

Order of the Tenancy Tribunal

Unit Titles Act 2010

Office of the Tenancy Tribunal

Tenancy Tribunal at Auckland

Unit Title Address

13h/135 Victoria Street West, Auckland 1010

Applicant

| Full Name | Address |
|----------------|---|
| Kazufumi Ikeda | Unit Owner 13h, Victopia Apartments, 135 Victoria Street West, Auckland Central, Auckland 1010 Po Box 91755, Victoria Street West, Auckland 1142 |

Respondent

| Full Name | Address |
|-----------------------|---|
| Body Corporate 346799 | Body Price Baker Berridge Corporate BCA Level 3 115 Queen Street, Auckland Central, Auckland 1010 |

Order of the Tribunal

The Tribunal hereby orders:

1. Body Corporate 346799 to pay Kazufumi Ikeda the sum of \$22,249.41 immediately calculated as follows:

| | |
|--|--------------------|
| Costs | \$18,949.41 |
| Filing fee reimbursement | \$3,300.00 |
| Amount payable by Respondent to Applicant | \$22,249.41 |

(Sections 171 Unit Titles Act 2010 and sections 7891)(d), 102 Residential Tenancies Act 1986)

Dated at Auckland on Friday 10-May-2019



B Harvey, Adjudicator

Reasons:

1. In a Tribunal order dated 27 June 2018 under application 9004521 the Tribunal granted the applicant's claim for a declaration that Mr Ikeda was elected to the body corporate committee at the Annual General Meeting held on 17 August 2017. This is a decision on the applicant's claim for costs including the filing fee following the Tribunal order. The respondent filed an appeal against the Tribunal order however the body corporate filed a notice of discontinuance on approximately 26 February 2019. The Tribunal stayed the costs decision pending the outcome of the appeal.
2. In unit title cases, the Tenancy Tribunal has jurisdiction to award costs where a party is represented by counsel under section 102 Residential Tenancies Act 1986 (which applied by virtue of section 176 Unit Titles Act 2010).
3. Section 102 Residential Tenancies Act 1986 provides:

102 Costs

(1) Except in a case to which any of subsections (2), (4), or (5) apply, the Tribunal shall have no power to award costs to or against any party to proceedings before it.

(2) The Tribunal may make an order of a kind referred to in subsection (3) in any of the following cases: (a) where, in the opinion of the Tribunal, the proceedings are frivolous or vexalious or ought not to have been brought: (b) where any of the parties was represented by counsel: (c) where, in the opinion of the Tribunal, the matter in dispute ought reasonably to have been settled before the Tenancy Mediator but that the party against whom the order is to be made refused, without reasonable excuse, to take part in proceedings before a Tenancy Mediator or acted in any such proceedings in a contemptuous or improper manner: (d) where any applicant to the Tribunal, after receiving notice of the hearing, fails to attend the hearing without good cause.

(3) In any case to which subsection (2) applies, the Tribunal may order a party to pay— (a) to the Crown, any 1 or more of the following: (i) the reasonable costs of the Tribunal hearing: (ii) the fees and expenses of any witness that have been paid or are payable by the Crown: (iii) the reasonable fees and expenses of any Tenancy Mediator in relation to the preparation of a report under section 99: (iv) the reasonable fees and expenses of any valuer in relation to the preparation of a report under section 100; or (b) to another party, the reasonable costs of that other party in connection with the proceedings.

