been refused leave to represent the First Respondent and accordingly on the penalty hearing before the Court on 5 February 2015, the First Respondent was unrepresented. Further, the submissions of the Second Respondent which went to submissions made on behalf of the First Respondent were not accepted by the Court.

11. The *Explanatory Memorandum to the Fair Work Bill 2008* (Cth) provides that compliance notices were designed to be another option to deal with non-compliance instead of pursuing court proceedings.[1] It was to be a less costly and less time consuming procedure. Section 716 of the FW Act allows a person to whom a compliance notice is issued an opportunity to rectify an under payment without being subject to civil remedy provisions. The First Respondent's failure to comply with the Compliance Notice issued has, in these proceedings, caused the Applicant and the Court to spend time and public funds in dealing with civil remedy proceedings which would not have been necessary had compliance occurred.

Penalty

12. Item 33 of the table contained in s.539(2) of the FW Act provides that the maximum penalty that may be imposed in respect of a contravention of s.716(5) of the FW Act is:-

    a) 150 penalty units for a corporation; and

    b) 30 penalty units for an individual.

13. The maximum penalty in dollar terms that may be imposed for the failure to comply with the Compliance Notice in these proceedings is:-

[1] Explanatory Memorandum, Fair Work Bill 2008 (Cth), [2673].

a) in respect of the First Respondent, $25,500; and

b) in respect of the Second Respondent, $5,100.[2]

14. The Court's approach to penalty is as set out in the various authorities. The Court is to identify the separate contraventions involved; take into account the extent to which two or more contraventions have common elements; consider what an appropriate penalty is in the circumstances for each contravention; consider an appropriate penalty to impose in respect of each contravention having regard to all the circumstances of the case; and finally look at the aggregate penalty to determine whether it is an appropriate response to the contravening conduct. This assessment is known as the "totality principle".[3]

Factors Relevant to Penalty

15. A non-exhaustive list of factors relevant to the imposition of a penalty was summarised by Mowbray FM (as he then was) in *Mason v Harrington Corp Pty Ltd t/as Pangaea Restaurant & Bar*.[4] Those factors include:-

a) the nature and extent of the conduct which led to the breaches;

b) the circumstances in which that conduct took place;

c) the nature and extent of any loss or damage sustained as a result of the breaches;

d) whether there has been similar previous conduct by the respondent;

e) whether the breaches were properly distinct or arose out of the one course of action;

f) the size of the business enterprise involved;

g) whether or not the breaches were deliberate;

---

[2] Section 12 of the FW Act provides that penalty unit has the same meaning as s.4AA of the *Commonwealth Crimes Act 1914* (Cth) at the time the respondents failed to comply with the Compliance Notice on 11 June 2013. Section 4AA of the *Commonwealth Crimes Act 1914* (Cth) defined penalty unit to be $170).
[3] *Kelly v Fitzpatrick* [2007] FCA 1080 (Tracy J).
[4] [2007] FMCA 7, [26]-[59].

h) whether senior management was involved in the breaches;

i) whether the party committing the breach had exhibited contrition, taken corrective action and cooperated with the enforcement authorities;

j) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and

k) the need for specific and general deterrence.

16. This summary was adopted by Tracy J in *Kelly v Fitzpatrick*.[5] While the summary is a convenient check list, it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion.[6] These factors and their non-exhaustive nature have been referred to repeatedly in the authorities which govern the determination of penalty. These factors remain appropriate for the Court's consideration in this matter, and they are dealt with below where relevant to the particular circumstances of this proceeding.

Consideration

17. These Reasons should be read in conjunction with those earlier Reasons as referred to in paragraphs 3 and 4 herein.

18. Of particular significance to the Court in these proceedings is the complete lack of contrition by both Respondents in respect of their failure to comply with the Compliance Notice. There is defiance, disbelief and aggression in place of a skerrick of contrition. Rather than accept any responsibility for the contravention, the Second Respondent has continued to contest the validity of the Compliance Notice, an issue determined by the Court in the Applicant's favour in May 2014. Further, there has been a failure by the Respondents to take any action to rectify the under payment owing to Mr Ittah. This is despite the Court making Orders on 27 May 2014 requiring the First Respondent to pay Mr Ittah the amount of $4,225.05 together with interest within 14 days. The Court has no confidence at all that the

[5] [2007] FCA 1080.
[6] *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560, [91].

