BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 13

READT 003/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	BARRY BUSTER BEATSON Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 416) First respondent
AND	JAMES CRISPIN, TIM MORDAUNT & PROPERTY BROKERS LTD Second respondents
Tribunal:	Mr J Doogue, Deputy Chairperson Ms C Sandelin, Member Mr N O'Connor, Member
Submissons:	Mr M Lawson for the appellant Mr M Mortimer, on behalf of the Authority Mr D Sheppard, on behalf of the second respondents
Date of Ruling:	1 May 2020

DECISION OF THE TRIBUNAL

Background

[1] The parties have now completed making submissions on the quantum of the costs order that the Tribunal might make in this proceeding.

[2] We now briefly set out our views on the appropriate quantum of costs that ought to be awarded.

[3] We accept that it is correct in principle that costs orders represent a contribution only to the party and party costs that the successful party has incurred. Such an approach applies generally other than where some exceptional factor is present that justifies departure from it. That is the long-standing principle that has been adopted in New Zealand courts. We can discern no reason why the legislature should have intended, when implementing section 110A of the act, that a different approach should now be taken.

[4] Likewise, the traditional approach that has been adopted is that costs follow the event and, again, we do not consider that there is any suggestion that in enacting the new costs regime the legislature intended that a different approach would be taken.

[5] Both deciding whether to make an order for costs and, if so, the quantum of such an order are matters for the broad discretion of the tribunal.

[6] The dispute in this case centred on a contention that the selling agent in this case had breached a number of duties and, most significantly, had falsified documents. We concluded that the case for the complainant/appellant did not succeed. The allegations were serious. The argument arose out of the discovery of electronic and printed copies of documents which had dates on them which were inconsistent with the evidence that the licensee had given. The case argument depended heavily upon the assertion that the date that appeared in such documents must be the correct date must be the actual date upon which the documents were created. We considered that such a conclusion did not necessarily follow and that there was another reasonable explanation as to why there might be additional copies of documents in existence which had different dates printed on them from the

original. Further, the allegations we have just been discussing were not put forward at the stage of the CAC investigation.

[7] There were other arguments put forward on behalf of the appellant but the matters just discussed were central to establishing supposedly misleading conduct on the part of the selling agent.

[8] Turning to the costs claimed, the Second Respondent assert that they expended $27,000 on legal fees and they seek to recover a party and party costs award of approximately $18,000. That is to say, the claim is for a two thirds contribution.

[9] In our previous decision we ordered that the appellant was to pay costs and sought submissions from the parties on quantum. We noted at paragraph 2 of our decision that we needed to be assured that the costs that were charged to the Respondent by their lawyers were reasonable. That was the starting point. In his submission, Counsel for the appellant, Mr Lawson, made the point that the solicitor-client costs that were charged were excessive.

[10] It had been our expectation, unfounded as it turned out, that the parties would either agree on the appropriateness of the actual costs charged on a solicitor client basis or that their level would be justified by some other means, if agreement proved not to be possible. No agreement was in fact reached and no factual material concerning the reasonableness of the costs has been put forward. This causes a problem because the approach to ordering costs is generally to order a fraction of the actual solicitor-client costs that were incurred. Caution is required to ensure that party and party costs are not illegitimately enlarged through adopting the starting point of an excessively large figure for solicitor client costs.

[11] Where the reasonableness of the solicitor client costs is challenged on some credible basis, the claimant for party and party costs must therefore satisfy the Tribunal on that matter.

[12] The resulting position in this particular case is not altogether satisfactory because it means that the appellant is raising an issue which the Tribunal has only a meagre evidential basis for deciding.

[13] It would be understandable in the context of this case why the solicitor/client costs were on the high side. Reputations were at stake. A level of costs which could not be justified in a relatively trivial matter may have an entirely different appearance where substantial and serious complaints are made involving the honesty of a party. In the latter case a party in the position of the appellant should appreciate that the person against whom the allegations were made would put forward a substantial and comprehensive defence which could result in the incurring of a relatively large amount of costs.

[14] In this case, the solicitor client costs which were charged to the Respondent were $27,767.93.