4. Under section 102(3) (b) RTA the Tribunal may order a party to pay another party the reasonable costs of that other party in connection with the proceedings. The applicant sought costs of \$24,400.70 particularised as follows:
 - (a) Legal costs of Doug Cowan Barristers & solicitors (\$6,464.80);
 - (b) Legal costs of Mclean Law Limited (\$17,221.97);
 - (c) Interpreter's fees for Mr Ikeda (\$713.93).
5. What is considered a reasonable contribution to a successful party's costs may be assessed by reference to the list of factors set out in *Holden v Architectural Finishes Ltd* [1997] 3 NZLR 143. These factors include the length of the hearing, the amount of money involved, the importance of the issues, legal and factual complexity, urgency, effective preparation time, interlocutory applications, discovery and inspection, unnecessary steps, the extent of any common ground between the parties, whether the arguments lack

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B Harvey, Adjudicator

- substance, any abuse of process, any failure to comply with the Rules or an order or direction, poor pleading, refusal to settle, unrealistic attitudes, technical or unmeritorious points, the degree of success and the fault notwithstanding the success.
6. The applicant submits that reasonable costs in this case is comparable to "a 2B District Court proceedings with a simplified trial lasting 0.75 days" which is calculated at \$18,690.00 (\$1,780.00 per day). The applicant also seeks "increased costs" of 25% to \$23,362.50 based on the respondent's behaviour. The applicant says "the respondent refused to release further documents that were requested" resulting in "further submissions" and a further order for discovery by the Tribunal.
 7. The Tribunal has a general costs jurisdiction and of course no costs scale. There has been a general reluctance by the tribunal to apply a costs scale from another jurisdiction. See Body Corporate 191164 v Kim [2015] NZTT Auckland 14/00125/UT. However, I accept that some general regard to what an award of costs may have been under a category and band pursuant to the District Court Rule might be considered helpful.
 8. "Increased costs" is a principle lifted from Rule 14.6(3) District Court Rules 2014. The Tribunal as the power to award "reasonable costs" under section 102 RTA however I am not persuaded that this extends to increased costs. The matters raised by the applicant to support a request for increased costs are also relevant considerations under *Holden*.
 9. The respondent argues there was no unreasonable refusal by the Body Corporate to co-operate with the applicant and to provide source documents on discovery. The respondent also says the costs associated with mediation should not be granted. There was no mediation undertaken by the parties with a tenancy mediator. I am satisfied that the time and costs associated with the applicant's attempt to mediate this matter with the body corporate should be considered part of "reasonable costs" in connection with the proceedings in this case.
 10. The fundamental considerations for the Tribunal are (1) whether the costs actually incurred by the applicant were reasonably incurred, and (2) taking into account all relevant factors, what is a reasonable contribution to costs. After considering all the relevant factors in respect of costs, I determine that an award equivalent to 80% of the applicant's actual legal costs is a reasonable contribution in this case. I award \$18,949.41 being 80% of the actual costs of \$23,686.77 (after the deduction of the interpreter's costs of \$713.93). In determining a reasonable contribution, I have considered the following;
 - (a) The hearing time was approximately 4.5 hours;
 - (b) The facts were reasonably complex and there were some complexities as to the law;
 - (c) Following the AGM on 17 August 2017 Mr Ikeda and Mr Cowan were invited to the first committee meeting by BCA with an understanding that Mr Ikeda would be reinstated as a committee member however they were asked to leave. All attempts to mediate this dispute were unsuccessful.
 - (d) There was a very large volume of documents to be considered by the parties and filed with the tribunal;
 - (e) Discovery and inspection was a lengthy process;

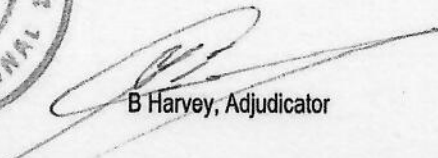


- (d) The respondent caused delay by failing to disclose all relevant documents relating to the election of the committee at the AGM resulting in a further application and tribunal order for disclosure;
- (e) There was considerable time required to prepare for the hearing including witness statements;
- (f) Both parties filed many lengthy memoranda following the disclosure of source documents relating to the committee election including revised voting tables and attaching hundreds of source documents (proxy forms, postal votes, voting forms in person, nomination forms, Notices, minutes of AGM meeting) from the AGM.

11. The applicant claimed the filing fee (\$3,300.00). The applicant was successful with their claim and therefore the tribunal should award the filing fee under section 102(4) Residential Tenancies Act 1986 (which applied by virtue of section 176 of the Unit Titles Act 2010).



