IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-000814
[2018] NZHC 971

IN THE MATTER	of the Companies Act 1993
BETWEEN	THE COMMISSIONER OF INLAND REVENUE Plaintiff
AND	NEW ORLEANS HOTEL (2011) LIMITED Defendant

Hearing: 16 April 2018 (Determined on the papers)

Counsel: R P Lemm for Plaintiff
R A Hearn for Defendant

Judgment: 7 May 2018

COSTS JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

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[1] The Commissioner of Inland Revenue applied for an order appointing liquidators to New Orleans Hotel (2011) Limited. After a number of adjournments, granted on each occasion for reasons related to prospects of imminent repayment of the taxation owing to the Commissioner, full payment was made and the application was withdrawn. The Commissioner now seeks costs on a 2B basis.

[2] The defendant opposes an award of costs on the basis that there is no evidence that the Commissioner has incurred costs in the sense contemplated by Part 14 of the High Court Rules 2016.

[3] It is common ground that throughout this proceeding the Commissioner has been represented by a barrister and solicitor employed by the Commissioner's office,

referred to in cases decided in this context as in-house counsel. The principal premise of the defendant's argument is that there were no "costs incurred" in terms of r 14.2 of the High Court Rules and in particular, in terms of r 14.2(1)(f), no costs should be awarded because "an award of costs should not exceed the costs incurred by the party claiming costs", here nil.

[4] Longstanding authority, binding on this Court, directs that costs may be awarded in respect of litigation where the successful party was represented by in-house counsel. In *Henderson Borough Council v Auckland Regional Authority*, Cooke J said:[1]

> As to costs, there is first the question of principle, whether any award to the Regional Authority should be refused in the light of the fact that the Authority was represented by an employee both as solicitor and counsel. Much of the work was counsel's work.
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> … In New Zealand I do not think it can be said to be improper for an employed barrister to represent his employer. Nor did counsel for the appellant so argue. A fortiori an employed solicitor duly enrolled and with a current practising certificate may properly act as solicitor for his employer. Against that background it appears to me that the fact that an employed practitioner has acted for a successful party is not a sufficient reason for denying that party an award of party and party costs: after all, the time of a salaried employee has been occupied.

[5] Woodhouse P and Richardson J agreed.

[6] The decision in *Henderson* is regularly applied. Perhaps the most common example of this is in the context of the present case. The Commissioner presents many hundreds of applications to this Court each year for adjudication in bankruptcy of individuals, and appointment of liquidators of companies. It is the common (though not invariable) practice of the Commissioner's office to arrange representation before the Court on those applications by in-house counsel, as in this case. Equally commonly it is the practice of this Court to award costs to the Commissioner on such cases where she is successful. The argument presented to the Court by the defendant in the present case would, if it were accepted, amount to a departure from this practice, and would be contrary to *Henderson*.

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1 *Henderson Borough Council v Auckland Regional Authority* [1984] 1 NZLR 16 at 23.

[7] The argument presented for the defendant was based on the decision of the Court of Appeal in *Joint Action Funding Ltd v Eichelbaum*,[2] in which the Court examined in detail the question of whether a lawyer who brings or defends a proceeding in person may, if successful, receive an award of costs, a long-established exception to the general principle that a self-represented litigant is not entitled to an award of costs. In this decision the Court of Appeal analysed the provisions of Part 14 of the High Court Rules which were introduced to the Rules in 2000 and materially altered the way in which a court is to determine awards of costs. Of present relevance are rr 14.1, 14.2 and 14.6:

> **14.1 Costs at discretion of court**
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> (1) All matters are at the discretion of the court if they relate to costs –
>
> (a) of a proceeding; or
>
> (b) incidental to a proceeding; or
>
> (c) of a step in a proceeding.
>
> (2) Rules 14.2 to 14.10 are subject to subclause (1).
>
> (3) The provisions of any Act override subclauses (1) and (2).
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> **14.2 Principles applying to determination of costs**
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> (1) 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:
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> (b) an award of costs should reflect the complexity and significance of the proceeding:
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> (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:
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> (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:
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> (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

[2] *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249.

