

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

CIV-2009-404-006234

UNDER The Arbitration Act 1996

BETWEEN IAN ROBERT MCKAY AND TREVOR
MCKAY AS TRUSTEES OF THE OTIS
TRUST
First Plaintiff

AND TREASURY TECHNOLOGY
DISTRIBUTION LIMITES AS
TRUSTEES OF THE TREASURY TRUST
NO 1
Second Plaintiff

AND VICTORIA STREET APARTMENTS
LIMITED
First Defendant

AND SUREN SHARMA
Second Defendant

Hearing: 19 October 2009

Appearances: D Grove for Plaintiffs
D E Smyth for Second Defendant

Judgment: 20 October 2009 at 4:45 pm

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 20 October 2009 at 4:45 pm
pursuant to r 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date.....

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[1] The parties to this proceeding participated in an arbitration which resulted in an award in the plaintiffs' favour. The arbitrator subsequently made an order as to costs 14 August 2009 requiring the second defendant, Mr Sharma, to pay \$5,000. On 6 October 2009, after demand for payment had been made and an application to enter the arbitrator's award as a judgment filed, Mr Sharma paid the outstanding costs together with \$500 as a contribution towards costs on the application. Mr Grove appears today seeking costs on the application. Mr Smyth resists the application.

[2] There is no dispute over the fact that Mr Sharma was liable to pay the \$5,000 costs award. Mr Smyth says that there were negotiations on foot regarding payment over time but there is no suggestion that the actual obligation to pay that amount was resisted on any ground. However, Mr Smyth takes the point that there was no proper service of the application on Mr Sharma. A copy of the application was posted to him without confirmation that he had instructions to effect service. I note, however, that the Court on 22 September 2009 sent to the parties an advice of hearing date and that Mr Sharma was identified on that advice as a recipient of the notice. Mr Smyth did not assert that either he or Mr Sharma had not received fair notice of the hearing.

[3] Mr Grove is seeking scale costs on a 1A basis. He acknowledges that the \$500 that Mr Sharma paid in addition to the costs award by way of a contribution to the costs on the application needs to be taken into account but points out that the filing fee alone was \$400. Taking the \$500 into account and adding back \$400 for the filing fee, scale costs on a 1A basis would be \$1,719. Mr Grove advises from the bar that the actual costs were approximately \$2,000. Mr Smyth does not take any objection to this calculation. However, he invites me to award a figure less than the amount claimed because of the manner of service of the application. There is no suggestion that the dispute over service warrants anything more than a signal to counsel that this kind of oversight is undesirable.

[4] Overall I see the position as this. The plaintiffs were entitled to their costs and Mr Sharma should simply have paid the costs. Although he was free to embark on negotiations about payment he was taking the risk that the plaintiffs would insist upon immediate payment in full. Several weeks had passed since the costs award

had been made. It was entirely reasonable for the plaintiffs to make the application. Having done so, however, it was reasonable to expect them to ensure service of the documents in a proper fashion. Taking into account all of these factors I do intend to reduce the costs slightly. I award the plaintiffs \$1,500 in costs, that figure encompassing the \$400 filing fee.

P Courtney J