Dated at Auckland on Friday 10-May-2019


B Harvey, Adjudicator

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The Tribunal hereby orders:

1. Body Corporate 346799 to pay Kazufumi Ikeda the sum of \$22,249.41 immediately calculated as follows:

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| Costs | \$18,949.41 |
| Filing fee reimbursement | \$3,300.00 |
| Amount payable by Respondent to Applicant | \$22,249.41 |

(Sections 171 Unit Titles Act 2010 and sections 7891)(d), 102 Residential Tenancies Act 1986)

Dated at Auckland on Friday 10-May-2019



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Reasons:

1. In a Tribunal order dated 27 June 2018 under application 9004521 the Tribunal granted the applicant's claim for a declaration that Mr Ikeda was elected to the body corporate committee at the Annual General Meeting held on 17 August 2017. This is a decision on the applicant's claim for costs including the filing fee following the Tribunal order. The respondent filed an appeal against the Tribunal order however the body corporate filed a notice of discontinuance on approximately 26 February 2019. The Tribunal stayed the costs decision pending the outcome of the appeal.
2. In unit title cases, the Tenancy Tribunal has jurisdiction to award costs where a party is represented by counsel under section 102 Residential Tenancies Act 1986 (which applied by virtue of section 176 Unit Titles Act 2010).
3. Section 102 Residential Tenancies Act 1986 provides:

102 Costs

(1) Except in a case to which any of subsections (2), (4), or (5) apply, the Tribunal shall have no power to award costs to or against any party to proceedings before it.

(2) The Tribunal may make an order of a kind referred to in subsection (3) in any of the following cases: (a) where, in the opinion of the Tribunal, the proceedings are frivolous or vexatious or ought not to have been brought: (b) where any of the parties was represented by counsel: (c) where, in the opinion of the Tribunal, the matter in dispute ought reasonably to have been settled before the Tenancy Mediator but that the party against whom the order is to be made refused, without reasonable excuse, to take part in proceedings before a Tenancy Mediator or acted in any such proceedings in a contemptuous or improper manner: (d) where any applicant to the Tribunal, after receiving notice of the hearing, fails to attend the hearing without good cause.

(3) In any case to which subsection (2) applies, the Tribunal may order a party to pay— (a) to the Crown, any 1 or more of the following: (i) the reasonable costs of the Tribunal hearing: (ii) the fees and expenses of any witness that have been paid or are payable by the Crown: (iii) the reasonable fees and expenses of any Tenancy Mediator in relation to the preparation of a report under section 99: (iv) the reasonable fees and expenses of any valuer in relation to the preparation of a report under section 100; or (b) to another party, the reasonable costs of that other party in connection with the proceedings.

4. Under section 102(3) (b) RTA the Tribunal may order a party to pay another party the reasonable costs of that other party in connection with the proceedings. The applicant sought costs of \$24,400.70 particularised as follows:
 - (a) Legal costs of Doug Cowan Barristers & solicitors (\$6,464.80);
 - (b) Legal costs of Mclean Law Limited (\$17,221.97);
 - (c) Interpreter's fees for Mr Ikeda (\$713.93).
5. What is considered a reasonable contribution to a successful party's costs may be assessed by reference to the list of factors set out in *Holden v Architectural Finishes Ltd* [1997] 3 NZLR 143. These factors include the length of the hearing, the amount of money involved, the importance of the issues, legal and factual complexity, urgency, effective preparation time, interlocutory applications, discovery and inspection, unnecessary steps, the extent of any common ground between the parties, whether the arguments lack

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substance, any abuse of process, any failure to comply with the Rules or an order or direction, poor pleading, refusal to settle, unrealistic attitudes, technical or unmeritorious points, the degree of success and the fault notwithstanding the success.

