

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2014-404-3010
[2015] NZHC 1998**

IN THE MATTER OF of an appeal under s 116 of the Real Estate
Agents Act 2008

BETWEEN DERMOT NOTTINGHAM, PHILLIP
NOTTINGHAM AND ROBERT EARLE
MCKINEY
Appellants

AND THE REAL ESTATE AGENTS
AUTHORITY
First Respondent

AND MARTIN HONEY
Second Respondent

On the papers

Judgment: 21 August 2015

JUDGMENT OF THOMAS J AS TO DISPOSITION AND COSTS

*This judgment was delivered by me on 21 August 2015 at 4.00 pm
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Background

[1] By my decision of 10 July 2015, I allowed the appeal of the appellants, Messrs Dermot Nottingham, Philip Nottingham and Robert McKinney against the Real Estate Agents Disciplinary Tribunal's (the Tribunal) decision dismissing appeals against the Complaints Assessment Committee's (the Committee) failure to bring charges.

[2] Given the absence of submissions on the next steps to be taken, I directed the parties to file memoranda on whether the Court should remit the matter back to the Tribunal either to direct the Committee to lay charges of misconduct against the second respondent or for the Tribunal to consider the impact of Mrs West's testimony and the fresh evidence. I also directed the parties to address the issue of costs, noting litigants in persons are not usually entitled to recover costs.

[3] This decision deals with those residual matters.

Submissions

The appellants

[4] The appellants have appealed to the Court of Appeal. The essence of the appeal relevant to the present decision is that, although there was no finding of bias on the part of the Tribunal, there should have been a finding of "grave incompetency" which, in the appellants' submission, "is a form of misconduct nevertheless".

[5] The appeal has a bearing on the current issue, the appellants say. There is a risk that by remitting the matter back to the Tribunal before the issue of misconduct is determined by the Court of Appeal, there will be further misconduct, incompetence or error on the part of the Tribunal. The essence of the appellants' submission is that it is not possible to get a fair investigation or hearing before the Tribunal because they are "disliked" by the panel. As I understand it, the appellants say the High Court should determine the charges but, in any event, none of the

matters should proceed to the Tribunal until the question of misconduct has been determined by the Court of Appeal.

[6] On the issue of costs, the appellants say they should be awarded the costs of disbursements, including expert reports. As well, as I understand it, the appellants say there should be a 50/50 split of the costs incurred by them.

The Real Estate Agents Authority (the first respondent)

[7] Mr Clancy submits the appropriate order would be for the Court to remit the case back to the Tribunal for it to consider the impact of Mrs West's testimony and the fresh evidence.

[8] It would be appropriate to do so, in Mr Clancy's submission, given the Court's finding that there was no bias or pre-determination on the part of the Tribunal.

[9] Whether or not the Tribunal should adjourn its proceedings pending the resolution of the application to the Court of Appeal will be a matter for the Tribunal to decide, Mr Clancy says.

[10] On the issue of costs, Mr Clancy submits that, in accordance with the general rule, the appellants are not entitled to costs because they are litigants in person. Mr Clancy accepts that they may be awarded reasonable disbursements and has requested the appellants to itemise them so that both parties can attempt to come to an agreement in that regard. In the event that an agreement cannot be reached, Mr Clancy seeks leave to revert the issue to the Court.

[11] Mr Clancy submits the issue of costs incurred at the Tribunal stage remains a matter for the Tribunal when it considers the appeals. He invites the Court to indicate that the only disbursements at issue before this Court are disbursements incurred for the purpose of the appeal to the High Court only.

Mr Honey (the second respondent)

[12] Mr Grove says Mr Honey is anxious to resolve the matters arising out of the appeal as quickly as possible.

[13] The second respondent agrees with the first respondent as to the next steps. That is, to remit the matter back to the Tribunal for the purposes of reconsidering its decision in light of Mrs West's testimony and the fresh evidence.

[14] Mr Grove submits that the issue of costs should be determined by the Tribunal following its conclusion on the further hearing.

[15] On the issue of costs in relation to the High Court proceedings, the submission is that costs lie where they fall. The appellants are litigants in person and although the appellants were partially successful, many of their arguments were dismissed or not relevant to the key issues on the subject of appeal. Further, the matter was unduly complicated, particularly given the vast quantity of documents included in the appellants' submissions, the majority of which were not necessary for determination of the issues referred to in the judgment.

Discussion

The matter is to be remitted to the Tribunal

[16] I do not agree that the matter should be put on hold until the issue of misconduct on the part of the Tribunal is determined by the Court of Appeal. I need to bring my substantive decision to a close by reaching a final decision on these matters before it is to be considered on appeal. That approach should not be departed from simply because the appellants have already appealed.

