**IN THE DISTRICT COURT**
**AT AUCKLAND**

**CIV 2013-092-002462**
**[2016] NZDC 14218**

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| BETWEEN | ERIC JAMES & ASSOCIATES LIMITED<br>Plaintiff |
| AND | RICHARD WILLIS<br>Defendant |

At Auckland 29 April 2016
(On the papers)

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**DECISION OF JUDGE G M HARRISON AS TO COSTS**

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[1] I have delivered two decisions in this matter. The first was issued on 9 March 2015 in which I held that restrictive covenants contained in two documents entered into by the parties were void as being contrary to public interest. The second decision was issued on 8 December 2015. In that decision I dismissed further claims by the plaintiff (EJA) relying upon clauses in the contractor's agreement and alleged breaches by Mr Willis of obligations arising under that agreement or peripherally to it.

[2] On the face of it, therefore, the defendant (Mr Willis) has succeeded on both decisions. The general principle, of course, is that costs follow the event and I am of the view that Mr Willis is entitled to an award of costs despite submissions on behalf of EJA that despite my decisions in Mr Willis' favour EJA nevertheless succeeded and is entitled to an award of costs. I reject that proposition.

[3] Extensive submissions filed on behalf of Mr Willis seeking in the first instance indemnity costs or, in the alternative, increased costs or, lastly, costs according to category 2B.

[4] I do not regard this litigation as falling within the category described in *Bradbury v Westpac Banking Corporation*[1] where it was held that the losing party's behaviour must be able to be described as being of a "flagrant" nature.

[5] There had obviously been considerable negotiation between the parties before the hearing of 27 February 2015. What I regard as significant is that that hearing was confined solely to the issue of the lawfulness and enforceability of the restrictive covenants in the contractor agreement and the shareholder agreement. The parties were agreed that that was the sole issue for determination at that hearing and that any remaining issues should be determined later, if necessary.

[6] As far as the two agreements are concerned, the shareholders' agreement of 21 April 2011 had been prepared by solicitors, their firm name appearing on the title page of the document. Similarly, the contractor's agreement, while not bearing the name of solicitors preparing it, is obviously a professionally prepared document. It seems reasonable to me in those circumstances that EJA had a reasonable expectation of the validity of the restrictive covenants in each agreement and that it was perfectly proper for it to seek a ruling as to their validity.

[7] Mr Willis submits that he made a number of "Calderbank" offers prior to this hearing in which he offered various undertakings that would protect EJA's commercial interests. That is certainly so, but he resisted offering to comply with the letter of the restraint clauses and so it cannot be said that EJA failed without reasonable justification to accept the settlement proposals advanced by Mr Willis.

[8] In my view, 2B costs are payable by EJA to Mr Willis in respect of the first hearing.

[9] As far as the second hearing is concerned, I note that one offer of settlement only was made in September 2015 whereby Mr Willis offered to pay EJA a certain amount to settle the dispute between them save as to costs. That offer was not accepted.

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1 *Bradbury v Westpac Banking Corporation* [2009] NZCA 234

[10] Prior to the commencement of the second hearing the parties settled one of the issues that had been set down for determination. The remaining three issues were then heard and determined in favour of Mr Willis.

[11] Again, in these circumstances I cannot find that the approach adopted by EJA was unreasonable. Indeed, the confidential settlement of one of the issues may well have shortened the required hearing time and the costs that the parties may have been put to but for that settlement.

[12] Mr Willis succeeded on the remaining issues according to my decision of 8 December 2015 and he is entitled to costs in that regard also assessed on a 2B basis.

[13] Costs calculated according to that category are set out in Schedule 1 to the submissions of 29 February 2016 filed on behalf of Mr Willis. I did not understand EJA to contend that those calculations were in any way erroneous and I therefore certify costs in the sum of $30,690 as payable by the plaintiff Eric James & Associates Limited to the defendant Mr Willis.

G M Harrison
District Court Judge