6. The applicant submits that reasonable costs in this case is comparable to "a 2B District Court proceedings with a simplified trial lasting 0.75 days" which is calculated at \$18,690.00 (\$1,780.00 per day). The applicant also seeks "increased costs" of 25% to \$23,362.50 based on the respondent's behaviour. The applicant says "the respondent refused to release further documents that were requested" resulting in "further submissions" and a further order for discovery by the Tribunal.
7. The Tribunal has a general costs jurisdiction and of course no costs scale. There has been a general reluctance by the tribunal to apply a costs scale from another jurisdiction. See Body Corporate 191164 v Kim [2015] NZTT Auckland 14/00125/UT. However, I accept that some general regard to what an award of costs may have been under a category and band pursuant to the District Court Rule might be considered helpful.
8. "Increased costs" is a principle lifted from Rule 14.6(3) District Court Rules 2014. The Tribunal as the power to award "reasonable costs" under section 102 RTA however I am not persuaded that this extends to increased costs. The matters raised by the applicant to support a request for increased costs are also relevant considerations under *Holden*.
9. The respondent argues there was no unreasonable refusal by the Body Corporate to co-operate with the applicant and to provide source documents on discovery. The respondent also says the costs associated with mediation should not be granted. There was no mediation undertaken by the parties with a tenancy mediator. I am satisfied that the time and costs associated with the applicant's attempt to mediate this matter with the body corporate should be considered part of "reasonable costs" in connection with the proceedings in this case.
10. The fundamental considerations for the Tribunal are (1) whether the costs actually incurred by the applicant were reasonably incurred, and (2) taking into account all relevant factors, what is a reasonable contribution to costs. After considering all the relevant factors in respect of costs, I determine that an award equivalent to 80% of the applicant's actual legal costs is a reasonable contribution in this case. I award \$18,949.41 being 80% of the actual costs of \$23,686.77 (after the deduction of the interpreter's costs of \$713.93). In determining a reasonable contribution, I have considered the following;
 - (a) The hearing time was approximately 4.5 hours;
 - (b) The facts were reasonably complex and there were some complexities as to the law;
 - (c) Following the AGM on 17 August 2017 Mr Ikeda and Mr Cowan were invited to the first committee meeting by BCA with an understanding that Mr Ikeda would be reinstated as a committee member however they were asked to leave. All attempts to mediate this dispute were unsuccessful.
 - (d) There was a very large volume of documents to be considered by the parties and filed with the tribunal;
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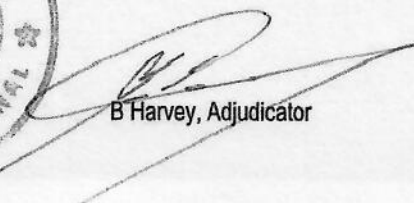


- (d) The respondent caused delay by failing to disclose all relevant documents relating to the election of the committee at the AGM resulting in a further application and tribunal order for disclosure;
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11. The applicant claimed the filing fee (\$3,300.00). The applicant was successful with their claim and therefore the tribunal should award the filing fee under section 102(4) Residential Tenancies Act 1986 (which applied by virtue of section 176 of the Unit Titles Act 2010).

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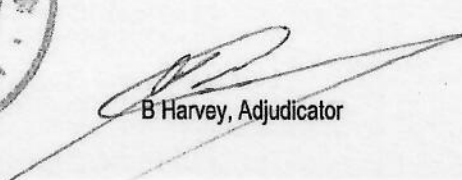
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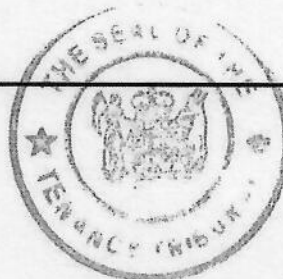



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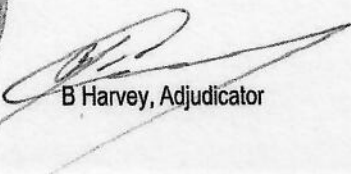
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