BEFORE THE CUSTOMS APPEAL AUTHORITY

[2020] NZCAA 01

CAA 010/17

UNDER THE	Customs and Excise Act 2018 ("the Act")
Between	**XXXX**
	Appellant
AND	**Chief Executive of the New Zealand Customs Service**
	Respondent

Hearing: 3 May 2018

Counsel: Ms V Sullivan and Ms K Keating, counsel for the Appellant

Ms P H Courtney, counsel for Customs

Decision: 07 July 2020

INTERIM DECISION
(COSTS)

Introduction

[1] On 5 August 2019 the substantive decision issued in this appeal, being *An Appellant v Chief Executive of the New Zealand Customs* Service [2019] NZCAA 13. The Authority allowed the appeal, the parties agreed on the computation of the financial effect of applying the decision. Unfortunately, the order confirming the agreed computation was issued with a description that it was a costs order, when that was not the case.

[2] The decision reserved costs, which are the subject of this decision.

[3] The Respondent (Customs) said the Authority does not have jurisdiction to award costs on the basis the Appellant claimed costs. Customs sought to be heard further if I did not agree. In my view the Authority must set reasonable costs, having regard to the long-established principles that apply to cost awards in New Zealand.

[4] The principles for this Authority awarding costs have some importance and are not set out in detail in the Customs and Excise Act 2018 (the Act). I have set out some potential principles the parties may wish to address. I will of course apply the principles only after considering any submissions, which need not be limited to the points I have raised in this interim decision.

The Appellant's position

[5] The Appellant sought costs on a scale basis under the District Court Rules.[1] The solicitor-client costs were $105,339. It said the District Court scale costs would be $27,504. The calculation was based on:

[5.1] A category 2 proceeding with two counsel.[2]

[5.2] Band B calculations of time.[3]

[6] The scale-based costs claim includes additional costs for the filing fee, and witness expenses of $19,575.00 and a filing fee of $356.52 (both GST exclusive). In respect of those disbursements the Appellant claims an additional $2,989.73 for GST.

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1 The Rules do not apply directly but provide a guide to quantum for the reasons set out in *AA v Chief Executive of the New Zealand Customs Service (Costs)* [2014] NZCAA 613, which the Appellant cited.

2 District Court Rules 2014, Sch 5

3 As above, Sch 4

[7] In all the Appellant claims:

[7.1] Costs and disbursements at scale of $51,379.00 (Category 1B with an uplift of 100% after a *Calderbank* offer).

[7.2] Disbursements of $22,921.25.

[8] The Appellant sought the 100% increase on most of the scale costs, based on:

[8.1] A *Calderbank* offer a year prior to the hearing. In summary the terms were an offer to settle for approximately a refund of $177,646, rather than the $340,203 that resulted from the Authority's decision.

[8.2] The *Calderbank* offer occurred very early in the appeal process.

[8.3] It says the rejection of the offer was unreasonable, as the facts were known at the time (Customs had investigated), the reasons supporting the offer identified a key legal position the Authority accepted.

[8.4] The offer essentially "split the difference" between the parties in terms of quantum.

[9] The Appellant accepted that the reasonableness of rejecting an offer must be assessed at the time of the rejection, not the ultimate outcome.[4]

[10] The Appellant acknowledged Customs said a reason for rejection of the offer was a concern to obtain an authoritative decision on the issue. However, the Appellant said it should not bear the cost of determining an issue for other importers.

Customs' position

[11] Customs contended:

[11.1] Clause 27 of Schedule 8 of the Customs and Excise Act 2018 gives a discretion to the Authority to award reasonable costs and expenses including witness expenses; and that the District Court scale could be used as a guide to what costs are reasonable.

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4 Citing McGechan on Procedure, High Court Rules, HR 14.6.02(3(a)(iii).

[11.2] Scale costs and disbursements of $50,425.25 in total were accepted.

[11.3] Clause 27 of Schedule 8 provides a specific provision to award only reasonable costs and expenses. That does not permit increased costs, and as there is no equivalent of Rule 14.6 or 14.10 of the District Court Rules, the principles in those rules do not apply.

