

IN THE COURT OF APPEAL OF NEW ZEALAND

CA233/2012
[2014] NZCA 455

BETWEEN RAYMOND BRUCE SMITH
Appellant

AND FRANCIS THOMAS DOOLEY
First Respondent

AND MOHAMMED SHAHADAT
Second Respondent

Counsel: P A McKnight for Appellant
R K P Stewart for First Respondent

Judgment: 15 September 2014 at 11.30 am
(On the papers)

JUDGMENT OF WILD J
(Review of Registrar's decision)

A The Registrar's decision of 17 June 2014 is set aside.

B An award of \$38,234.64 costs and disbursements is substituted.

REASONS

[1] Mr Dooley applies, under r 7(2), for a review of the Registrar's decision ordering him to pay \$47,863.64 costs and disbursements, on the basis the Registrar's decision mistook the extent of an offer by his counsel.

[2] In a judgment delivered on 13 September 2013, this Court allowed Mr Smith's appeal, ordering Mr Dooley to pay costs for a standard appeal on a band

A basis and usual disbursements.¹ The parties were unable to reach full agreement on the quantum of costs. Counsel filed extensive memorandums. Pursuant to a minute from Stevens J on 15 April 2014, the parties referred their remaining disputes to the Registrar for decision.

[3] On 17 June 2014 the Registrar fixed the total award at \$47,863.64, comprising:

- (a) costs as per the Registrar's Schedule 1 in the sum of \$12,770;
- (b) costs in terms of the Registrar's Schedule 2 in the sum of \$24,875;
and
- (c) total disbursements as claimed in the sum of \$10,218.64.

[4] In her decision, the Registrar explained that the costs in her Schedule 2 were "not claimable under Schedule 2 of the Court of Appeal (Civil) Rules 2005", but she had allowed them because they had "been accepted by respondent counsel" as payable.

[5] Mr Dooley takes issue with the Registrar's determination that he had "accepted" all the Schedule 2 costs. He seeks to review only that part of the Registrar's decision. In particular he challenges the Registrar's allowance of:

- four costs items in the Registrar's Schedule 2;
- two disbursements relating to those items; and
- one filing fee relating to an application in respect of which there had been no order for costs.

¹ *Smith v Dooley* [2013] NZCA 428.

[6] Mr Dooley “accepts the Registrar’s award in relation to the remaining costs and disbursements”. What is sought on review, therefore, is a reduction in the total award by \$9,629.²

[7] I am satisfied the Registrar was mistaken in including the four Schedule 2 costs items. Counsel’s memorandum of 11 April 2014 makes it clear those four items were not “accepted” as part of a costs award.³

[8] I am also satisfied the disbursements associated with those four costs items were wrongly included in the total award. So, too, the filing fee for the application upon which no costs were awarded.

[9] I need to mention, in order to set aside, a jurisdictional difficulty. On 19 June 2014 the Registrar sealed judgment in terms of her 17 June 2014 costs decision. She did that before Mr Dooley sought review of her decision. Yet Mr Dooley’s application on 24 June 2014 was within the 10-working-day time limit for review. It is therefore “not clear [whether] there is a basis for a review of the ... Registrar’s decision given the judgment has been sealed”.⁴ In the inauspicious circumstances of this case, where the Registrar sealed judgment in terms of her decision while the time within which to seek a review of that decision was yet to expire, I consider this Court has jurisdiction to consider the review application.⁵

[10] Accordingly, having reviewed the Registrar’s decision, I set it aside. I substitute an award of a total of \$38,234.64 costs and disbursements.

Solicitors:
Langford Law, Wellington for Appellant
Izard Weston, Wellington for First Respondent

² This total comprises two disputed Schedule 2 items at \$1,194 each, two at \$1,990 each, two disbursements of \$1,087 each and one filing fee of \$1,087 also.

³ Prior to this memorandum the first respondent had agreed to these items being included, but this was on a without prejudice basis and moreover was negated by the 11 April 2014 memorandum.

⁴ *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 311 at [3].

⁵ The situation would be different had recall been sought: sealing forecloses recall.