IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2013-488-000269
[2014] NZHC 1306

UNDER	the Declaratory Judgments Act 1908 and Part 18 of the High Court Rules
BETWEEN	KELLY SUZANNE HAYES and ANDREW NATHANIEL HAYES as the Executors and Trustees of the Estate of MARLENE RUTH KEEYS Plaintiffs
AND	DOUGLAS FREDERICK PARLANE Defendant

Hearing: 3 and 4 June 2014

Counsel: J G Ross for the Plaintiffs
A M Swan for the Defendant (granted leave to withdraw)

Judgment: 11 June 2014

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 11 June 2014 at 11.00 am, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: J G Ross, Whangarei
A M Swan, Auckland

Copies To: SwanLaw (G P Swanepoel), Whangarei
Titirangi Law Centre (R D Ganda), Auckland

[1] On 3 June 2014, I delivered a result ruling in which I ordered that the defendant's late filed affidavits in this proceeding not be read. My reasons for this ruling now follow.

[2] The issue that arose for consideration was whether a defendant who had taken no steps to comply with timetable orders for the filing of his evidence and who had offered no proper explanation for this conduct should have the evidence excluded from consideration at the substantive hearing.

[3] The ruling did not prohibit the defendant, who had filed a statement of defence and counterclaim, from being represented at the hearing for the purpose of cross-examining the plaintiffs' witnesses and making legal submissions opposing the plaintiffs' case. However, the exclusion of the defendant's evidence would have severely hampered the defendant's counsel from making any headway in opposing the plaintiffs' case. Accordingly, after the ruling was given the defendant's counsel sought and was given leave to withdraw. The hearing then proceeded by way of formal proof.

[4] The plaintiffs are the executors and administrators of the estate of the late Marlene Ruth Keeys ("the estate"), who died on 18 November 2012. On 22 January 2013, the defendant, Douglas Parlane, gave notice under s 61 of the Property (Relationships) Act 1976 to the plaintiffs that he claimed an interest in the estate as the late Ms Keeys' surviving de facto partner. After giving notice of this claim the defendant took no further steps to advance it.

[5] On 13 May 2013, the plaintiffs filed an application in this Court for an order under the Declaratory Judgments Act 1908 that the defendant was not in a de facto relationship with the late Ms Keeys for the five years prior to her death.

[6] On 10 July 2013, the defendant responded by filing a statement of defence; later on 5 August 2013, he filed an amended statement of defence and counterclaim. In the counterclaim he sought an order under the Declaratory Judgments Act that he was in a de facto relationship with the late Ms Keeys for a period of approximately five years prior to her death.

[7] The proceeding was subject to the case management regime. It was scheduled for its first case management conference on 24 September 2013. However, ahead of the conference, counsel filed a joint memorandum. Associate Judge Bell issued a Minute on 23 September 2013 giving directions based on the joint memorandum of counsel, and so the conference was vacated.

[8] The Associate Judge's directions included a direction that the mode of evidence was to be by way of affidavit. The setting down date was 24 February 2014. The plaintiffs were to file and serve their affidavits by 24 March 2014. The defendant was to file and serve his affidavits by 21 April 2014, and the plaintiffs were to file and serve any affidavits in reply by 5 May 2014. Other steps relating to the preparation of a chronology and bundle of documents and opening were to occur on subsequent dates. The proceeding was set down for hearing for three days commencing on 3 June 2014.

[9] It is clear from the affidavits that the defendant sought to file late, that many of them were completed well before the first case management conference. The dates on which the affidavits were sworn reveal that nine of them were sworn before 23 September 2013. These were the affidavits of:

(a) Selina Riddle, sworn 12 July 2013:

(b) Bryce Whyte, sworn 12 July 2013;

(c) Dennis Tyson, sworn 15 July 2013;

(d) Warren McIntyre, sworn 19 July 2013;

(e) Robert Teixeira, sworn 27 July 2013;

(f) Gordon Parlane, sworn 31 July 2013;

(g) Alan Sharp, sworn 3 August 2013;

(h) Brian Williams, sworn 3 August 2013; and

(i) Graham Boyle, sworn 27 August 2013.

