IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-002772
[2020] NZHC 1793

IN THE MATTER	of an appeal under s 116 of the Real Estate Agents Act 2008
BETWEEN	DERMOT NOTTINGHAM, PHILLIP NOTTINGHAM, ROBERT MCKINNEY AND PROPERTY BANK REALTOR LIMITED Appellants
AND	REAL ESTATE AGENTS AUTHORITY First Respondent
	MARTIN RUSSELL HONEY Second Respondent

Hearing: On the papers

Judgment: 23 July 2020

JUDGMENT OF WYLIE J
[Costs/Disbursements]

This judgment was delivered by Justice Wylie
On 23 July 2020 at 2.00pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……

Solicitors/counsel:
Meredith Connell, Auckland
D Grove, Auckland

Copy to:
The appellants

Introduction

[1] I refer to my substantive judgment in this matter issued on 3 July 2020.[1] I allowed the appeal brought by the appellants and reinstated their appeals to the Real Estate Agents Disciplinary Tribunal (the Tribunal). I directed the Tribunal to proceed with the rehearing required by Thomas J in this Court and by the Court of Appeal as soon as is reasonably practicable.

[2] I recorded that the appellants had succeeded in their appeal but noted that they were litigants in person, and therefore prima facie not entitled to costs. I noted that they were entitled to recover their reasonable disbursements, and further observed that it was possible that the primary no costs rule could be relaxed if there were exceptional circumstances. I put in place a timetable for the filing of memoranda in this regard.

[3] I have now received those memoranda.

[4] The appellants seek "indemnity costs" for the hearing fees paid and also costs for photocopying "at the rate that lawyers receive them". They also seek "preparation and arguing costs … at a moderate band".

[5] The first respondent – the Real Estate Agents Authority – notes that it abided the Court's decision, and submits that any order for costs and disbursements should not be made against it. It also suggests that the appellants have not addressed why the general rule against lay litigants being awarded costs should not be followed, and that no submissions have been made in relation to quantum.

[6] The second respondent – Mr Honey – opposes any order for costs. It is observed that Mr Honey has obtained substantial awards of costs against Mr Dermot Nottingham in the past, that those awards have not been paid and that Mr Dermot Nottingham has been bankrupted as a result. It is suggested that, while the appeal was successful, no fault lies with Mr Honey and in particular that the delays in obtaining the rehearing cannot be attributed to him.

Analysis

[7] I can see no justification for any award of costs under rr 14.2 – 14.11.

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[1] *Nottingham v Real Estate Agents Authority* [2020] NZHC 1561.

[8] The appellants were lay litigants. They appeared in person. The Supreme Court has confirmed that in such circumstances, the primary rule is that there should be no costs award.[2] The Court however noted that the law is not altogether settled and left open the issue whether or not it is possible for this primary rule to be departed from in exceptional circumstances.[3] I recorded this in my substantive judgment and, in effect, invited the appellants to address the issue. They have not done so; no exceptional circumstances have been advanced by them and I cannot see that there is any justification for departing from the primary rule in this case.

[9] I accept that the appellants are entitled to recover their reasonable disbursements. Quantum is at the discretion of the Court.[4] The Court should take a reasonably liberal approach to both the assessment and classification of any disbursements claimed.[5]

[10] To be recoverable as a disbursement, an item must fall within the definition of the word "disbursement" contained in r 14.12(1). Here the appellants claim Court fees incurred in relation to the hearing of the appeal and their photocopying expenses. Both claims are for items which fall within the definition of the word "disbursement" – r 14.12(1)(b)(i) and (iii). In addition, to be recoverable, the disbursement sought to be reimbursed must be specific and reasonably necessary to the conduct of the proceeding and reasonable in amount.[6]

[11] The hearing fees incurred were of course specific and reasonably necessary to the conduct of the proceeding. The fees were paid in two tranches – $640 being the scheduling fee on 23 March 2020 and a further $640 on 29 April 2020, being fees for the additional half day required.

[12] Notwithstanding that total hearing fees of $1,280 were incurred, I am not persuaded that it is appropriate to award that sum in full. Rule 14.7(g) permits the Court to reduce an award, including an award of disbursements, if some reason exists which justifies the Court doing so, despite the principle that the determination of costs

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2 *McGuire v Secretary of Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [88].
3 At [55].
4 *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA) at 441-442.
5 *Jagwar Holdings v Julian* (1992) 6 PRNZ 496 at 499.
6 Rule 14.12(2).

should be predictable and expeditious. Rule 14.12(2) requires that any disbursement claimed must be reasonable in amount.

[13] Most of the time taken at the hearing was occupied by the appellants' submissions. As I noted in my substantive decision, those submissions were unhelpful. They did not focus on the way on which the strike out applications were dealt with by the Tribunal. Rather, they sought to drag the Court into the merits of the substantive dispute, and they sought to debate the decisions made by Judge Paul and Davison J. Specific direction had been given by Powell J, on two separate occasions, as to the relevant issues on which the appellants should focus at the appeal hearing. Those directions were ignored. As a result, valuable Court time was wasted. I reduce what would otherwise be the appellant's entitlement by 50 per cent, to recognise this factor.

[14] The appellants also seek reimbursement of their photocopying costs. They have not however identified how much photocopying was involved. Nor have they verified the disbursement incurred as required by r 14.12(2).

[15] While they did not comply with the timetable directed by Powell J, the appellants did belatedly produce three bundles of documents at the hearing and a separate bundle of authorities. There were approximately 720 pages in one set of the bundles. Some of the materials in the bundles were reasonably necessary for the conduct of the proceeding. However, many were not. By way of example, I note that the appellants produced the evidence at the earlier criminal hearing. That material was irrelevant. Approximately 30 per cent of the materials photocopied were specific to, and reasonably necessary for the conduct of the proceeding. Any allowance for photocopying is only justifiable to this extent.

[16] Moreover, the appellants have not verified the disbursement incurred by them in undertaking the photocopying. Rather, they seek that they should be paid at the same rate as lawyers who undertake photocopying. Insofar as I am aware, there is no fixed rate for photocopying undertaken by lawyers.

[17] Where a claimant fails to provide verification of a disbursement claimed, the Court can refer the issue to the Registrar for verification – r 14.12(4).[7] I direct the Registrar to verify any disbursement incurred for photocopying which the appellants can establish they incurred. Any request for verification is to be submitted to the Registrar within 10 working days of this costs judgment. If no request for verification is made within this period, the claim for reimbursement of photocopying expenses is to be treated as having been abandoned.

Result

[18] I make an award of $640 in favour of the appellants against both respondents to reimburse the appellants for the hearing fees necessarily and reasonably incurred. I direct that that one third of this sum is to be met by the first respondent and two thirds by the second respondent. I accept that the first respondent abided by the decision of the Court, and that it was not responsible for the fact that the Tribunal did not progress the rehearing directed. Nevertheless, the first respondent did not withdraw from the proceeding. It elected to appear and it did make submissions. The second respondent actively resisted the appeal.

[19] I also make an award against the respondents, on a joint and several basis, for 30 per cent of such disbursements (if any) incurred for photocopying as shall be verified by the Registrar.

Additional issue

[20] There is an additional issue. On 13 March 2020, Mr Phillip Nottingham paid $2,390 into Court as security for costs, in accordance with r 7.13 of the High Court Rules and as directed by Powell J. That sum was to be invested by the Registrar. I direct that these monies are to be returned to Mr Phillip Nottingham, together with any accumulated interest.

Wylie J

[7] And see, *East v Medical Assurance Society New Zealand Ltd* [2017] NZHC 2802 at [38]-[39].