First Respondent – if it was not wound up and resumed trading – would not be involved in future contraventions of workplace relations law. There is also no evidence that the Second Respondent has taken any corrective action to prevent further contraventions of workplace relations law. The Second Respondent in his various submissions to the Court has shown, and continues to show, a complete lack of understanding of workplace relations law or any determination to comply with them.

19. The Court accepts the Applicant's submission that it is unlikely that the First Respondent will make any payments in the future to Mr Ittah. The First Respondent is no longer trading. In or around February 2014, the company Saporitalia Group Pty Ltd ('Saporitalia') was registered. The two directors of this company are the Second Respondent and Amut Gabay, the current director of the First Respondent. The First Respondent ceased to hold the business name, Saporitalia, on or around 30 June 2014 and the restaurant, Saporitalia, previously operated by the First Respondent appears to be continuing to trade. There is an apparent cessation of the First Respondent's involvement in the Saporitalia business and on the facts of this case it is likely there will be a winding up of the First Respondent. The Court finds that the Respondents have demonstrated an ongoing unwillingness to accept the determinations of the Fair Work Ombudsman. In spite of the Respondents' knowledge of the Compliance Notice; the warnings of the consequences of non-compliance given both prior to the issue of same by the Applicant and within the Compliance Notice itself; and the explanations for the determinations included in the Compliance Notice, the Respondents took no action to comply with it. Rather, the Second Respondent made a decision not to comply with the Compliance Notice because he personally disagreed with it. Despite his personal disagreement with the determinations included in the Compliance Notice and knowledge of the right to review, the Second Respondent did not seek to review it until January 2014, some seven months after the issue of the Compliance Notice and well after these proceedings had been initiated. The Second Respondent then continued the litigation with an antagonist approach. He said as to the proceedings

"I'm going to fight it and I'm going to fight it all the way along and I've no wish at all to give up".[7]

20. The Court accepts the Applicant's submission that the total under payment of $4,225.05 is not an insignificant under payment, in particular since it arose over a period of just less than three months. That under payment remains outstanding and has done so for a period of over two years. I reiterate it is unlikely, in the Court's view, that Mr Ittah will ever receive payment from the First Respondent. The Respondents' intentional failure to comply with a mandatory notice issued by the workplace regulator is "conduct .. [which] undermines the utility and effectiveness of a fundamental objective"[8] of the FW Act. The Court does treat as very serious conduct that of the Respondents in this regard.

21. Following the decision of the Court on 28 March 2014 not to grant the Second Respondent leave to represent the First Respondent, the First Respondent has not participated in the proceedings in any way. This frustrated progression of the proceedings and demonstrated an unwillingness and inability to cooperate with the Court and the Applicant and ultimately constituted a failure to defend the proceedings with due diligence. The failure to obtain legal representation occurred in the context where the Applicant's solicitors had informed the Respondents on no less than eight occasions, of the requirements for the First Respondent to be legally represented in order to participate in the proceedings.

22. The Court finds the Respondents have been almost completely uncooperative with the Applicant. The Second Respondent himself has made unfounded allegations about the Applicant's motivations for commencing and conducting the proceedings; made remarks in submissions that "at times were offensive to the Applicant, the Applicant's counsel and its instructing solicitor"[9]; expressed an intention to make the proceedings a "personal conflict" and throughout including on the penalty hearing itself, sought to re-agitate issues determined by the Court in earlier decisions.

[7] Transcript of Hearing 13 March 2014, p.20, lines 15-17.
[8] *Secretary, Dept of Health & Ageing v Pagasa Australia Pty Ltd* [2008] FCA 1545 at [56].
[9] *Fair Work Ombudsman v Darna Pty Ltd & Anor* [2014] FCCA 595 at [18].

23. The issue of specific deterrence in respect of the Respondents looms large in this proceeding. The Second Respondent may no longer be a director of the First Respondent, but he continues to be involved in a number of businesses, including businesses in the restaurant industry. He has shown no remorse. He has taken no steps to ensure that no further breaches will occur. The Second Respondent has taken no steps to rectify the under payment and continues to dispute the Compliance Notice. A significant penalty in the high range must be imposed on the Second Respondent. The Court notes that the Applicant in its submissions acknowledges that specific deterrence carries less weight in respect of the First Respondent which appears to no longer be involved in operating a business, and may soon be wound up. The Court however does note the ongoing non-compliance of the Court's Orders of 27 May 2014 by the First Respondent, and accepts the Applicant's submissions that that is relevant to the consideration of specific deterrence in respect of the First Respondent.