[10] The defendant prepared five further affidavits in 2013, after the first case management conference. These were the affidavits of:

(a) Kathleen Unwin (Parlane), sworn 30 September 2013;

(b) Gary Conroy, sworn on 21 October 2013,

(c) Selina Riddle, sworn 10 November 2013;

(d) Peter Wilding, sworn 25 November 2013; and

(e) Gary Higgins, sworn 8 December 2013.

[11] Then three further affidavits were sworn close to the hearing date:

(a) Anthony Parlane, sworn 15 May 2014;

(b) Carmen Parlane, sworn 15 May 2014; and

(c) the defendant's own affidavit, which was not sworn until 26 May 2014 and served on that date.

[12] Apart from the last three affidavits sworn in May 2014, the defendant was clearly in a position to provide the plaintiffs with the majority of the affidavits well within the timetable directions.

[13] The most significant evidence was the defendant's own affidavit. This was not sworn and served until four working days before the hearing was due to commence.

[14] In addition to the 17 affidavits, the defendant had subpoenaed two witnesses who were not prepared to provide him with affidavits. The admission of this

evidence would have brought the defendant's evidence to 18 witnesses (one deponent had provided two affidavits).

[15] The plaintiffs accepted that there had been a "hitch" to them filing and serving all of their evidence on time. Seven of the plaintiffs' affidavits were filed and served by the time limit of 24 March 2014. The Court record shows that two affidavits were later filed on 2 April 2014; five were filed on 14 April 2014; and two were filed on 2 May 2014. Whilst I was not provided with the actual dates on which service was effected, I gained the impression from counsel for both sides that service of the plaintiffs' affidavits occurred before they were filed in Court.

[16] Prior to the hearing, the late affidavits of the plaintiffs were not the subject of any complaint from the defendant. There was opportunity to do so at the second case management conference scheduled for 7 May 2014. Had the plaintiffs' late affidavits caused problems for the defendant, I would have expected him to raise this matter at the second case management conference so as to ensure that his complaint was noted, and for some provision to be made to accommodate his concerns.

[17] Instead, once again, counsel prepared a joint memorandum, dated 6 May 2014, which was filed the day before the conference. Once again, Associate Judge Bell made directions on the papers, and the conference of 7 May 2014 was vacated. The joint memorandum recorded that there was a "hitch" with some affidavits filed by the plaintiffs and consequently the parties had agreed that the defendant would file his affidavits by Friday 9 May 2014, which was 13 working days later than the original time limit.

[18] The plaintiffs said that before the second case management conference and the preparation of the joint memorandum of counsel for that conference, the defendant never advised them that he already had 14 sworn affidavits and intended to prepare three further affidavits. Nor did the defendant advise them about the proposed oral evidence from the two witnesses who refused to make an affidavit. The defendant did not dispute those assertions.

[19] No affidavits were filed and served by the defendant on 9 May 2014. It was not until the period between 20 and 23 May 2014 that the defendant served most of his affidavits. Even then the defendant's own affidavit, which contained the most substantial evidence in support of his case, was only served on 26 May 2014. Consequently, the plaintiffs did not know the evidential basis for the defence and counterclaim until 20 May 2014 at the earliest, and even then they were missing the defendant's evidence until 26 May 2014.

[20] The plaintiffs provided me with copies of correspondence to show that on 21 May 2014, the plaintiffs' barrister, Mr Ross, wrote to the defendant's barrister, Mr Swan, expressing concern about the late filed affidavits. The letter noted: (a) the affidavits were late; and (b) many of them had been sworn in 2013 and so they could easily have been served on or before 9 May 2014. The letter advised the defendant that Mr Ross was presently taking instructions concerning the late filing of the affidavits. Then on 26 May 2014, Mr Ross wrote to Mr Swan requesting as a matter of urgency the sworn copy of the defendant's affidavit, which Mr Ross was still to receive. This letter enclosed the plaintiffs' synopsis, which at paragraph 9 recorded the plaintiffs' formal objection to the late filing of the affidavits for being in breach of timetable orders. Paragraph 10 of the synopsis stated that the defendant's counsel had assured Mr Holgate, who was then counsel for the plaintiffs, that the defendant's affidavits would be filed by 9 May 2013, or that at least draft copies of the affidavits would be supplied by then. At the hearing, the defendant did not dispute this statement.

