

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.305/83

BETWEEN RAM CHANDAR of Hamilton,
Painting Contractor
Appellant

AND THE COMMISSIONER OF INLAND
REVENUE
Respondent

Hearing: 31st May, 1984

Counsel: Ms Mills for Appellant
P. R. Morgan for Respondent

Judgment: 13 - 6 - 84

JUDGMENT OF SINCLAIR, J.

This appeal is in respect of proceedings which had been commenced in the District Court by the Commissioner of Inland Revenue seeking to recover from the Appellant a sum in excess of \$26,000 for outstanding tax. However, by reason of certain actions taken by the Appellant the amount of tax was re-assessed as the original claim had been based on assessed figures in default of there having been filed the appropriate returns. Once the appropriate returns were filed and once certain payments had been made by the Appellant there was no further amount due by him to the Respondent in respect of tax and in relation to the proceedings which had been issued in the District Court in Hamilton.

However, in due course, not unnaturally, the Commissioner sought a judgment for costs and the District Court Judge directed that the Commissioner was entitled to costs and that they should be fixed by the Registrar. In due course he fixed a total sum of \$806.14 being costs assessed in accordance

with the scale in the District Court at 3% of the total amount claimed. Later, after the entry of that judgment, the Appellant applied to have that judgment set aside as he had not been heard in respect of it. His application was dismissed but there is no record of the reasons for that dismissal. Today I was requested by counsel for the Respondent, with the obvious concurrence of counsel for the Appellant, that the application to set aside the judgment ought to be granted. Accordingly an order is made allowing the appeal against the refusal of the District Court to set aside the judgment and on that application the judgment so entered is set aside.

It is now necessary to consider the question of costs, it being appreciated that no amount was recovered by the Commissioner as the result of the judgment in the District Court, but nevertheless the proceedings which had been issued had the effect of the Appellant regularising his tax position with the Commissioner.

Crown counsel pointed out to me that the Commissioner had incurred disbursements of \$100, being an issue fee of \$50 and a setting down fee of a similar amount. In addition he claimed that by reason of the trouble which the Commissioner had had to go to some further costs by way of solicitors' fees ought to be allowed as some work had been done in preparation for having the matter officially determined.

The Appellant sought to resist this application claiming that under Rule 320 the ability of the District Court to grant

any costs had come to an end by reason of the fact that there had been no amount "recovered". The basis of this argument was that Rule 320 of the District Court Rules 1948 provides that the scale of costs in an action for the recovery of a sum of money only shall be determined as regards the costs of the Plaintiff by the amount recovered. Accordingly it was said that there having been no amount recovered, no costs were payable and, indeed, the submission went so far as to suggest that it was not possible to recover the disbursements. Reliance was had upon the decision of Mudd v. Mair (1897)16 N.Z.L.R. 76. That case concerned the Supreme Court Rules and determined that the amount that a Plaintiff recovers in an action is the balance he is entitled to by the judgment after setting off any sums adjudged to be due by him to the Defendant for costs or otherwise.

With respect to that argument I am satisfied that that is not the position. The fees of Court are provided for in Rule 313 and are stated to be those specified in the Third Schedule to the Rules. Costs are covered by Rule 316 and by sub-Rule (1) it is provided that the costs of any proceedings shall be paid by or apportioned between the parties in such manner as the Court thinks fit and in the default of any special directions such costs are directed to abide the event of the proceedings. By sub-Rule (3) it is provided that on any judgment the costs or order carrying costs shall include any moneys paid or payable for Court fees under the Third Schedule.

In addition it is provided that the Solicitors' costs are to be allowed on the appropriate scale prescribed in the Fifth Schedule to the Rules. Thus the entitlement to costs is as in Rule 316 and the quantum of costs is regulated by Rule 320

where that is appropriate for the Court to apply. In other words, if \$1000 is recovered the Court can allow the appropriate costs as on a claim for that amount and no more. Where, as here, no amount was recovered the Court has a complete discretion as to what costs are to be allowed. Even though no amount was in fact recovered the issue of the proceedings was justified and accordingly the Commissioner ought to have been entitled to some costs including those disbursements which he had had to pay to the Court.

Certainly as there had been no defended hearing the full scale which would otherwise have been applicable ought not to be applied and within the spirit of Rule 316 the costs allowable to the Commissioner ought to have been those which were fair and reasonable having regard to the overall situation. If this Court decided that costs ought to be awarded then it was acknowledged by both counsel that the appropriate figures to award were \$100 for Court costs and \$150 for Solicitors' fees, a total of \$250. That figure seems eminently suitable to me.

If the conclusion which I have come to were not correct it would certainly lead to chaos and would render the forms in the Second Schedule to the District Court Rules 1948 nugatory. For instance, Form 11 relating to an ordinary summons provides for there to be specified on the summons the amount of the claim, the amount of the cost of the summons and the amount of the Solicitor's fee for preparing the statement of claim and there is a notice on the form which reads as follows:

"If the claim is for money only and you admit the whole claim, you may within the time mentioned below, either

- (a) file in the office of the Court and serve on the plaintiff a confession for the full amount and the costs noted on this summons; or
 - (b) pay into Court the full amount of the claim and the costs noted on this summons -
- and no further costs will be incurred."

If a defendant could escape payment of the costs and the solicitor's fee for preparing the statement of claim merely by paying the amount of the claim, then the notice to him, and which I have just quoted, would be superfluous. However, the overriding consideration in my view is that in all questions of costs the Courts do have a discretion and that is the way the District Courts have operated for very many years. On numerous occasions where the amount of a claim has been paid there has been judgment entered merely for Court costs and solicitors' fees and that occurs because of the discretion which is reposed in the Court.

Accordingly I direct that in respect of the proceedings in the District Court, in lieu of the judgment which has been set aside there be entered judgment for the Commissioner in the sum of \$250 to cover Court costs and solicitor's fees.

In respect of the present appeal, while the Appellant has been partially successful, having regard to the circumstances I am of the view that he should not have any costs and that in the circumstances neither should the Respondent.

P. D. [Signature]

SOLICITORS:

Evans Bailey & Co., Hamilton for Appellant
Crown Solicitor, Hamilton for Respondent