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. …

14.6 Increased costs and indemnity costs

(1) Despite rules 14.2 to 14.5, the court may make an order –

(a) increasing costs otherwise payable under those rules (**increased costs**); or

(b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (**indemnity costs**).

(2) The court may make the order at any stage of a proceeding and in relation to any step in it.

(3) The court may order a party to pay increased costs if –

(a) the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or

(b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by –

(i) failing to comply with these rules or with a direction of the court; or

(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

(iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or

(iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or

(v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or

(c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or

(d) some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

(4) The court may order a party to pay indemnity costs if –

(a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or

(b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; or

(c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or

(d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it; or

(e) the party claiming costs is entitled to indemnity costs under a contract or deed; or

(f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[8] In *Joint Action Funding* the Court noted the use of the word "incurred" in rr 14.2 and 14.6:[3]

> [31] However in three instances the word [costs] is used in conjunction with the word "incurred" to describe the successful party's expenditure or outgoings (a phrase we adopt as a neutral description) in fact accrued in connection with representation by a qualified lawyer. Sequentially the three different phrases are:
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> (a) the costs actually incurred by the party claiming costs: r 14.2(e);
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> (b) the costs incurred by the party claiming costs: r 14.2(f);
>
> (c) the actual costs, disbursements and witness expenses necessarily incurred by a party: r 14.6(1)(b).

[9] The Court then examined these questions:[4]

> Is the phrase confined to legal fees rendered to and paid by a party (in other words, a solicitor's bill of costs or counsel's fee referred to the definition of disbursement)? Or does it include a monetary amount assessed as reflecting

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3 At [35].
4 At [31].

> the time and effort expended by a lawyer litigant in self-representation? Or does it [thirdly] extend to the opportunity cost of time lost, …

and concluded:

> [41] We therefore consider that the natural meaning of the phrase "costs actually incurred", and thus "costs incurred", envisages invoices rendered for legal services provided by a legal practitioner to a litigant. We do not think that the phrase is apt to include a period of time spent in connection with litigation upon which some notional numerical value is placed but which is not the subject of a bill of costs.
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> …
>
> [43] Consequently it is our conclusion that in the context of the current costs rules the proper meaning of the composite phrase "costs actually incurred" is confined to legal costs billed by a lawyer retained by a party litigant for legal services provided by the lawyer to that litigant.
>
> [44] Because a lawyer-litigant who has no separate legal representation will not have a liability for such costs actually incurred, the effect of the sixth general principle in r 14.2(f) will be that no award of costs should be made in favour of such a party. In mathematical terms, a lawyer-litigant's "costs incurred" will be zero and hence no award of costs can be made.

[10] For the present case, the crucial conclusion is that in paragraph [43].

[11] In the present case it is not suggested that the lawyer who represented the Commissioner rendered a bill to the Commissioner for so doing. As "costs actually incurred" is confined to legal costs billed by a lawyer retained by a litigant for legal services provided by the lawyer to that litigant, there are no costs actually incurred in this case in respect of which an award of costs could be made, if the principles in *Joint Action Funding* are to be applied.

[12] The decision in *Joint Action Funding* related to a practising lawyer who represented himself in the proceeding. The issue was whether the exception for self-representing lawyers to the general rule that litigants in person are not entitled to an award of costs continued to apply. In the present case the Commissioner and her appointed counsel are separate legal entities, the latter employed by the former. This was the fact situation in *Henderson*, and the passage quoted earlier from that case expressly recognises the distinction between the employer and the employee. The argument presented for the defendant in this case is based squarely on the decision in *Joint Action Funding*: is the interpretation of the present rules applicable to all contexts

in which they are to be applied? On that basis it is argued that there should not be an award of costs in any context where costs are not actually incurred by the party seeking an award of costs.

[13] *Joint Action Funding* was considered by a Full Bench of the Court of Appeal in *McGuire v Secretary for Justice*.[5] In that case the Court noted that *Joint Action Funding*:[6]

> … afforded an opportunity, for the first time, for a comprehensive consideration of the proper interpretation of the relevant rules now in pt 14 of the High Court Rules. The position reached as a result of the analysis carried out was consonant with the fundamental idea, recognised for hundreds of years, that costs awards should be for professional legal costs actually incurred.