[11.4] Departure from scale costs departs from the usual approach, that has regard to the fundamental right of parties to access the courts. If the principles relating to *Calderbank* offers were to apply the legislation authorising costs would say so.

[11.5] Customs sought further time to respond if the Authority considered it had power to award increased costs.

Discussion

General principles

[12] My preliminary observation is that the statutory provision for awarding costs under s 271 of the Customs and Excise Act 1996, and now cl 27 of Schedule 8 is:

> An Authority may … order a party to pay to the other party … costs and expenses (including witnesses' expenses) [the Authority] considers reasonable …

[13] The operative wording is identical under both Acts. The provision amounts to a general discretion, and it is subject to a reasonableness requirement. Customs contends that without express statutory authority increased costs, and *Calderbank* principles cannot apply. The difficulty with that argument is that the principles are reasonable principles used to set costs in New Zealand Courts. The Courts have statutory provisions governing costs in New Zealand. However, universally as far as I am aware, there is an overarching discretion,[5] where principles such as considering *Calderbank* offers, and the policy of using scale rather than indemnity costs are weighed against the circumstances of the case before the Court.

[14] In this jurisdiction it is difficult to apply default principles, as the appeals vary so much in terms of the matters in issue. The jurisdiction does not have a monetary limit, so appeals vary from issues such as small volumes of tobacco imported by "mail order"; to disputes over

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5 District Court Rules 2014, 14.1, High Court Rules 2016 14.1, Court of Appeal (Civil) Rules 2005, 53; and Supreme Court Rules 2004, 44

many millions of dollars of GST or duty. It is necessary to consider the justice of the case, and it would be very difficult to do that equitably using default principles.

[15] The Court of Appeal's decision in *Auckland Gas Co Ltd v Commissioner of Inland Revenue* identified that costs in revenue proceedings are treated in the same way as other civil proceedings, the Court noted the relevance of a scale approach.[6] *AA v Chief Executive of the New Zealand Customs Service*[7] discusses the application of the principles to this Authority, and that decision also discusses why scale costs under the District Court Rules will usually be a starting point rather than indemnity costs.

[16] If Customs' argument was correct that setting "reasonable" costs excludes consideration of *Calderbank* offers, and the policy underlying scale costs; it must be for a different reason. The Authority's costs awards should be reasonable for the same reasons as the awards made by Courts and Tribunals generally.

[17] If those factors cannot be considered it will be because the empowering provision contemplates indemnity costs, provided they are reasonable. Some Tribunals have costs provisions of that kind an example is discussed in *Chief Executive of the Ministry of Social Development v Genet*.[8]

[18] However, that statutory context is different. In my view the principle in the *Auckland Gas Co. Ltd.* case must apply to this Authority. This is a revenue jurisdiction the analysis is applicable, and the factors discussed in the *Genet* case at least in this present matter have limited relevance. In my view the routine approach to scale costs and *Calderbank* principles must apply, where they are applicable to the overall justice of a particular case before the Authority.

Issues concerning the application of the District Court scale of costs

[19] When applying the approach to scale costs it is necessary to have regard to the fact the Authority's jurisdiction is not coterminous with the jurisdiction of the District Court. Some matters in terms of the monetary amount would be within the jurisdiction of the Disputes

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6 *Auckland Gas Co Ltd v Commissioner of Inland Revenue* [1999] 2 NZLR 409 (CA)

7 *AA v Chief Executive of the New Zealand Customs Service* [2014] NZCAA 613

8 *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541

Tribunal, others at a value where the proceedings would be in the High Court if determined on the basis of the monetary amount.

[20] More important, the Authority exercises jurisdiction that is quite different from the general civil jurisdiction exercised by the District Court. It is a specialised jurisdiction with exclusive first instance jurisdiction for matters such as this appeal. Some of the appeals involve the interface of legal and accounting principles, and other similarly technical questions. For example, some appeals involve the interpretation of free trade agreements where international law principles are important. The flexible procedure and specialised expertise expected of the Authority means the process is substantially different from a Court in some cases. However, in a case such as this appeal the legal underpinning of the issues, and both parties being represented by experienced counsel means the differences are relatively minor.