24. There is a need in the restaurant industry for general deterrence, in particular to other employers who have been issued with compliance notices. This is a general matter of some weight but in the circumstances of this particular case I afford it less weight than the other factors referred to, given that they are so overwhelming.

25. At no stage in these proceedings did the Second Respondent indicate that either of the Respondents financial circumstances prevented them from complying with the Compliance Notice. The Second Respondent indicated to the Court that he considered the amount owing to Mr Ittah to be not significant, and on the penalty hearing the Second Respondent described his financial position as "solid" and further that he sought "no mercy" from the Court as a consequence of his financial position. He did not wish otherwise to put his financial position before the Court. There is nothing in respect of the business size or the Respondents' financial circumstances to mitigate penalty.

26. Ensuring compliance with minimum standards is a very important consideration in this case. The Respondents have demonstrated a complete disregard for the minimum standards contained in the FW Act and the Second Respondent's personal interpretation of workplace laws is an inaccurate one. There must be, for these Respondents,

serious consequences for failing to comply with a compliance notice in these circumstances.

27. When looking to whether any penalty imposed by the Court is an appropriate response to the conduct which led to the breaches, the Court determines the imposition of a penalty at the high range is appropriate. Further, that such imposition of penalty will not be crushing or oppressive to the Respondents. The seriousness of the conduct engaged in by the Respondents is paramount.

28. The Applicant submits penalties approaching the maximum are appropriate. A higher penalty is sought by the Applicant for the Second Respondent based on the totality of his conduct, including on the basis that specific deterrence is a very relevant consideration in respect of him, which applies to a lesser degree to the First Respondent. The Court concurs in that view.

29. In his submissions on penalty, the Second Respondent continued to re-agitate issues that had already been determined by the Court and were not relevant to the imposition of appropriate penalties. Indeed his conduct throughout has verged on an abuse of process. The Second Respondent's liability as an accessory and the dismissal of the application for review of the Compliance Notice had been dealt with by the Court well prior to the penalty hearing. Much of the submissions prepared by the Second Respondent were directed to those matters which had previously been determined. Much of them the Court could give no or little weight to.

30. On the penalty hearing the Second Respondent sought to make submissions on behalf of the First Respondent and inappropriately so. The Court had earlier ruled that the Second Respondent was not given leave to represent the First Respondent. The Second Respondent failed to address important matters as to why there was a need to create a new entity to operate the Saporitalia Restaurant; why he had removed himself as a director of the First Respondent; and why he had indicated to the Australian Securities and Investments Commission that the First Respondent was soon to be wound up. The Second Respondent submitted to the Court that the First Respondent was no longer trading. Its only income stream from trading revenue has been removed from it and it appears to now exist as a 'shell'. The Second Respondent's

failure to address these important issues is critical. He has acted to wind up the First Respondent corporation prior to the imposition of civil penalties against it.

31. During the course of the penalty hearing, the Second Respondent continued to make unfounded allegations against the Applicant and Mr Ittah, including raising matters as to Mr Ittah's inability to be employed at the present time, and made further criticism of the Court and its processes. The Second Respondent exhibits a blatant disregard of the Australian workplace laws, and contempt for them.

32. The Second Respondent, the Court finds, has no intention of seeing that Mr Ittah is paid. He sought to resist any order that penalties up to the value of the under payment be paid to Mr Ittah instead of the Commonwealth. The Applicant sought such an order on the hearing of the matter on the basis that a payment of any penalties imposed upon the Second Respondent be paid to Mr Ittah, it being the only realistic way that he will receive what he is owed. The Second Respondent's treatment of Mr Ittah was disgraceful, and it continues in the unsubstantiated and appalling criticism of him to this day. The Second Respondent addressed the Court on the penalty hearing and in part described Mr Ittah in this manner:-

> *"Mr Ittah is – also remained unemployed these days because everybody in our community has already heard of his characteristics and personality and work ethic. That's another consideration. Mr Ittah was dismissed because he was sabotaging the business. And full right to dismiss it. He hasn't got any right to annual leave. He hasn't got any right to one weeks' leave."*