[21] At the commencement of the hearing, the plaintiffs vigorously argued that the defendant's affidavits should not be read in the hearing due to their non-compliance with the timetable order made on 6 May 2014. The plaintiffs submitted that there was an aggravating factor in respect of the late filing of the affidavits, namely 14 of the 17 affidavits were sworn in 2013, and the defendant had provided no reason for those affidavits not being served on time. The Court was referred to Mr Ross' letters dated 21 May 2014 and 26 May 2014, and the complaint about lateness contained in the plaintiffs' synopsis at paragraph 9. The plaintiffs submitted that r 7.7 of the High Court Rules provides that no statement of defence or amended pleading or

affidavit may be filed or step taken, after the close of pleadings date without the leave of a Judge.

[22] The plaintiff relied on a statement of Fisher J in *Fordham v Xcentrex Communications Ltd* (1996) 9 PRNZ 682 (HC) where a defendant who had failed to file a statement of defence on time later sought leave of the Court to file a defence out of time. At 685 Fisher J ruled:

> The ultimate object is of course to exercise the discretion in the way which will best achieve justice. There must be some basis or material upon which the Court could exercise its discretion in favour of the applicant.

[23] The plaintiffs submitted that in the present case, the defendant had not taken the trouble to apply for leave to file his affidavits out of time, nor had the defendant filed any affidavit explaining his breach of the timetable orders and the High Court Rules. The plaintiffs observed that alternatively, the defendant could have sought an extension of time under r 1.19 of the High Court Rules but he had not done so, nor had he filed any affidavit along those lines.

[24] The plaintiffs referred to *Spicers Paper (NZ) Ltd v BPK & GA Buckley Ltd* (1993) 6 PRNZ 16 (HC) where Master Williams QC at 18 to 19 considered authorities on the former High Court Rule governing extensions of time. The Judge noted that the object of the rule was to give the Court in every case a discretion to extend the time with a view to the avoidance of injustice, but that, nonetheless, the rules of Court must be obeyed. So, in order to justify the Court exercising its authority to extend the time during which a step is to be taken there must be material on which the Court can rely in the exercise of its discretion. The Master then referred to the Privy Council decision in *Ratnam v Cumarasamy* [1965] 1 WLR 8 at 12 and the statement of principle that:

> The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a timetable for the conduct of litigation.

[25] The plaintiffs also referred to *Day v Ost (No 2)* [1974] 1 NZLR 714 (SC) where O'Regan J at 717 stated:

> [The defendant] does not explain, or attempt to explain, in his affidavit in support of the present application this cavalier attitude. In a word, he advances nothing on which I could properly exercise my discretion in his favour.

[26] The plaintiffs relied on those statements of principle because, as they rightly pointed out, the defendant had made no application, let alone provided any affidavits by way of explanation for his delay, to enable the Court to exercise its discretion. With the result, the plaintiffs submitted, that the defendant should not be entitled to the indulgence that the admission of the late affidavits would entail. Further, the plaintiffs said that they would not consent to an oral application under r 7.41 and that, in any event, r 7.41 could not apply.

[27] The plaintiffs submitted that they have suffered prejudice in that they had effectively lost their right of reply in respect of the defendant's affidavit and his 16 witnesses and, in addition, as they had instructed new counsel for the hearing their preparation for trial was impeded. The plaintiffs contended that there were issues of credibility in this case, and that it was most unjust that they had been "ambushed" at the last moment. They argued that, in short, there had been not just a breach of the timetable orders and the High Court Rules, but that the breach was intentional, deliberate and designed to prejudice their case.

[28] The plaintiffs advised the Court that should it rule that the defendant's affidavits not be admitted, then they were ready to proceed. They recognised that if the defendant's affidavits were to be admitted at this late stage, they would be placed in the position of reluctantly having to seek an adjournment in order to prepare their reply evidence, and to attend to other matters of trial preparation necessitated by the defendants' late evidence.