[21] In the present case there was a significant technical component, as a result the solicitor/client legal costs and disbursements for the Appellant amounted to $105,339. It is a significant portion of the current $350,000 monetary limit of the standard civil jurisdiction of the District Court. Though of course other aspects of that Court's jurisdiction involve proceedings with far greater monetary amounts at issue. The key point is that this proceeding did involve a high level of expertise on the part of counsel due to the technical nature of the contested evidence, and the legal principles. Potentially more time was required than a typical mid-band case. The Court Rules generally emphasise the objective nature of the issues in dispute, and the legal resources to address them determine the evaluation of scale, and increased costs.

[22] The scale costs calculated by the Appellant were based on the appeal equating to:

[22.1] A Category 2 proceeding, which is defined to be of average complexity requiring counsel of skill and experience considered average.[9]

[22.2] The band B allowance for the reasonable time.[10]

[23] Potentially, the view is open that the nearest equivalent in the District Court scale costs is a Category 3 proceeding where due to complexity

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9 District Court Rules 2014 14.3

10 As above at 14.5

or significance the proceedings "require counsel to have special skill and experience", and Band C where a comparatively large amount of time is considered reasonable. However, in an appropriate proceeding a party could contend the subject-matter made the Disputes Tribunal approach of excluding lawyers and costs, or the scale of the High Court a more appropriate analogy. For this Authority, there is no direct reference to a scale, there is a discretion and an obligation to exercise it reasonably.

[24] The actual costs of $105,339 are not surprising when dealing with a revenue dispute that involves substantial factual and accounting issues, and does point to potential complexity, and a large amount of time being required.

[25] If the costs were calculated as a District Court Category 3, Band C proceeding (for each step, and each should be considered on its own), the scale costs would, it appears, be $55,695.00, rather than the $27,504.00 calculated by the Appellant:

Step	Category 2, Band B		Category 3, Band C	
	Days	$	Days	$
1.0	1.50	$ 2,865.00	3.00	$ 8,460.00
7.4	0.40	$ 764.00	0.75	$ 2,115.00
9.3 & 9.4	1.00	$ 1,910.00	2.00	$ 5,640.00
16.1	2.25	$ 4,297.50	3.50	$ 9,870.00
16.2	2.25	$ 4,297.50	3.50	$ 9,870.00
17.1	4.00	$ 7,640.00	4.00	$ 11,280.00
18.1	2.00	$ 3,820.00	2.00	$ 5,640.00
18.2	1.00	$ 1,910.00	1.00	$ 2,820.00
		$ 27,504.00		**$ 55,695.00**

[26] If the 100% uplift were applied to Category 3 Band C, from Step 9.3 forward (as the Appellant claims) it would add a further $45,120.00 to the costs. A total of $100,815.00 (excluding disbursements). A 50% uplift would result in an increase of $22,560, to a total of $78,255.00.

[27] It is not clear to me whether the actual costs of $105,339 included disbursements, importantly the witness fee of $19,575 (excluding GST). It is generally a fundamental principle that costs awarded should not exceed actual costs.

Principles to apply in this case

[28] The extent to which *Calderbank* principles could apply in this case are by analogy a successful plaintiff that offered to settle for a lesser amount than the sum awarded. It does not appear to me either party claims the other contributed to time or expense in a way that should affect costs. Accordingly, it appears that the issue is whether the Appellant should receive increased costs on the basis Customs

rejected a settlement proposal. Generally, to take that into account it is necessary to show the rejection was clearly unreasonable (*Holdfast New Zealand Ltd v Selleys Pty Ltd*).[11] At this point I am not satisfied the Appellant has demonstrated that was the case. I accept the point that there was a genuine need for Customs to reach a determined position on the legal issues. However, that does not mean that the Appellant should unreasonably bear the costs of a general benefit where it is only one of many affected.

