Application Number: 9000247

Order of the Tenancy Tribunal

Unit Titles Act 2010 *Office of the Tenancy Tribunal*

Tenancy Tribunal at Auckland

Unit Title Address

Suite 13H, 135 Victoria Street West, Auckland Central, Auckland 1010

Applicant

Full Name		Address
Kazufumi Ikeda	Unit Owner	PO Box 91755, Victoria Street West, Auckland 1142

Respondent

Full Name	Address
Body Corporate 346799	Floor 7, Southern Cross Building, 61 High Street, Auckland Central, Auckland 1010

Order of the Tribunal

The Tribunal orders

Body Corporate 346799 to pay Kazufumi Ikeda the sum of $3,350.00 immediately calculated as follows:

Costs	$2,500.00
Filing fee	$850.00
Amount payable by Respondent to Applicant	$3,350.00

(Unit Titles Act 2010, sections 171, 176)

(Residential Tenancies Act 1986, sections 78, 102)

Reasons

[1] On 1 November 2016, the Tenancy Tribunal made orders by consent for Body Corporate 346799 to make documents available to Mr Ikeda by 22 November and that both parties had a right to apply for costs. Mr Ikeda' lawyer later applied for costs (letter, 8 February 2017). The case manager advised that the body corporate was sent a copy of the application and made no response.

[2] Submissions for Mr Ikeda (72 pages) stated, in summary:

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(a) The body corporate was involved in leaky building litigation, which it settled.

(b) Mr Ikeda "chose not to be involved" in the claim, but suspected that he was being levied for the body corporate legal costs.

(c) On 17 August 2015, at an extraordinary annual general meeting (EGM), the body corporate manager stated that Mr Ikeda did not have to contribute to legal costs.

(d) There was correspondence in which Mr Ikeda sought an explanation of additional levies charged to him – his solicitor (3 June, 21 June, 4 July 2016); the body corporate solicitors (4 July); his solicitor (4 August); body corporate solicitor (10 August).

(e) At an EGM, on 18 August, the body corporate manager stated Mr Ikeda's solicitor that Mr Ikeda would be refunded additional levies paid after he paid the levies.

[3] The Tenancy Tribunal file date stamped Mr Ikeda claim as filed on 11 October, although correspondence to him stated 3 October. The submissions continued

(a) The body corporate solicitors, on 18 October, asked Mr Ikeda's solicitor for an adjournment to review payments made; and, on 31 October, stated that they would trace and reconcile additional levies paid in the next days (not done).

(b) Mr Ikeda's solicitor, on 31 October, prepared a drop box link for the body corporate to deposit documents; and declined the request for adjournment.

(c) On 1 November, there was a hearing at the Tenancy Tribunal and the order was made, by consent, for documents to be provided by 22 November.

[4] The subsequent events were, the submissions stated:

(a) On 3 November, Mr Ikeda's solicitor asked the body corporate solicitor for documents – body corporate agreement with the manager (Body Corporate Administration Ltd); building manager's agreement; and owner contact list.

(b) On 22 November, Mr Ikeda's solicitor reminded the body corporate solicitor about the body corporate obligations under the order dated 1 November.

(c) After further correspondence, on 14 December, the body corporate provided "most of the items in the order".

(d) On 19 January 2017 (follow up, 3 February), Mr Ikeda's solicitor sought further explanation from the body corporate – the "calculation behind" additional levies charged to Mr Ikeda; body corporate committee meeting minutes; calculation of the "alleged refund" to Mr Ikeda, "being the amount paid for litigation fees"; and body corporate bank statements.

(e) The body corporate did not respond.

[5] The submission then stated that Mr Ikeda's legal costs were $10,823.53:

19 May to 16 June 2016	$1,747.50
17 June to 29 July 2016	$2,727.74
1 to 18 August 2016	$3,974.40
2 to 30 September 2016	$805.75
3 October to 1 November 2016	$1,568.14

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[6] Mr Ikeda's counsel sought a contribution of $7,522.50 on the basis that:

(a) Reasonable costs were $5,015, "in keeping with" the District Court scale of costs.

(b) There should be an uplift of half because of body corporate delay; non-compliance with the order by 22 November; that the application to the Tenancy Tribunal was unnecessary given multiple previous letters from Mr Ikeda.

Principles

[7] Mr Ikeda's lawyer referred to some uncontroversial costs principles. Adopting the principles in Body Corporate 191164 v Kim [2014] NZTT Auckland 125/UT (2 March 2016), the Tenancy Tribunal could award "reasonable costs" where parties were represented by counsel (Residential Tenancies Act 1986, section 102(2)(b), (3); Unit Titles Act 2010, section 176(1))). No party disputed that legal representation was justified given the nature and complexity of the issues involved (section 93(3)(a)). The basic principle was that costs "followed the event" – the unsuccessful party should pay a reasonable contribution to costs actually and reasonably incurred by the winning party. See, for example, Binnie v Pacific Health Ltd [2003] 1 NZELR 1 (CA), a case that originated in the Employment Court:

> [14] The first step is to decide whether the costs actually incurred by the plaintiff were reasonably incurred. Adjustment must be made if they were not. The second step is to decide, after an appraisal of all relevant factors, at what level it is reasonable for the defendant to contribute to the plaintiff's costs. Potentially that level can be anywhere from 100 percent to zero percent. A starting point at 66 percent is generally regarded as helpful in ordinary cases. Mr Taylor reflected common practice when he referred to this as the two-thirds rule. If such a starting point is adopted, careful attention must be given to factors said to justify an increase or a decrease.