[29] The application for the exclusion of the defendant's affidavits was resisted. Counsel for the defendant acknowledged that he was first instructed in September 2013. Mr Swan argued that from the date of the first case management conference, the plaintiffs had six months to prepare their affidavits. He said that the

defendant wanted to keep the trial on track and that it was the plaintiffs' initial failure to comply with the original timetable that had resulted in the present position. But he could not explain why the impact of the plaintiffs' delay was not drawn to Associate Judge Bell's attention at the time of the second case management conference. Mr Swan also said that the defendant lives in Whangaroa and as his solicitor and counsel were based in Auckland, it had been difficult getting instructions, particularly as the defendant is someone who does not use text messaging or emails. In explanation for why the 14 affidavits sworn before 9 May 2014 were not filed and served on that date, he said that he needed to obtain instructions from the defendant as to their accuracy. When asked if the defendant was in a position to pay solicitor-client costs to compensate the plaintiffs for their wasted costs, should the hearing be adjourned, Mr Swan replied that the defendant realised that if he was to pursue his defence and counterclaim he would have to sell his house, and once this was done there would be funds to pay a costs award resulting from an adjourned hearing.

[30] In addition to the late filed affidavits, there were the two witnesses that the defendant had summonsed to give evidence under subpoena. In his Minute of 23 September 2013, Associate Judge Bell had directed that the evidence in this proceeding be by way of affidavit, which is usual for proceedings under the Declaratory Judgments Act. Rule 9.75 deals with the situation where a person refuses to make an affidavit. The rule enables a party to apply for an order that the prospective witness appear and be examined on oath before the Court. A transcript of the evidence then becomes available. However, the defendant took no steps under this rule.

Analysis

[31] The defendant had committed numerous procedural errors. Further, the defendant's counsel must bear some responsibility for what had occurred. He was instructed last year so it was not as if he were newly instructed counsel who had inherited a poorly prepared defence and counterclaim. For the reasons expressed below, I consider that the manner in which the defendant's case was conducted reveals a blatant and deliberate disregard for this Court's rules of procedure.

[32] First, there was the way in which the defendant approached the joint memorandum for the second case management conference. One of the purposes of this conference was to ensure the proceeding was in fact ready for hearing on the allocated fixture date. I acknowledge that the plaintiffs had earlier been in default of the original timetable directions, but this default was rectified by the joint memorandum of 6 May 2014. This memorandum recognised that there had been some slippage in the plaintiffs' compliance with the timetable. Counsel had obviously discussed between themselves how the slippage could be accommodated and had been able to reach an agreed joint position.

[33] When the defendant recorded his agreement in the joint memorandum to a specific time for filing his affidavits, he should have realised that he would then be expected to keep to that self-imposed time, or take steps to have it extended at the earliest opportunity. This is not a case where the Court has imposed a time limit on the defendant, and it turned out to be unrealistic. Further, by the time that the joint memorandum was executed, the defendant only had three remaining affidavits to prepare, so it is difficult to see why he could not have kept to his self-imposed deadline.

[34] Had the plaintiffs' delay truly caused prejudice for the defendant, his counsel could have insisted on some reference to this prejudice being included in the joint memorandum. Instead, the joint memorandum conveyed the impression that any delay in the preparation for trial could be accommodated without jeopardising the fixture of 3 June 2014. The late filed affidavits of the plaintiffs were presented as being no more than a minor matter to be accommodated by the proposed adjustment to the timetable; the defendant was presented as being untroubled by this delay, and, provided that he had until 9 May 2014 to file and serve his affidavits, there was no risk of the hearing not proceeding on 3 June 2014.

[35] At the time counsel were preparing the joint memorandum of 6 May 2014, Mr Swan should have informed Mr Ross that the defendant had 14 affidavits in support of his case and expected to prepare further affidavits, as well as calling two witnesses under subpoena. Counsel could then have discussed whether a three day fixture was still sufficient to dispose of this proceeding. Moreover, as at 6 May

2014, if Associate Judge Bell had been informed of this expansion in the proceeding, he could have ascertained from counsel if the hearing could still proceed on 3 June 2014. If more hearing time was seen to be required, the fixture could have been adjourned to a new date and steps taken to ensure that valuable Court hearing time became available for other litigants.

