EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV-2015-009-002081
[2016] NZDC 11459

BETWEEN	COMMISSIONER OF INLAND REVENUE Applicant
AND	MATHIAS BEHRING Respondent

Hearing: (On the papers)

Counsel: P Saunders for the Applicant
Respondent appears in Person

Judgment: 24 June 2016

JUDGMENT OF JUDGE K G SMITH

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[1] On 22 April 2016, leave was granted to the applicant to issue proceedings by way of originating application against the respondent. The application was granted and Mr Behring was ordered to produce to Inland Revenue for review documents and information sought in paras 1.2(1) – (12) of the application.

[2] Having been successful the applicant was entitled to costs. An opportunity was provided for the applicant and respondent to reach agreement on costs failing which leave was reserved to file memoranda. Agreement has not been reached and the applicant has now sought an order for costs.

[3] Mr Behring disputes the order sought. While accepting some costs might be payable, Mr Behring considers too much has been claimed by the Commissioner.

[4] The Commissioner's cost memorandum contains a schedule itemising a total claim for $3186 and disbursements of $336.25.

[5] The schedule of costs claimed is as follows:

SCHEDULE OF COSTS

Originating Application		Allocated days or part days A	
1	Preparing, filing and serving originating application (Costs as at Category 1A ($1,180 per day)	1.0	$1,180.00
2	Preparation: short trial (Costs as at Category 1A ($1,180 per day)	0.5	$ 590.00
3	Appearance at hearing: short trial (Costs as at Category 1A ($1,180 per day)	1.0	$1,180.00
4	Sealing Order (Costs as at Category 1A ($1,180 per day)	0.2	$ 236.00
TOTAL			$3,186.00

[6] That claim has been calculated on a category 1A basis throughout.

[7] The schedule of disbursements claims a total of $336.25 made up of a filing fee of $200, a service fee of $86.25 and a fee for sealing the judgment of $50.

[8] Mr Behring disagrees with the applicant's claim for costs and makes a number of points in opposition. In summary, Mr Behring submits:

(a) The applicant has applied too late for an order to be made in her favour.

(b) These proceedings were conducted at the same time as related proceedings by the Commissioner seeking orders against Mrs Truong-Behring and the amount claimed in this proceeding, and the proceeding against Mrs Truong-Behring, is an attempt at a double recovery.

(c) The total hearing time was less than three hours but the amount claimed exceeds that time and is excessive.

(d) Inland Revenue has not incurred real costs for representation in these proceedings because her counsel, Mr Saunders, is the Commissioner's employee.

[9] Mr Behring accepts that some disbursements are payable. He agrees that he should pay the filing fee of $200. He also accepts that the sealing fee of $50 is payable, but he disputes the claim for a service fee of $86.25 because that sum has also been claimed in the proceedings against Mrs Truong-Behring; meaning that the total claim to serve proceedings on Mr Behring and Mrs Truong–Behring was $172.50.

[10] Mr Behring submitted his liability for costs should be $125 which he arrived at by calculating the disbursements he considers ought to be paid in this proceeding, and the proceeding against Mrs Truong-Behring, and dividing that sum in two. Mr Behring would pay $125 for costs for this proceeding and Mrs Truong-Behring would pay $125 in costs in relation to the proceedings against her.

[11] Costs in the District Court are assessed under Part 14 District Court Rules 2014. Under r 14.1 costs are always at the discretion of the Court. However, that discretion must be exercised judicially according to what is reasonable and just.[1]

[12] Although the Court has an overriding discretion, that discretion is guided by r 14.2. The rule reads:

> **14.2 Principles applying to determination of costs**
>
> The following general principles apply to the determination of costs:
>
> (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
>
> (b) an award of costs should reflect the complexity and significance of the proceeding:
>
> (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step

[1] *Cates v Glass* [1920' NZLR 37; *Wellington Regional Council v Post Office Bank Ltd* CP 720/87, 5 July 1988.

reasonably required in relation to the proceeding or interlocutory application:

(d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:

(e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:

(f) an award of costs should not exceed the costs incurred by the party claiming costs:

(g) so far as possible the determination of costs should be predictable and expeditious.

[13] In general, the party who loses is expected to pay a contribution towards the costs of the party who succeeds. What the principle means is that, in the absence of reasons to the contrary, costs follow the event.[2]

[14] Costs awards should also reflect the complexity and significance of proceedings assessed in accordance with the categorisation criteria of those proceedings in r 14.3 District Court Rules discussed below. Costs are to be assessed by applying the appropriate daily recovery rate in r 14.4, and as specified in schedule 5, to the time reasonably required for each step in a proceeding.

