IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-3827

BETWEEN	RUSSELL EDMIND LAWN Applicant
AND	DONNA MARIE WARD Respondent

Hearing: 19 November 2009

Counsel: D M J Jones for Applicant
D M Ward, Respondent, in person

Judgment: 2 December 2009

JUDGMENT OF HEATH J

This judgment was delivered by me on 2 December 2009 at 11.00am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Kumeu-Huapai Law Centre, PO Box 122, Kumeu
Copy to:
D M Ward, Respondent

The application

[1] Mr Lawn, a solicitor in private practice at Huapai, seeks to review a decision of a Registrar of this Court, made on an appeal from the revision of two bills of costs, under Part VIII of the (now repealed) Law Practitioners Act 1982 (the Act). The Act continues to apply, for the purpose of this proceeding, because the revision process was commenced before the Lawyers and Conveyancers Act 2006 came into force.

[2] The sole issue concerns the entitlement of Mr Lawn to recover interest charged on outstanding costs and the jurisdiction (if any) of the Costs Reviser to treat interest as part of the costs rendered, for the purpose of a revision.

[3] Both the Reviser and the Registrar disallowed Mr Lawn's claim for interest. Mr Jones, on behalf of Mr Lawn, submits that they lacked jurisdiction to do so.

[4] An opportunity was afforded to the New Zealand Law Society to appear and make submissions on the application. The Society decided not to intervene. Primarily, it considered that the issue had been overtaken by events; in particular the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Those rules have no relevance to the present application.

Background

(a) The costs revision hearings

[5] Mr Lawn practises under the style Kumeu-Huapai Law Centre. In November 1999, he was instructed to act for Ms Ward, in relationship property proceedings before the Family Court at Hamilton.

[6] On 8 December 2004, a substantive hearing of the relationship property proceedings took place. Initially, Mr Hudson, a barrister from Hamilton, had been

instructed as counsel for the purpose of that hearing. Ms Reynolds, another barrister, had been instructed to assist Mr Hudson.

[7] In November 2004, Mr Hudson indicated that, due to a clash of hearings, he and Ms Reynolds would be unable to represent Ms Ward. Ultimately, Mr Lawn undertook the task of representing Ms Ward in the Family Court. Ms Ward considers that Mr Lawn acted negligently in his representation of her. Out of fairness to Mr Lawn, I record that no proceedings have been issued against him for negligence.

[8] On 30 November 2004, Mr Lawn conferred with Ms Ward. During that conference, she signed a document called a "Client Instruction Sheet". In that document Ms Ward agreed to pay the costs of Mr Hudson and Ms Reynolds. She acknowledged that an estimate of costs provided by Mr Lawn of $16,000 plus GST and disbursements was based on a hearing to last three days, plus his preparation. Ms Ward acknowledged that the estimated costs did not include fees rendered by either Mr Hudson or Ms Reynolds.

[9] Attached to the Client Instruction Sheet was another document headed "Client Engagement Contract for Legal Services". That document set out the basis on which Ms Ward was required to pay fees rendered by Kumeu-Huapai Law Centre. By the terms of that contract, in the absence of prior credit arrangements, Ms Ward was required to pay all costs and disbursements within seven days of the date on which the bill of costs was mailed to her, without the need for the firm to prove actual receipt of the bill by her.

[10] In addition, Ms Ward could be charged with interest on any overdue account. Clause (iv) of the Client Engagement Contract provided:

> (iv) If any payment is not made as provided above, the amount or amounts unpaid shall be liable to carry interest, from the date of commencement of default to the date of payment, at the rate of 16% per annum with monthly rests provided however the Firm's right in respect of recovery of unpaid amounts shall not be prejudiced, and the client agrees to pay any actual legal costs incurred in the recovery of any costs (including attendances by Kumeu-Huapai Law Centre, solicitors) which have become outstanding by the client to the Firm on a solicitor and party basis and agrees to be billed directly and personally for same together with costs incurred to

> third parties in the amount revised from date of the issue of the note of costs revised (not the date of revision). The client agrees upon the issuing of a note of costs to mortgage any and all of the client's estate and interest in the client's real property (land) and personal property if the note of costs is unpaid for a period of 7 (seven) days from the date of issue to secure the payment of those costs to the Firm without more. This clause shall apply to any real property owned by the client from time to time. The terms of the mortgage shall be the amount of fees due, as issued under note of costs, and such amount shall be deemed to have been advanced under the mortgage by the Firm to the client for a period of 7 (seven) days carrying interest at the rate of 16% per annum and the said amount so deemed to be advanced to be repaid at the end of the 7 (seven) day period. The form of mortgage shall be the Auckland District Society Form Ref.4158. the date of deemed advance shall be the date the note of costs became due for payment or any other date if nominated by the Firm with interest calculated with monthly rests. If an account is subsequently reduced by revision the mortgage advance hereunder shall be deemed to have been reduced accordingly and the Firm shall give a credit for same. The client shall pay the costs of and incidental to the mortgage and authorises the Firm to lodge and maintain a caveat against the title of any land the subject of this clause from the date the note of costs is incurred.