[14] This supports the proposition that the interpretation of the rules in *Joint Action Funding* is of application outside the context of a litigant representing him or herself in person. This is also borne out, in my view, by other passages in the judgment in *Joint Action Funding*:[7]

> … In each case involving a lawyer-litigant an inquiry would need to be undertaken either as to the extent of the litigation conduct for which the lawyer should be compensated or in the assessment of the time expended as a measure of the lawyer's opportunity cost. In the decision under appeal, deductions on this account were made to the scale time allocations for commencement of proceedings, preparation of briefs and preparation for hearing, but these deductions were necessarily somewhat arbitrary in nature.
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> The fact that such an exercise must be undertaken dilutes the predictability and expedition in the costs determination and hence tends to undermine the objective in r 14.2(g). We therefore consider that such a consequence tells against the retention of the lawyer-litigant exception in the new costs regime.

[15] These passages appear in the context of a specific discussion on the lawyer litigant exception, but of present relevance is the Court's view of the exercise which would need to be undertaken by the Court if costs were to be allowed to a lawyer litigant. Adjustments would need to be made for the attendances of the lawyer, as noted in *London Scottish Benefit Society v Chorley*:[8]

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5 *McGuire v Secretary for Justice* [2018] NZCA 37.
6 At [72].
7 At [56] and [57].
8 *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 (CA) at 876.

> It is true, however, to say that the costs of a solicitor appearing in person must be taxed differently from those of an ordinary litigant appearing by a solicitor. The unsuccessful adversary of a solicitor appearing in person cannot be charged for what does not exist, he cannot be charged for the solicitor consulting himself, or instructing himself, or attending upon himself. The true rule seems to be that when a solicitor brings or defends an action in person, he is entitled to the same costs as an ordinary litigant appearing by a solicitor, subject to this restriction, that no costs which are really unnecessary can be recovered. Of this kind are the costs of instructions and attendances.

[16] This case was decided under a regime of taxation of costs by the Court. In the present case, of course, the Commissioner claims costs on scale. Her claim is for 8.6 days based on the time allocations in Schedule 2. Those time allocations, though, are intended to cover all the work which is involved in the actual attendance described in the schedule. For example, the time for commencing a proceeding includes attendances on taking instructions and so forth. Thus, even a claim by in-house counsel for scale fees involves a claim for attendances on fellow members of staff.

[17] Whether such attendances are to be regarded in the way described in *Chorley* is moot. They are not attendances by a lawyer on himself, but by a lawyer upon other staff of his or her employer. But the undesirability of undertaking such an exercise was a factor leading the Court of Appeal to its interpretation of the Rules in *Joint Action Funding* and *McGuire*.

[18] Thus this Court is now called upon to decide whether to apply *Henderson*, or the interpretation of the Rules in Part 14 in accordance with *Joint Action Funding*. I have concluded that this Court should follow *Joint Action Funding* and *McGuire*. In both cases the Court of Appeal expressly interpreted the current Rules. In neither case did the Court limit its interpretation to application only in relation to self-representing lawyers. Nor does there appear to be any principled basis upon which the rules could bear one interpretation in one context and another in a different context. The interpretation set out by the Court excludes an award of costs to in-house counsel unless the circumstances of that counsel's retainer fit within the terms of these cases.

[19] As to *Henderson*, the Court is left with no alternative but not to follow it. Justification for that unusual course lies in the fact that in *Henderson* the Court did not undertake any analysis of the then current costs rules which were contained in the Code of Civil Procedure and concentrated its attention on the propriety of an employed

solicitor acting for his employer, and whether that fact was a sufficient reason to deny costs which would otherwise be awarded. In any event, those rules did not contain a limitation on awards of costs to costs actually incurred.