[36] The same can be said regarding the defendant's failure to comply with the time for filing and serving his affidavits. Had the defendant met this deadline, the extent of the evidence is likely to have caused someone to reassess the estimated hearing time. So, if the fixture were to be adjourned on the ground that more hearing time was required, there would still have been time for the Registry to see if other litigants wanted a fixture for the week commencing 3 June 2014. Alternatively, if the fixture went ahead, the plaintiffs would have had sufficient time to prepare to meet the defendant's case.

[37] The defendant's breach of a consent order, coupled with his failure to bring the late service of his affidavits to the Court's attention as soon as possible after the 9 May 2014 deadline shows him to have no regard for this Court's procedural requirements. That he should have acted in this manner when 14 of his affidavits were actually completed in 2013 is extraordinary. This is an aggravating factor that can reasonably be understood to indicate a deliberate and blatant disregard for the rules of procedure.

[38] The second example of the defendant disregarding procedural requirements is the oversight regarding r 9.75. Given the Court's direction that the evidence was to be by way of affidavit, the appropriate approach to a reluctant witness was to invoke r 9.75. But, instead of following the requirements of this rule the defendant adopted his own response to obtaining evidence from persons who were reluctant to make an affidavit. This had the potential to prejudice the plaintiffs. Rather than having access to a transcript of the reluctant witnesses' evidence, which would have been the likely result if an application under r 9.75 had been made in a timely fashion, the approach taken by the defendant would have resulted in the plaintiffs' counsel having to deal with viva voce evidence given in the course of the trial, and of which the plaintiffs had no advance notice.

[39] The third example of the defendant's disregard for procedural requirements is the way in which he responded to the plaintiffs' complaint about the late filed affidavits. The plaintiffs had placed the defendant on notice that they would be objecting to the Court reading his affidavits. They did this by the letters of 21 and 26 May 2014 and [9] of the synopsis filed and served in advance of the hearing. Thus, the defendant had time to prepare to meet the plaintiffs' opposition in the proper way.

[40] Nonetheless, the explanations that the defendant gave for the late affidavits were advanced from the bar. Moreover, he gave no explanation for why he had not taken any active steps to cure his default, such as by an application to the Court for leave to file and serve the affidavits out of time. Nor was any explanation given for the absence of affidavits to explain the delay. This was despite the defendant having heard the plaintiffs' argument and the authorities on which they relied regarding the need for a party in default to provide the Court with some basis or material upon which it can exercise discretion in favour of that party.

[41] The explanations that the defendant tendered from the bar were weak. As I have already pointed out, it was no excuse to point to the plaintiffs' earlier delay as this was properly rectified. The need to have the defendant approve the affidavits of the other witnesses was real but, for most of the affidavits, that could have been done in 2013 or early 2014 at the latest. In addition, further time for taking this step should have been built into the amended timetable. It was not as if it was an unforeseen event that had only occurred after the amended timetable order was made. Finally, Mr Swan's explanation that the defendant would soon have funds to pay wasted costs because he would be selling his house to fund the proceedings was telling. It suggested that as at the fixture date, the defendant still had not secured the necessary funds to meet his legal costs.

[42] In short, whilst the plaintiffs had taken the appropriate steps to address the prejudice that the late filed affidavits had caused them, the defendant failed to take any of the appropriate steps available to him to ameliorate his default of the timetable directions. In this regard, he had failed both procedurally and substantially to provide the Court with material upon which it could exercise its discretion in his

favour. The "cavalier" attitude displayed by the defendant was more egregious than that displayed in *Day v Ost (No 2)* where the Court at least was provided with an application and supporting affidavits seeking an extension of time.

[43] Clearly, the plaintiffs could not proceed with the hearing on 3 June 2014 facing the amount of late evidence from the defendant. They had no time to prepare reply evidence, or to prepare to cross-examine the defendant's witnesses, let alone to consider how the evidence might impact on their legal argument. The choice for the Court, therefore, was either to refuse to accept any of the defendant's evidence, or adjourn the hearing to another date.

[44] Enquiries of the Registry revealed that if the hearing were adjourned, then the earliest available hearing date for a fixture of any length exceeding two to three days was in March 2015. This was unsatisfactory. It would hold up the distribution of the estate for at least a further nine months. Further, until the defendant actually sold his house, it appeared that he had no funds from which to pay the plaintiffs' wasted costs.