[11] The following elements of cl (iv) require emphasis:

a) The "amount or amounts unpaid", for the purpose of the clause, were the costs and disbursements payable within seven days of the date on which the bill of costs was mailed to the client.

b) Interest was calculated at the rate of 16% with monthly rests, indicating that interest compounded each month.

c) The client agreed to pay "actual legal costs" incurred by the solicitors in recovering costs.

d) The client was subject to the possibility of a mortgage being taken to secure payment of costs outstanding for more than seven days, with any fees due being deemed to be advanced under a mortgage by the firm to the client carrying interest at the same rate.

e) If the account were subsequently reduced by revision, "the mortgage advance [was] ... deemed to have been reduced accordingly" and the solicitors were required to give a credit for that amount. The time from which any credit for interest was required was not stated.

f) The solicitors were authorised to lodge and maintain a caveat against any land subject to cl (iv) from the date the note of costs was incurred.

[12] After the hearing in the Family Court, Mr Lawn rendered two bills of costs:

a) The first was dated 14 December 2004, in the sum of $24,173, the fee component of which was $21,000.

b) The second was dated 23 December 2004, in the sum of $1793.75, the fee component of which was $1550.

[13] Mr D H Rishworth was appointed as Reviser by the Council of the Auckland District Law Society. He conducted a hearing on 16 April 2007. In his decision, Mr Rishworth reduced the fees charged on the 4 December account to $16,500. The bill of costs of 23 December 2004 was left unchanged. GST was to be adjusted to be charged on the fee component of the (revised) first of the bills; otherwise the amounts charged for GST and disbursements were unchanged.

[14] In the course of his decision, Mr Rishworth addressed interest charged on overdue fees at 16% per annum. He considered such interest "to be excessive in the circumstances" and disallowed "all interest charged to Ms Ward on the accounts subject to [the] revision". Mr Rishworth observed that he was "concerned that Ms Ward had without independent advice apparently signed a "Client Engagement Contract" containing an estimate of costs".

[15] Later bills of costs, dated 29 March 2005 and 31 March 2005, were the subject of a separate revision before Mr W M Paterson. Those accounts were not adjusted and are not in issue before me.

[16] While the question of interest was not pursued before Mr Patterson, he echoed Mr Rishworth's observations. Mr Paterson was concerned that Ms Ward "apparently signed [a] client agreement with its rather Draconian provisions for interest and for mortgages, etc, without legal advice". Mr Patterson expressed the view that that type of arrangement should not be entered into unless the client were

given adequate opportunity both to understand its implications and to take independent legal advice.

(b) The appeal to the Registrar

[17] Mr Lawn appealed against Mr Rishworth's decision. The appeal was restricted to the question of interest. He submitted that the Reviser had erred in law because a solicitor is under no legal obligation to advise a client as to the adequacy or otherwise of the terms of engagement: see *Mills v Rogers* (1899) 18 NZLR 291 (SC and CA).

[18] The appeal was heard before Mr Registrar Mortimer on 22 April 2009. Mr D Hurd was appointed as Counsel to Assist the Registrar. Evidence was taken from both Mr Lawn and Ms Ward.

[19] In a decision given on 12 June 2009, the Registrar dismissed Mr Lawn's appeal. The Registrar held that the charging of interest did fall within the definition of "bills of costs" and "costs" set out in s 139 of the Act: the Registrar's reasons are set out at para [20] below. Those definitions state:

> **139 Interpretation**
>
> In this part of this Act, unless the context otherwise requires,—
>
> Bill of costs, or bill, means a bill rendered by a practitioner to his client, whether or not the items of fees, charges, disbursements, expenses, and remuneration in respect of the work done by the practitioner, whether in any court or elsewhere, are set out in it; and includes a bill rendered by a barrister to his instructing solicitor:
>
> *Costs means fees, charges, disbursements, expenses, and remuneration* for any work or business done by a practitioner, whether in any court or not: (my emphasis)

[20] The Registrar concluded that the interest component was a "charge", "expense" or "remuneration" for work carried out by the practitioner. He added:

> 37. As I see it, the terms of engagement here effectively provide the Client with the option to pay for the Practitioner's services by one of two methods:

(a) Cash payment of the fees rendered within seven days; or

(b) Deferred payment of the fees rendered, in which case the Client is to pay, in addition to the fees rendered, interest at the rate of 16% per annum. The Practitioner's position, meanwhile, was secured by the Client's agreement to mortgage.