[8] In general, the Tenancy Tribunal should award costs where parties were represented by counsel – see Westwood v Western [1997] DCR 759 at 768-769, where the Tenancy Tribunal's refusal of costs was reversed on appeal to the District Court:

> This was a case involving claims totalling approximately $7,000. Both parties were represented by counsel. It was entirely appropriate – indeed desirable – that they should be so represented, because the background to the proceedings was in large part a dispute as to liability which turned on the proper interpretation of an agreement and of the Act. … Given the nature of the dispute, and the proper involvement of counsel, it is difficult to envisage a tenancy case in which an award of costs would more clearly be appropriate.

[9] What was reasonable was assisted by considering a "shopping list" of factors, so far as they applied to each case (see Holden v Architectural Finishes Ltd [1997] 3 NZLR 143 at 148), including:

(1) Length of the hearing.

(2) The amount of money involved.

(3) The importance of the issues, in a monetary or a non-monetary sense, to either the parties or generally. …

(4) Legal and factual complexity.

(5) Whether urgency was required.

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(6) The amount of time required for effective preparation.

(7) The number, complexity, and urgency of interlocutory applications …

(8) The extent of, and time involved in, discovery and inspection

(9) Whether any unnecessary steps had been undertaken.

(10) The extent of any common ground between parties separately represented …

(12) Whether argument(s) lacking substance (but not necessarily frivolous or vexatious) was/were advanced.

(13) An abuse of the process of the Court [including collateral purposes and attrition — care is needed. Angry allegations do not suffice: proof rests on the party so asserting].

(14) Any failure to comply with the rules, or an order or direction of the Court [to the extent such non-compliance has impeded progress].

(15) Poor pleading and/or presentation of the case.

(16) Unreasonable or obdurate refusal to settle, so far as known to the Court [the Calderbank procedure and R 46A now have relevance].

(16)(b) Unrealistic attitudes, or inadequate payments into Court.

(17) Technical or unmeritorious points [a win against the merits can be a special case, more usually dealt with by denial of costs rather than a reversal of liability onto the successful party].

(18) Non-usage of the District Court where available.

(19) The degree of success achieved by the parties [a party may succeed on only one of a number of causes of action, or succeed but for significantly reduced relief. Success only in part frequently is recognised by significant reduction in costs awarded].

(20) Whether the hearing was lengthened or shortened by the conduct of either party.

(21) Fault, notwithstanding success [particularly applicable where the successful party's conduct has contributed to the dispute and ultimate litigation. Provocation should not be rewarded].

[10] Costs could be awarded anywhere between 0 and 100 per cent of actual costs, but rules of thumb were the "two-thirds rule" (40 to 70 per cent, Holden at page 150); a per day assessment; and two days' preparation for every day of hearing (Binnie at [14] to [16]. However, "costs should always be proportionate to the issues and amount at stake" (Curly Ltd v Harvey Norman Stores (NZ) Pty Ltd HC Auckland, M29/IM02, 24 May 2002) and there was a need to stand back and make a principled decision:

> These specific factors, generally referred to as the first port of call, have their important place, but a Court should not forget the ultimate question, or overlook the principles which underlie. There is a wood as well as these trees. The ultimate question always remains: What is a reasonable contribution in these particular circumstances? (Holden at 148).

[11] Mr Ikeda's lawyer referred to French v Ryan DC Auckland, CIV-2012-004-000711, 29 November 2012) at [24], where the District Court stated that the District Court scales of costs could be

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considered by the Tenancy Tribunal for "guidance purposes". The scales allowed standard amounts for time, complexity and a fixed daily rate intended to be about two-thirds of the reasonable daily rate – see rule 14.2(d) of the High Court Rules 2008:

> an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application

[12] The Tenancy Tribunal, of course, had no scale and High Court authority suggested that the scales were essentially a different basis for awarding costs than a Tribunal with a general jurisdiction as to costs – see L v W [2003] NZFLR 961, where costs were sought in the Family Court, which had no scale:

> [27] It is no longer appropriate to regard the jurisdiction to award costs as being exercised on identical discretionary principles in all Courts. For example, the approach to costs in the High Court is now more rigid. The (relatively) new costs regime introduced on 1 January 2000 [that is, the scales] places greater emphasis on predictability of outcome over individualised justice … The greater rigidity arises from the operation of the Third Schedule which fixes the hourly rate to be applied in determining a hypothetical two-thirds contribution to the costs of an opposing party. That differentiates the High Court from Courts which exercise a general jurisdiction as to costs.