[15] The Tribunal itself is not in a position to make its own assessment of the reasonableness of the costs unassisted by any evidence on the point. To do so would require us to consider the criteria which apply between solicitor and client and which are part of Rule 9.1 of the Lawyers and Conveyancers Act Client Care Rules. Factors which are relevant to this case would include the time and labour expended, the skill, specialised knowledge and responsibility required; the importance of the matter to the client and the results obtained; the complexity of the matter and the difficulty of the questions involved; the experience reputation and ability of the lawyer; the reasonable costs of running a practice and the fee customarily charged in the market and locality for similar legal services.

[16] But there is something of a knowledge vacuum on the part of the Tribunal. For example, there has been no agreement on, or evidence about, what a lawyer of the same seniority as counsel for the licensee would be justified in charging.

[17] We note the contention which Mr Lawson put forward on behalf of the appellant that the costs that would be allowed under the High Court costs scheme for preparation and appearance on an appeal of one days duration would be $10,755 inclusive of GST. Counsel submitted:

> It is difficult to see how a costs award for a one-day hearing before the Disciplinary Tribunal should exceed the costs of a one-day appeal in the High Court

[18] The figure put forward in that submission was based upon category 2B. Therefore, it represents what is considered to be two thirds of a reasonable amount that would be justified for counsel of average experience acting in a High Court matter proceeding of moderate complexity and difficulty in the High Court context.

[19] The amounts that have been adopted by the Rules Committee for the purposes of part 14 High Court Rules are applicable only to proceedings in the High Court. Nonetheless, those sums represent the consensus between the Rules Committee, the New Zealand Law Society, the New Zealand Bar Association and the Legal Services Agency. They represent two thirds of the rates that New Zealand practitioners in the relevant category are currently charging to clients[1]. *McGechan*, though, warns against using the rates for "costs revision" purposes because they are at best an approximation

[20] In our view, the High Court costs arrangement reflects a pragmatic view of fixing costs. There is an approximation which has been adopted as part of a suite of rules which avoid the court having to consider the specific facts of the case before it concluding the actual amounts charged. The approach in the rules is adopted on the grounds of expediency and efficiency. Any shortcomings that the approach suffers from through lack of true applicability to the individual cases before, is made up for by a system which resolves cost disputes promptly and with the expenditure of a minimum of resources. It is part of a wider system of cost fixing that it was decided was appropriate in the High Court regime and does not necessarily provide wider guidance to other Tribunals which are, of course, not operating in that environment when they make costs determinations.

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[1] *McGechan On Procedure* commentary to rule 14.4

[21] Counsel for the appellant, though, put forward another basis upon which the solicitor-client costs could be calculated. He referred to what he said was an accepted rule of thumb that adopted a ratio of three preparation days to one day in court. Based upon that approach, Mr Lawson submitted:

> Counsel for the Second Respondent gives no details as to his hourly rate but if an hourly rate of $300 per hour is assumed this would equate to four 8 hour days totalling $9600. Again, this is well shy of the $27,767.93 claimed by the Second Respondent and brings into sharp focus the unreasonableness of these costs.

[22] The remarks just quoted highlight the problem that we have in coming to a view on what amounts to reasonable solicitor client costs. The result is that in fixing the amount of costs, a degree of discounting of the costs will be required to reflect this uncertainty and to ensure that any liability for costs that is imposed upon the appellant is justified by the law.

[23] We therefore start with the fact that there is apparently recognition on the part of the appellant that solicitor-client costs in the region of $10,000 would be justified. Some augmentation is required of this figure to reflect the factors that we referred to earlier concerning the potential effect on the reputation of the Second Respondent. This does not appear to be a factor that the appellant's counsel took account of in his calculation. We are reasonably satisfied that a resulting solicitor-client figure of $12,500 would not be out of the way. Allowing two thirds of that figure as a contribution to the costs of the Second Respondent, we arrive at a figure for the purposes of a costs order of $8250. As well, actual and reasonable disbursements incurred are allowed.

[24] We reserve leave to the parties to seek any further necessary directions for the implementing of the terms of this order. We would hope that counsel will be able to resolve matters without the need for further intervention of the Tribunal.

[25] Pursuant to s 113 of the Act 2008, the Tribunal draws the parties' attention to s 116 of the Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served (s 116A). The procedure to be followed is set out in part 20 of the High Court Rules.

Mr J Doogue
Deputy Chairperson

Ms C Sandelin
Member

Mr N O'Connor
Member