[20] In reaching this conclusion I am departing from the conclusion reached by Associate Judge Gendall in *Commissioner of Inland Revenue v Harbour City Tow and Salvage (2003) Ltd*. His Honour awarded costs to in-house counsel after argument that costs should not be awarded because no costs had actually been incurred. His Honour said:[9]

> [32] Also, I reject the suggestion from counsel for the defendant that first, there is nothing before the Court to indicate actual costs incurred by the plaintiff, and secondly, that as a result, r 47(f) prevents any award of costs being made here. Counsel for the plaintiff has confirmed that nearly 45 hours of practitioner time was involved in this matter. I have no doubt that a reasonable lawyer charge for the cost of this time plus usual office overhead and related expenses would provide an "actual cost" in this proceeding exceeding the $4,330 "deemed" scale costs sought by the plaintiff.

[21] When this case was decided, his Honour clearly had the benefit of argument establishing that an actual cost was incurred. This case was decided before *Joint Action Funding*, and the approach taken by his Honour is expressly rejected by the Court of Appeal in that case, as is evident from the passage from the judgment of the Court cited above at [13].

[22] The approach taken by Associate Judge Gendall has been applied in at least two further cases. I refer first to *Grant v Pandey*, a judgment of Courtney J on 11 December 2013. In this case Courtney J said:[10]

> The real issue in this case is the basis upon which costs should be awarded where in-house counsel are involved. There is no specific provision in the rules regarding costs where a party is represented by in-house counsel. Previous decisions of this Court have awarded costs on the same basis as would have been awarded to a party represented by external counsel. I note, in particular, the approach and discussion taken by Gendall AJ (as he then was) in *CIR v Harbour City Tow and Salvage (2003) Ltd*.

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9 *Commissioner of Inland Revenue v Harbour City Tow and Salvage (2003) Ltd* HC Wellington CIV-2006-485-2002, 12 February 2007.

10 *Grant v Pandey* [2013] NZHC 3323, (2013) 21 PRNZ 676 at [6].

[23] After rejecting an argument presented by counsel based on two judgments of the Employment Court, Courtney J concluded:[11]

> [Counsel's] approach, I think, proceeds on the flawed assumption that the costs deemed by the Rules Committee to represent an appropriate level of time and cost for certain types of work are somehow different when applied to in-house counsel as to external counsel. In general, there is no reason that the statutory regime ought not operate effectively for both in-house and external counsel.

[24] Secondly, in *Bright v Auckland Council*,[12] Venning J noted that cases decided under Part 14 of the High Court Rules apply the principle enunciated in *Henderson*, and awarded costs to a party represented by in-house counsel. His Honour made the same finding in *Re Commissioner of Inland Revenue, ex parte Mills*.[13]

[25] All of these cases were decided before the decisions of the Court of Appeal in *Joint Action Funding* and *McGuire*, which have laid express emphasis on the correct interpretation of the phrases "costs actually incurred" and "costs incurred". In the four cases in this Court cited above the Court was prepared to proceed on the basis that there is a cost involved in being represented by in-house counsel. I do not demur from this proposition, but given the interpretation of the Rules now laid down by the Court of Appeal I am unable to accept that I should proceed in the present case in the way the Court did in these four cases.

[26] Finally, I refer to r 14.1. This preserves the rule that all matters are at the discretion of the Court if they relate to costs of a proceeding. Despite the apparent width of this discretion it is to be exercised on a principled basis, and it is established that since the introduction of the detailed costs regime now contained in the High Court Rules, the discretion has not been unfettered. Rather, it is now qualified by the specific costs rules in rr 14.2 – 14.10 and is exercisable only in situations not contemplated by those specific rules or which are not fairly recognised by them.[14] Since *Joint Action Funding* and *McGuire*, it would not be a principled exercise of the discretion given to the Court by r 14.1 to award costs in a circumstance where legal

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11 At [12].
12 *Bright v Auckland Council* [2016] NZHC 2117.
13 *Re Commissioner of Inland Revenue, ex parte Mills* [2016] NZHC 1189.
14 *McGechan on Procedure* (online loose-leaf ed, Thomson Reuters) at HR14.1.02 and the cases cited in that paragraph.

costs have not been billed by a lawyer retained by a party litigant for legal services provided by the lawyer to that litigant.

Outcome

[27] The application for costs by the Commissioner of Inland Revenue is dismissed.

[28] Costs on this application were not argued. In my view, given the nature of this case, costs should lie where they fall. If counsel disagree memoranda may be filed within 10 working days.

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J G Matthews
Associate Judge

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