[13] The Tribunal therefore only had regard to the scales in a general way. An aspect of the scales was that daily recovery rates in the High Court were $1,480.00 (category 1), $2,230 (category 2) and $3,300.00 (category 3); and District Court daily rates were lower ($1,180.00, $1,780.00 and $2,640.00 respectively). A "guidance purposes" conclusion was therefore that Tenancy Tribunal costs should be lower than District Court costs, in the same way that District Court costs were lower than High Court costs. This was also a reflection of the recognised costs principle that what was "reasonable" was determined by the nature of the proceeding, not the skill or experience of the person doing the work – compare High Court Rules, rule 14.2(e):

> what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs

[14] What guidance was available from the District Court scales in this case? There were a number of ways to calculate costs under the District Court Rules 2014. Mr Ikeda's lawyer suggested category 1A for a short trial ($5,015.00). The 2014 Rules allowed, for a short trial, category 1A (omitting non-existent pre-hearing processes in the Tenancy Tribunal), it seemed, 2.25 days (preparation of claim 0.75, preparation 0.5, hearing 1.0) at $1,180.00, a total of $2,655.00. Mr Ikeda's lawyer probably included other items, but this was not made clear. This part of the lawyer's submission was therefore of limited use for "guidance purposes".

Decision

[15] In the end, from this patchwork of incomplete information, what was a reasonable contribution to costs incurred? The Tribunal assessed costs of $2,500.00 on the basis, in particular, that:

(a) There was no dispute from the body corporate that the costs were reasonable.

(b) However, many costs were incurred well before the proceedings and for other purposes (such as a body corporate AGM, 18 August 2016, $1,383.45 including GST).

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(c) The hearing was short (part of a morning).

(d) The amount of money involved was not made clear.

(e) The issues were not, in the scheme of unit title cases in the Tenancy Tribunal, of great or special importance.

(f) The legal and factual complexity was not high (basic filing fee paid, $850.00); there appeared to be no special or extra time needed for effective preparation; but there were a fairly large number of documents (as shown by the size of the file).

(g) There was no "unreasonable or obdurate refusal to settle" to justify an uplift of half in costs – there may have been (in Mr Ikeda's eyes) excessive delay by the body corporate, but the proceedings themselves were resolved promptly by a consent order at the first hearing.

(h) Mr Ikeda's calculation of costs under the District Court scale for "guidance purposes" was not made clear but, in a general way, pointed to an amount well below actual costs claimed.

(i) In the end, a substantial discount from actual legal costs claimed was justified by the lack of proof (such as the intermingling of attendances not for filing the claim and hearing the case) and the large difference between actual costs and scale costs (however calculated).

(j) Bearing in mind that costs should be proportionate to the issues and work involved and considering the wood as well as the trees, a reasonable contribution to costs was $2,500.00.

Filing fee

[16] Mr Ikeda succeeded in his application – the orders agreed to were, it seemed, what he sought in his application. He was therefore entitled to the filing fee of $850.00 (Residential Tenancies Act 1986, section 102(4)).

Backing sheet

[17] A backing sheet stating appeal rights was attached to these orders when signed (section 104(2)).

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Please read carefully

SHOULD YOU REQUIRE ANY HELP OR INFORMATION REGARDING THIS MATTER PLEASE CONTACT YOUR LOCAL "DEPARTMENT OF BUILDING AND HOUSING" OFFICE.

MEHEMEA HE PATAI TAU E PA ANAKI TENEI TAKE, PATAI ATU KI TE TARI "DEPARTMENT OF BUILDING AND HOUSING".

AFAI E TE MANA'OMIA SE FESOASOANI E UIGA I LENEI MATAUPU, FA'AMOLEMOLE IA FA'AFESO'OTA'I LOA LE OFISA O LE "DEPARTMENT OF BUILDING AND HOUSING".

Re-hearing:

You make an application to the Tenancy Tribunal for a re-hearing. Such an application must be made within five working days of this order and must be lodged with the Registrar of the Tribunal where the dispute was heard.

The only ground for re-hearing of an application is that a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur. ***Please note that being unhappy or dissatisfied with the decision is not a ground for a re-hearing (see "Right of Appeal" below).***

Right of Appeal:

If you are dissatisfied with the decision of the Tenancy Tribunal, you may appeal to the District Court. You only have 10 working days to lodge a notice of appeal.

However, you may **not** appeal to the District Court:

1. Against an interim order made by the Tribunal.
2. Against an order, or the failure to make an order, for the payment of money where the amount that would be in dispute on appeal is less than $1,000.
3. Against a work order, or the failure to make a work order, where the value of the work that would be in dispute on appeal is less than $1,000.

Enforcement:

Where the Tribunal makes any order and it needs to be enforced, then the party seeking enforcement should apply to Collections Unit at the District Court.

Notice to a party ordered to pay money or vacate premises etc:

Failure to comply with any order may result in substantial additional costs for enforcement. It may also involve being ordered to appear in the District Court for an examination of your means or seizure of your property.