IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-007033

UNDER	the District Courts Act 1947 ("the Act")
IN THE MATTER OF	of an appeal against a judgment of the District Court at Auckland
BETWEEN	MELTZER MASON HEATH Appellant
AND	JAMES GORDON HALL Respondent

Hearing: 4 March 2009

Appearances: S J Ropati for the Appellant
J B Samuel for the Respondent

Judgment: 4 March 2009

(ORAL) JUDGMENT OF DUFFY J

Solicitors: S J Ropati P O Box 90232 Victoria Street West Auckland 1142 for the Appellant
Jennifer G Connell P O Box 29172 Greenwoods Corner Auckland 1347 for the Respondent

[1] This is an appeal against the quantum of costs awarded to the respondent in the District Court at Auckland. The District Court awarded costs to the respondent at category scale 2B. However, the quantified sum awarded was $10,880.

[2] The appellant submits that the costs award is materially inaccurate and incorrect and that the costs judgment in the District Court was made in error.

[3] The respondent sought to uphold the award of costs on two bases:

i) Where there has been a short hearing, the successful party is entitled to claim for preparation under both item 7 and item 8; and

ii) If preparation under item 7 claim was wrongly included, nonetheless, the award of $10,880 costs should stand, as costs are discretionary and that was the figure the District Court Judge had in mind to award.

[4] The relevant schedules on costs in the procedural rules in both the District Court and this Court separately provide for preparation when a hearing does not eventuate (item 7) or when it does (item 8). A cumulative claim under both item 7 and item 8 is not permissible.

[5] The means of calculation for item 7 and item 8 is different. When a matter is heard the preparation time allowed is double the hearing time. But when a matter does not proceed to a hearing the preparation time is assessed according to specific timeframes provided for in the costs schedule. The upshot is that the allocated time for when a hearing does not proceed can in theory exceed the time for preparation for a short hearing. This anomaly in the Rules was recognised in *Tram Lease Ltd v Croad and Ors* HC AK CL16/02 26 September 2003. Salmon J said at [5] and [6]:

> If a trial proceeds, preparation for hearing is dealt with separately and is calculated on the basis of twice the time occupied by the hearing measured in half days".
>
> The scale gives rise to anomalies in cases where the hearing is short, (as it was in this case). In such a case, the allowance for preparation in

> accordance with the scale is less than that which would be permitted if the case had not gone to hearing. Such a result can hardly have been intended.

[6] Salmon J considered the way to remedy the anomaly was for the Court to exercise its general discretion relating to costs and to award costs in excess of scale costs.

[7] That you cannot claim for preparation cumulatively under items 7 and 8 is made clear in the Court of Appeal's judgment in *Gibson v Minter Ellison Rudd Watts* [2007] NZCA 595 at [104]:

> … One cannot claim under both item 7 and item 8. The item 7 claims must be disallowed.

In the present case there was a hearing. Consequently, costs of preparation must be assessed under item 8. The District Court was wrong to award costs in circumstances where the award included preparation time calculated under both items 7 and 8. The preparation time claimed under item 7 item must be disallowed.

[8] When the costs for this case are properly calculated under scale 2B, they come to the amount of $5,760.

[9] The second argument of the respondent is that r 47 confers a general discretion to award costs. Given the anomaly created by having different preparation costs, depending on whether a hearing eventuates or not, the respondent contends that this was a case where an award above scale 2B was appropriate. Therefore, the costs of $10,880 awarded by the District Court should stand. The respondent refers to the District Court judgment awarding costs at [1] where the Judge says

> I award costs on the action on Scale 2B and I allow the sum of $10,880.00 as claimed.

The respondent contends that this passage confirms the Judge was of the view that the sum of $10,880 was an appropriate amount of costs to award.

[10] The answer to this argument is also to be found in *Gibson v Minter Ellison Rudd Watts.* Much the same argument as the respondent makes was advanced in that case. In responding to the argument at [100] the Court of Appeal said

> While it is true that r 46 [High Court equivalent of r 47] confers a general costs discretion, that does not mean costs orders are or should be immune from appellate review. The reason for that discretion was given by this court in *Glaister v Amalgamated Dairies Limited* [2004] 2 NZLR 606 at [24]: "The discretion exists to enable the unexpected and the unforeseen to be fairly accommodated". The court also observed that the costs regime introduced with effect from 1 January 2000 "is of a regulatory character": at [21]. The court emphasised the importance of maintaining the integrity of the scheme; where a departure from the scheme was warranted it was necessary, this court said, "that it be done in a particularised, and principled way": at [22]. An appellate court will interfere only if "the Judge has applied wrong principles of law, or was plainly wrong.": at [30]

[11] In this case, the sum of $10,880 awarded in the District Court was not arrived at as a result of the Judge approaching the costs application in a particular and principled way. The Judge did not decide to exercise his discretion to depart from scale costs and to award costs in excess of the scale. The judgment makes it clear to me that the Judge believed he was awarding costs based on scale 2B. He was plainly wrong in that regard. The respondent's actual costs were approximately $11,000. An award of $10,880 is almost the same as an award of indemnity costs. The Judge had expressly refused the respondent's application for indemnity costs. It follows that there is no reasoned basis in the District Court's judgment for awarding costs of $10,880. There is nothing in the judgment to suggest to me that there was a conscious exercise of judicial discretion to award costs in excess of scale 2B. It follows that the $10,880 awarded as costs cannot stand.

[12] I consider it appropriate to deal with the matter on appeal by setting aside the costs awarded and replacing those costs with the sum of $5,760, this being the correct calculation of scale 2B costs.

[13] It was suggested to me by the respondent that a better approach would be to allow the appeal and send the matter back to the District Court for the District Court to decide the matter afresh. The respondent is perhaps hopeful that he may persuade the District Court to award costs in excess of scale 2B once that Court is aware of the quantum of scale 2B costs.

[14] When this appeal was called at the pre-trial management conference, Venning J raised with counsel that an appropriate way to address the issue, if there was a miscalculation, would be to ask the District Court Judge to re-call the

judgment. That approach was made. The Judge considered the appellant's request and decided that as the judgment had been delivered, the matter would not be re-visited. Against this background, I do not think it is appropriate to send the costs award back to the District Court for further decision. This matter is acknowledged to have a protracted history. Finality is required. There is no information before me that suggests to me that an award of costs in excess of scale 2B is required. The additional costs on further applications in the District Court are likely to cancel any benefit that might come from further hearings. Scale 2B is regularly applied in costs awards and I think it would be an appropriate award in a case such as this where the actual solicitor/client costs came to approximately $11,000. Therefore, I have decided against sending it back to the District Court.

[15] The appellant has been successful today. It is usual that costs follow the event. The appellant seeks costs at scale 2B in this Court. There is no opposition to that from the respondent, it being recognised that in terms of general costs principles, that is an expected outcome of what has eventuated today. Accordingly, the appellant is awarded costs at scale 2B.

Result

[16] The appeal is allowed. The respondent's costs award of $10,880 is set aside and replaced with a costs award of $5,760.

[17] The appellant is awarded costs in the appeal at scale 2B

Duffy J