38. In these circumstances, as I see it, the interest charged is in every sense part of the charge rendered by the Practitioner for conducting the relevant work. In my view there is no proper basis to regard it as falling outside the ambit of revision. As well as being in my view the correct interpretation of s 139, I think policy reasons strongly favour the same conclusion. If the provision were interpreted otherwise, there would be no power to review what might be a very significant element of a practitioner's charges. That seems to me most unlikely to have been Parliament's intention when it enacted this legislation.

The purpose of Part VIII of the Act

[21] Section 142 of the Act provided:

> **142 Bill subject to revision notwithstanding agreement as to costs**
>
> (1) This Part of this Act shall apply to every bill of costs rendered on or after the date of the commencement of this Act, notwithstanding any agreement made between the practitioner and the client, whether before or after that date, as to the amount or manner of payment of costs for the whole or any part of any past or future services, either by a gross sum or by commission, percentage, salary, or otherwise.
>
> (2) Any such agreement may be taken into account in any proceedings for the revision of a bill under this Part of this Act, for the purpose of determining whether the costs are fair and reasonable.

[22] Part VIII of the Act came into force on 1 April 1983. Its purpose was considered in *Cortez Investments Ltd v Olphert and Collins* [1984] 2 NZLR 434 (CA). In that case, the question was whether the High Court ought to have ordered a practitioner's bill to be revised out of time. Woodhouse P observed:

> ... *The broad policy underlying it is to ensure that legal charges will be fair and reasonable and whether or not the client has become committed in terms of some contractual arrangement.* A liberal enactment of this kind deserves and is intended to be given an appropriately liberal interpretation and one which reflects contemporary attitudes to such matters. .... (my emphasis)

[23] Richardson J emphasised the opportunity for an independent adjudication of the fairness and accuracy of bills of costs, saying that s 142(1) reflected "the importance attached to this safeguard in the public interest in providing as it does that every bill of costs is subject to revision under Part VIII notwithstanding any agreement between practitioner and client as to the amount or manner of payment of costs": at 438.

[24] McMullin J set out the three stage process envisaged by the Act in relation to a costs revision. His Honour observed, at 440:

> Provision for the reference of a bill to the District Council is made in s 145. A further check on the bill may be obtained by either the practitioner or the party charged appealing within 14 days to the Registrar of the High Court against the decision of the District Council (s 148(1)). If there is no appeal within that time the reference procedure under s 145 is complete. But if an appeal to the Registrar is preserved by its timeous commencement then either party, if dissatisfied with the Registrar's decision on appeal, may apply within 14 days of it for review by the High Court. Thus a client dissatisfied with his solicitor's bill of costs may seek revision or review of the bill through the three stage system provided by ss 145, 148 and 149 of the Act.

[25] The scope of this Court's power on review was considered by Barker ACJ, in *Gallagher v Dobson* [1993] 3 NZLR 611 (HC). The Acting Chief Justice adopted the approach articulated by Tompkins J in *Bruns v Buddle Findlay* (High Court, Auckland, M1048/90, 1 October 1992), in holding that a Judge should only interfere with the Registrar's decision if satisfied that the Registrar acted on a wrong principle, took into account irrelevant matters, did not have regard to relevant matters, failed to observe natural justice or demonstrated bias: at 618.

[26] The issue before me is one of law. The question is whether the Registrar acted on a wrong principle.

Preliminary point

[27] Ms Ward submits that the application to review has been brought out of time. Section 149(1) of the Act provides that any application to the High Court to review a Registrar's decision must be brought within 14 days of the date of the decision. The application was filed in time but served out of time.

[28] Section 149 of the Act provided:

> **149 Review by High Court**
>
> (1) If either party is dissatisfied with any decision of a Registrar under section 148 of this Act, he may within 14 days after the date of the decision, or within such further time as a Judge of the High Court may allow apply to the High Court to review the decision.
>
> (2) On hearing the application, the Court may—
>
> > (a) Make such order by way of confirmation, variation, or reversal of the decision or any part of it as the Court thinks fair and reasonable:
> >
> > (b) In the case of a revision by order of the Court, make such other order in relation to the revision as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the amount found to be due with costs.