33. The Applicant sought costs in these proceedings in respect of a limited part of the proceedings. The Applicant sought, in accordance with Schedule 1 of the FCC Rules, costs in respect of the liability hearing of the Second Respondent. The Court is satisfied that the amount claimed accords with Schedule 1 of the FCC Rules being in the sum of $7,483.50. The calculation of that cost is as set out in the document tendered to the Court in the penalty proceedings. It is as follows:-

Cost of family law proceedings and general federal law proceedings		
Item	Description	Amount for a general federal law proceeding (including GST)
6	Preparation of final hearing – one day matter	$5,988.00
12	Advocacy loading	50% of the daily hearing fee mentioned in item 13 that applies to the hearing
13	Daily hearing fee	(b) for a half day hearing--$997.00
	TOTAL	**$7,483.50**

34. A restriction on an award of costs in proceedings such as these is imposed by s.570(1) of the FW Act. However if the Court is satisfied that the conditions set out in s.570(2) of the FW Act are met, then the Court can make, in the exercise of its discretion, a costs order. The Court notes when considering any exercise of discretion as a second step as it were, that the conduct of the Second Respondent in committing the breaches is objectively serious.

35. The provisions of s.570(2) of the FW Act are as follows:-

> *"(2) The party may be ordered to pay the costs only if:*
>
> *(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or*
>
> *(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or*
>
> *(c) the court is satisfied of both of the following:*
>
> *(i) the party unreasonably refused to participate in a matter before the FWC;*

(ii) the matter arose from the same facts as the proceedings."

36. At the outset I note the Second Respondent's response to this application is to say at the hearing "You're out of your mind". Counsel for the Applicant submitted at the penalty hearing in support of the application the following:-

> *"MS CAREY: The basis of the costs application, your Honour, is under section [570(2)(b)] of the Fair Work Act [2009] which provides that costs may be ordered in a fair work proceeding if the [Court] is satisfied that a party's unreasonable act or omission caused the other party to incur costs…*
>
> *The basis of our costs application in respect of the liability, your Honour, occurs in the context where on 18 July last year and again on 1 August the applicant's solicitors took steps to outline to Mr Oren the test for accessorial liability under the [FW Act], and to clarify what appeared to be a misapprehension by him as to the function that the [Court] would be performing. And in doing that, the applicant set out what appeared to us to be the evidence, which was that Mr Oren had admitted the material facts that comprised the contravention by Darna [Pty Ltd]. He misapprehended the test which he took to mean that the test was whether or not he intended to break the law.*
>
> *And we provided him with further opportunity to consider his position. Then again at the hearing on 13 August, your Honour made orders reserving the issue of costs. And at the time he appeared to be willing to admit his liability. Instead, we went on to the hearing. And the submissions that were filed by Mr Oren in that liability hearing, your Honour, largely agreed with the applicant's submissions. And your Honour's decision identified that. His interpretation was completely unsupported by any court authority, and it was directly contrary to the authorities that the applicant had put before the [Court] and served on Mr Oren.*
>
> *And obviously in your decision on 27 October your Honour found that Mr Oren took no issue with the fact that he had actual knowledge of the compliance notice and the failure to comply, and that he didn't dispute that Mr Ittah had not been paid the sum required in the notice. We say, your Honour, in all the circumstances that conduct was objectively unreasonable. The costs that were incurred by the applicant for preparation for the liability hearing – in particular, we prepared and filed two affidavits and submissions that were settled by counsel. Counsel*

appeared at the liability hearing and we have an instructing solicitor also attend. [10]

…"

37. The factual findings of the Court in the various hearings of this matter are such the Court finds as to activate s.570(2) of the FW Act against the Second Respondent, a party to the proceedings, and in respect of s.570(2) of the FW Act. The Court accepts the submissions made by the Applicant which go to the satisfaction of the factors in s.570(2)(b) of the FW Act. On any objective analysis of these circumstances the Second Respondent's conduct was not what a reasonable person might expect and directly caused the Applicant to incur costs. The Second Respondent had been put on notice as to the application being made and provided no response that could be meaningfully considered.

38. Having made the above necessary jurisdictional finding, the Court shall exercise its discretion to award costs against the Second Respondent.

I certify that the preceding thirty-eight (38) paragraphs are a true copy of the reasons for judgment of Judge Hartnett

Associate:

Date: 27 March 2015

[10] Transcript of Hearing 5 February 2015, p.13, lines 1-34.