[29] Potentially, the more appropriate analysis is having regard to the public benefit consideration. There are elements of this being a "test case", though I am not aware of how representative the facts were, simply that both parties seem to recognise this aspect. For some revenue disputes, the Tax Administration Act 1994 specifically provides for a "test case" procedure (ss 89O, 137 and 138Q). It is more widely recognised that increased costs may be awarded where a proceeding is of general importance to persons other than the parties and it was reasonably necessary for the party to bring the proceedings.[12] More specifically in test cases a successful "tester" can be ordered to pay the costs of the opposing party, contrary to the usual rule of costs following the event, or there may be no award of costs: *Securities Commission v Kiwi Co-op Dairies Ltd*.[13]

[30] Further, there has been recognition in the Court Rules, and decisions that the aim of standard scale costs in New Zealand without an uplift is to award the successful party two-thirds of the reasonable costs of the proceeding or step in the proceeding.[14] It appears the policy is principally to balance access to justice, unreasonable imposition on a successful party, and encourage efficiency by settlement and application of appropriate skills.

[31] In *Holdfast NZ Ltd v Selleys Pty Ltd,* the Court gave valuable guidance on the proper approach to an application seeking an uplift from the

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11 *Holdfast New Zealand Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA).

12 As reflected in HC Rule 14.6(3)(c), *NZ Maori Council v A-G (No 3)* HC Wellington CP942/88, 28 April 1995, McGechan J said, at 4, that, "in a proceeding of wide significance, brought in the public interest, it can be appropriate for the public to contribute very substantially", *Auckland Council for Civil Liberties v A-G* HC Auckland CP452/93, 10 November 1993; cf *Whangamata Marina Society Inc v A-G* (2006) 18 PRNZ 565 (HC) where the plaintiff had a direct interest in obtaining the resource consents necessary for the marina it wanted, and had not brought the case in the public interest.

13 *Securities Commission v Kiwi Co-op Dairies Ltd* [1995] 3 NZLR 26

14 *McGechan* at HR 14.4.01, *Green v Police* [2019] NZHC 1019, and expressed in District Court Rules 2014 14.2, High Court Rules 2016 14.2; and Court of Appeal (Civil) Rules 2005 53A

scale.[15] In the present case, the issue is not an uplift from a mandated scale, rather a decision that produces a principled and reasonable result without a scale applied. However, I consider the approach is applicable and likely that it is appropriate to use the District Court scale as a point of reference in this matter, in summary:

[31.1] Step 1 is to categorise the proceeding or step in terms of a category;

[31.2] Step 2 is to work out a reasonable time for each step in the proceeding, the Band may set at time,

[31.3] Step 3 is potentially to apply for a reasonable time for the step, if there is justification to go beyond the Band;

[31.4] Step 4 is to look at the reasonableness: an increase over 50% of the result of Steps 1 and 2 is unlikely, given that two-thirds of the reasonable daily rate is the intended result.

[32] It should be noted that a GST registered party is not able to recover GST as they have already had the benefit of input tax,[16] and output tax is not charged to the recipient of a costs award. It appears the two-thirds comparison should be against the GST exclusive measure of costs. The same would apply to disbursements, as the payment is compensation not a payment for a taxable supply, only the GST exclusive amount would be recoverable.

Timetable

[33] The Appellant and the Respondent should exchange draft memoranda on costs.

[34] Then each should file a memorandum, taking account of the other party's position.

[35] I request that the Appellant provide confirmation of the solicitor/client costs, it is sufficient to know:

[35.1] The quantum of legal costs (including intra-firm disbursements);

[35.2] The witness costs; and

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15 *Holdfast NZ Ltd v Sellys Pty Limited, above at n 9*

16 *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282, (2016) 27 NZTC 22-058 at [13].

[35.3] Filing fees.

[36] All figures to exclude GST, or plus GST if the Appellant could not claim input tax on its costs.

[37] If any issues arise, the parties may request a telephone conference. I set 5:00 pm 29 July 2020 for filing final memoranda, subject to any further directions.

DATED at Wellington 07 July 2020

G D Pearson
Customs Appeal Authority