[29] Section 149(1) empowers a Judge of this Court to extend the time within which the application can be brought. The context in which that discretion must be exercised is the need to determine costs revisions promptly and the fact that review of a Registrar's decision is the third step in a tiered process of determining the fairness and reasonableness of the costs; as described by McMullin J in *Cortez Investments*.

[30] I have not considered specifically whether an application under s 149(1) had to be both filed and served within the specified period. On the assumption that it did, having regard to my view on the merits, the fact the appeal was filed in time and to the relatively short delay in serving the application for review, I extend the time for bringing the application.

Analysis of the "interest" issue

[31] Mr Jones submitted that the Reviser and the Registrar had failed to apply *Mills v Rogers*, in determining that jurisdiction existed to disallow interest charges. That case involved an agreement between client and solicitor which was held, ultimately, to amount to champerty and maintenance, rendering it illegal. Having made that finding, both the Supreme Court and the Court of Appeal held that the client could not sustain an independent cause of action against the solicitors in

negligence for failing to advise that the agreement was illegal and void. Nor was there any reason for the court to exercise its summary jurisdiction over practitioners to assist the client's cause.

[32] Mr Jones also submitted that Part VIII of the Act did not extend to interest charged on an overdue account. He submitted that solicitors ought to be able to reach arrangements with their client about interest, in just the same way any other professional or commercial concern might.

[33] There are two bases on which a reviser may have had jurisdiction to disallow interest charged. The first is based on Mr Paterson's view that the Client Engagement Contract ought not to have been entered into without independent legal advice. The second arises out of the Registrar's interpretation of the definition of "costs" in s 139 of the Act: see para [20] above.

[34] I see no need, particularly now that Part VIII of the Act has been repealed, to address the first of those bases. I am satisfied that the Reviser and the Registrar both had jurisdiction to disallow interest under Part VIII of the Act. I state my reasons briefly.

[35] As the Court of Appeal made clear, in *Cortez Investments*, Part VIII was designed to ensure that all bills of costs (see s 139, set out at para [19] above) are "fair and reasonable". The jurisdiction is a public interest one. It was a feature of the way in which the legal profession was regulated under the Act. That led to the Court of Appeal describing Part VIII as "consumer protection" legislation. Generally, see Woodhouse P at 437 and Richardson J at 438.

[36] The definition of "costs" includes "charges, disbursements, expenses and remuneration", as well as "fees": s 139. A requirement for a client to pay a sum of interest, in addition to fees and disbursements, is clearly a "charge" by the solicitor on the client. There is no other basis on which it could tenably be put that the client had an obligation to pay the solicitor the interest. Interest was *charged* by the solicitor, the person to whom the principal debt was owed.

[37] The justification for bringing contractual interest under the umbrella of a costs revision rests on the fiduciary duty owed by a solicitor to his or her client. A solicitor is in a position to exert influence (intentionally or unintentionally) over a client. Particularly, as in this case, when the client is facing an imminent Court hearing and has lost the services of counsel retained to conduct it, he or she may not consider there is any option but to agree to terms imposed.

[38] A compounding interest rate, as charged in this case, coupled with an ability to take a charge over a client's property, are factors that can appropriately be dealt with by a Reviser exercising jurisdiction under Part VIII of the Act. Applying *Cortez Investments*, the purpose of the Act is to ensure the client does not pay more than what is "fair and reasonable" for the services rendered. That notion is also captured in s 142 of the Act which provides that the contract between solicitor and client is only relevant to the fairness and reasonableness of a fee charged, not determinative of it.

[39] The Reviser did not rely on the lack of independent advice. Rather, approaching the issue under Part VIII, he considered the interest "to be excessive in the circumstances": see para [20] above. It was Mr Paterson who referred to the need for 'legal advice": see para [16] above. The Registrar's decision was based firmly on the definitions of "bills of costs" and "costs" and was, in my view, entirely correct.

[40] It follows that the Reviser did have jurisdiction to disallow interest charged and the Registrar was right to uphold that decision.

Result

[41] Time to bring the application for review is extended but the substantive application is dismissed.

[42] As Ms Ward is a litigant in person, she is not entitled to costs. I award reasonable disbursements in her favour, which will include reasonable travelling

expenses to attend the hearing in Auckland on 19 November 2009. Those disbursements shall be fixed by the Registrar.

P R Heath J

Delivered at 11.00am on 2 December 2009