[17] I do not accept the appellants' submission that the High Court should determine the charges. Given its expertise and specialist nature, the Tribunal is best placed to deal with the matter which is why, by my decision of 10 July 2015, I directed the parties to file memoranda on the basis on which the matter was to be remitted to the Tribunal.

[18] I accept the submission for the respondents that the matter should be remitted back to the Tribunal to consider the impact of Mrs West's testimony and the fresh evidence. Whether or not the matter ought to be stayed until the final appeal is determined is for the Tribunal to decide.

Costs

[19] Costs are awarded at the discretion of the court.¹ The guiding principles are set out in r 14.2 of the High Court Rules (Rules).

[20] The appellants say:

The actual time of the appellants [before the REAA CAC, the READT, and this Court], all of which have worked as advocates charging \$220.00 [through Advantage Advocacy Limited] would be well over \$100,000.00. ... As to who pays these costs, the appellants assert that they should be split 50/50 between the respondents as they are equally to blame for the appellants having to incur them.

[21] The fact remains that the appellants were litigants in person. There is nothing before me to support the view that this case should be treated as an exception to the general rule that lay litigants are not entitled to costs. I see no reason to depart from the general rule especially given the appellants appealed on a number of grounds, only some of which were successful. In the Court of Appeal decision of *Packing In Ltd (in liq) v Chilcott*, the Court held:²

... where in broad terms each party has had similar success, we do not consider it helpful to focus too closely on the question which party has failed and which has succeeded. Costs in a case such as this should rather be based on the premise that approximately equal success and failure attended the efforts of both sides. To that starting point should be added issues such as how much time was spent on each transaction or group of transactions in issue, and any other matters which can reasonably be said to bear on the Court's ultimate discretion on the subject of costs. In the end, as in all costs matters, the Court must endeavour to do justice to both sides, bearing in mind all material features of the case.

[22] Overall, I consider the appropriate course is to direct that costs lie where they fall.

¹ High Court Rules, r 14.1.

² *Packing In Ltd (in liq) v Chilcott* (2003) 16 PRNZ 869 (CA) at [5].

[23] Litigants in person are however entitled to reasonable disbursements in the discretion of the court. Fees and expenses of experts are a disbursement which must be approved by the court under r 14.12(2)(a)(i) of the Rules.³ The requirements are that:⁴

- (a) the disbursement is specific to the conduct of the proceeding; and
- (b) the disbursement was reasonably necessary for the conduct of the proceeding; and
- (c) the disbursement is reasonable in amount.

[24] In the appellants' submission of 28 July 2015, they say the obvious costs are:

22.1 The costs of experts [disbursements] being:

22.1 Mr Hikaka's report - \$4,056.00 & \$1,500.00

22.2 Mr Cronje's report - \$1,150.00

22.3 Mr Chappells [sic] report \$4,348.15 & \$2,500.00

[25] In their submission, the appellants say Mr Hikaka's report was necessary to enable the appellants to anticipate "what likely offences have been committed by whom, and what evidence" to look for. Mr Cronje's report was "only necessary because the First Respondent secreted the report of Mr Spence". Mr Chappell's report was pursued because "the first respondent instructed Mr Spence not to view the video".

[26] Where a party is successful on appeal, they are usually treated as entitled to recover costs of the hearing below as if they had won the lower court case.⁵ However, the issue of costs is fixed by the relevant court.⁶ The same reasoning applies to disbursements.

³ *Auckland Waterfront Development Agency Ltd v Mobil Oil New Zealand Ltd* [2015] NZHC 470 at [32].

⁴ High Court Rules, r 14.12(2)(b), (c) and (d).

⁵ See *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2015] NZHC 685 and *Americhip, Inc v Dean* [2015] NZHC 700.

⁶ See *Haronga v Waitangi Tribunal* at [2011] NZCA 670. I note that the Tribunal is, in effect, in the position of a District Court; see Real Estate Agents Act 2008, s 114.

[27] The expenses referred to in [24] above relate to the Tribunal hearing and were not incurred in respect of the appeal. It is only disbursements specific to the appeal which I can award.

[28] Additionally, the appellants have stated but not specified the following disbursements:

22.2 Photocopying, printing at cost rates, stationary [sic] in the Tribunal and in the High Court.

22.3 All filing fees and court fees.

[29] The parties are to confer on reasonable disbursements incurred in connection with the appeal with leave reserved to revert to the Court if parties are unable to agree on the matter.

Result

[30] The matter is remitted to the Tribunal to consider the impact of Mrs West's testimony and the fresh evidence.

[31] Costs lie where they fall.

[32] Disbursements in these proceedings are to be agreed between the parties with leave to revert to the court if this cannot be achieved.

Thomas J