[45] On the other hand, to refuse to read the defendant's affidavits effectively undermined his defence and his counterclaim against the plaintiffs. To deprive a party of his opportunity to advance a defence and counterclaim may seem a severe action, particularly as it was not clear as to what extent the fault lay with the defendant as opposed to his legal practitioners. However, if he was not personally responsible, then any injury to him that resulted from their faults could be cured by him taking remedial action against them.

[46] Further, any injustice that the defendant might suffer as a result of the exclusion of his affidavits was in my view considerably outweighed by the injustice that the plaintiffs and other litigants would suffer if the affidavits were accepted and the proceeding adjourned. This would have left the plaintiffs waiting until March 2015 at the earliest for their proceeding to be resolved. Meanwhile, they could not distribute the estate.

[47] Finally, an adjournment of the hearing date meant that three days of hearing time that other litigants may have wished to utilise were lost. In this regard, I note that hearing time in this Court is a valuable resource that is not to be squandered. If the 3 June 2014 fixture had been adjourned, there would be the waste of three days of Court hearing time but, in addition, the allocation of another fixture for this proceeding would further reduce the hearing time available for other litigants. These are relevant factors to be taken into account in the exercise of the Court's discretion.

[48] *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27, (2009) 239 CLR 175 is a case that concerned an application to amend pleadings, as opposed to the late filing of affidavits. However, I consider that the principles in this case are applicable to all situations where the Court is asked to exercise its discretion to adjourn or delay proceedings. The High Court of Australia in *Aon* allowed an appeal against an order granting leave to amend a statement of claim. Regarding the Judge's discretion to allow an application for adjournment and amendment of pleadings, the Court gave weight to the importance of case management concerns. At [5], French J stated:

> [5] In the proper exercise of the primary judge's discretion, the applications for adjournment and amendment were not to be considered solely by reference to whether any prejudice to Aon could be compensated by costs. Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the *time of the court is a publicly funded resource*. *Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account*. So too is the need to maintain public confidence in the judicial system. Given its nature, the circumstances in which it was sought, and the lack of a satisfactory explanation for seeking it, the amendment to ANU's statement of claim should not have been allowed. The discretion of the primary judge miscarried. (emphasis added)

[49] The other Judges, Gummow, Hayne, Crennan, Kiefel and Bell JJ, concurred with French J's comments and stated at [101]:

> The stated object in the Court Procedures Rules, of minimising delay, may be taken to recognise the ill-effects of delay upon the parties to proceedings and that such effects will extend to other litigants who are also seeking a resolution in their proceedings.

[50] In the present case, the plaintiffs' opposition to the late affidavits was well made, meritorious and soundly based. The principles expressed in *Fordham*; *Spicers Paper (NZ) Ltd*; *Ratnam, Day v Ost (No 2)* and in *Aon* supported upholding it.

[51] The plaintiffs and other litigants are entitled to expect that this Court will police and enforce its procedural rules when necessary. Moreover, when a party, who has blatantly and deliberately disregarded procedural rules in a way that has prejudiced others, then appears before the Court offering lame duck excuses in a procedurally incorrect manner, this simply compounds the offending conduct. Here the Court was faced with three discrete examples of blatant and deliberate disregard of its procedural rules. In such circumstances, if the Court is to preserve the integrity of its procedural rules and to ensure it acts justly to all persons who are reliant on those rules it must be prepared to enforce them, even though the result will be to bring the offending party's litigation to an end. Whilst those occasions are likely to be rare, I was satisfied that this was one of them. Indeed, my view was that if a stern response was not seen to be warranted in this case, it would be hard to imagine when such a response might result. Further, the resulting injustice to the plaintiffs and other litigants were the hearing to be adjourned far outweighed any injustice that the defendant might suffer from having his evidence excluded. Accordingly, I upheld the plaintiffs' argument, with the result that the defendant's evidence was excluded from the hearing.

[52] The plaintiffs sought costs at category 2B for their time and effort in opposing the reading of the defendant's affidavits. They have been successful and so in accordance with the general principle that costs follow the event, they are awarded costs at category 2B.

Duffy J