[15] Successful parties should normally be awarded the daily rate considered reasonable by virtue of r 14.2(d). That appropriate daily rate should not depend on the skill and experience of counsel, the amount of time actually spent by counsel, or the costs actually incurred by the party claiming costs.[3] However, costs awards should not exceed the actual costs incurred by the party claiming them.[4]

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[2] *Commerce Commission v Southern Cross Medical Care Society* [2001] 1 NZLR 491.
[3] Rule 14.2(e).
[4] Rule 14.2(f).

[16] The actual costs incurred by a party in most cases, is not taken into account in assessing the reasonable daily rate. As an example of this proposition, the Court of Appeal said in *Health Waikato Ltd v Elmsly*:[5]

> Under the current High Court costs regime the actual costs incurred by a successful party have limited relevance. There is an over–arching principle that a costs award should not exceed the actual costs incurred by the successful party. As well, if a Judge is considering the possibility of making an award of indemnity costs, the actual level of costs incurred might be of some relevance. But for general purposes associated with the costs regime, the actual costs incurred by a successful party are irrelevant and ought not to be referred to the Judge in the course of submissions…

[17] While that quote refers to the High Court Rules, the District Court Rules follow a similar approach and the comment by the Court of Appeal is pertinent.

[18] Rule 14.3 categorises proceedings for the purposes of r 14.2(b). The applicant in this case has sought category 1. That assessment is reasonable. That category is for proceedings of a straight-forward nature able to be conducted by counsel considered junior. It represents the least complex, and lowest categorisation of costs, available in the categories provided in r 14.3. The appropriate daily rate for the purposes of r 14.2(c) for the categories of proceedings in r 14.3 is in schedule 5. Schedule 5 provides an appropriate daily rate for category 1 proceedings of $1,180 per day.

[19] Time allocations to be applied to the daily rate are in schedule 4. For matters identified in schedule 4 falling within category A, as is claimed, the allocation of time for preparing, filing and serving an originating application is one day. The time allocation for preparing to a short trial on a category A basis is 0.5 of a day as has been claimed; that is $590. The time allocation for an appearance at a short trial hearing is one day on a category A basis as has been claimed. The allocation of sealing an order is 0.2 of a day or $236 as claimed.

[20] The costs calculated by the applicant therefore comply with the District Court Rules. However, it is necessary to consider the arguments by

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[5] (2004) 17 PRNZ 16.

Mr Behring to determine if it is appropriate to make an order for costs in favour of the applicant or to adjust the amount that might be ordered in the interests of justice.

[21] Mr Behring's first point was that the costs application is outside the time originally reserved. It is not necessarily for me to attempt to calculate that time. The Court is always entitled to consider an application for costs whether made inside the time previously allowed or otherwise. Even if Mr Behring is correct, and the costs application is late, it is not so late so that considering it would amount to an injustice.

[22] The second point by Mr Behring is that the applicant is claiming too much because what is claimed in this proceeding is identical to what is claimed against Mrs Truong–Behring. While two applications were made they were run as one and were heard at the same time. This argument has merit and will be returned to shortly.

[23] The next submission is that the total hearing time was around three hours. As has been indicated earlier, the whole purpose of having a costs regime, guided by Part 14 District Court Rules, is to provide consistency in decision-making. The actual time involved in the hearing is only part of that assessment, bearing in mind that it has been necessary not only to prepare the originating application, with supporting affidavits, but to prepare for, and present, evidence and submissions.

[24] The next point Mr Behring makes is that the Commissioner has not incurred any real costs because Mr Sanders is a lawyer employed by the Commissioner. The answer to that submission is that costs incurred in proceedings conducted by in-house counsel are usually considered in the normal way, relying on *Henderson Borough Council v ARA.*[6]

[25] In my view, the Commissioner is entitled to the costs and disbursements which have been sought against Mr Behring. That is, costs on a category 1A basis of $3186 and disbursements of $336.25. However, there was one area where I have sympathy for the argument by Mr Behring, which is the potential for some of those

[6] [1982] 2 NZLR 751(HC); [1984] 1 NZLR 16 (CA)

costs to have been duplicated in the applications against Mrs Truong-Behring. Any potential duplication will be addressed in the related decision about Ms Truong-Behring which should be read together with this decision.

Conclusion

[26] Mr Behring is ordered to pay costs to the applicant of $3,186 and disbursements of $336.25.

K G Smith
District Court Judge