

TENANCY TRIBUNAL AT Blenheim

APPLICANT: Robert Alexander Bain
Tenant

RESPONDENT: Sonya Thomas
Landlord

TENANCY ADDRESS: 46 Ward Street, Kaikoura, Kaikoura 7300

ORDER

1. Robert Alexander Bain must pay Sonya Thomas \$2,393.01 immediately, being costs of \$2,693.01, less the reduction by the bond of \$300.00.

Reasons:

1. On 3 November 2020 Order TT4271436 was made. That order dismissed an application for exemplary damages, struck out a claim of defamation, and provided for the respondent to file a memorandum of costs. This order addresses costs.
2. On 13 November 2020, Ms Clarisse, counsel for the respondent, lodged a memorandum. A response, on behalf of the applicant, was submitted on 27 November 2020 by Mr Gaines. As Mr Gaines noted in his response, his instructions from Mr Bain were solely regarding this matter of costs.

Discussion

3. Part 3 of the RTA relates to the Tenancy Tribunal and sets out the mechanical provisions under which the Tribunal operates.
4. Included in Part 3 of the RTA is section 102, which relates to costs. Section 102(2) confirms that the Tribunal “may make an order” where “any of the parties was presented by counsel”. Subsection 3 confirms that an order may be made to a party for “the reasonable costs of that other party in connection with the proceedings.” The question then becomes whether the Tribunal should exercise its discretion to award costs, and if so to what amount.
5. It is unusual for a Tribunal or Court in New Zealand to award full indemnity costs against the losing party.
6. What is considered to be ‘reasonable costs’ will depend on a range of factors. In *Holden v Architectural Finishes Ltd* [1997] 3 NZLR 143. Justice McGechan, in his reserved costs decision, held that:

“...the sum in issue is a ‘reasonable’ ‘contribution’. It is not some mere gesture. It is not some virtual payment in full. It is merely a contribution, and a reasonable one. At the outer limits, proportions of reasonable actual fees can afford some guidance. A 10% or even 20% contribution – very little indeed – may seldom qualify. A 90% or 80% contribution, virtually the total, may be regarded as likewise...if the ‘reasonable contribution’ earlier determined falls within a middle range, say 40% to 70%, there is a feeling of some comfort...”
7. The High Court judgment of *Holden v Architectural Finishers Ltd* [1996] 7 NZCLR 260, 976 as relevant. The High Court confirmed that when a party is represented by counsel, that the following factors are relevant to be considered when assessing costs:
 - a. The length of the hearing.
 - b. The sum of money involved.
 - c. The legal and factual complexity.
 - d. Whether the argument lacking substance was advanced, and
 - e. The degree of success achieved by the parties.
8. Similarly, in the judgment of *David Blair Ltd v Hawkins Arms and Engineering Ltd (No 2)* [1988] 1 PRNZ 162, Tompkins J considered a costs issue where the party was represented, and held:

In addition to the length of the hearing, matters such as the amount of money involved, the importance either to the parties or generally of the issues, monetary or non monetary, the legal and factual complexities, the amount of time required for effective preparation, the number and complexity of interlocutory applications and the likely or actual solicitor and client costs incurred, may, in appropriate cases, be relevant to the exercise of the discretion.

Should costs be awarded for these proceedings?

9. The Tribunal dismissed Mr Bains's claim for exemplary damages as applied within this jurisdiction. A claim regarding defamation was struck out.
10. Ms Thomas had sought legal representation for this matter, but it was initially declined. The reasons for this were explained in a letter from the Blenheim District Court Registry dated 2 October 2020. That letter provided for a reconsideration if supporting information was provided. A second request, from Ms Clarisse, provided further justification and the request was granted. I refer the parties back to my order dated 3 November 2020, section *Costs* for a summary of the reasons.
11. Ms Clarisse established costs of \$10,534 and sought an order close to 70% of such costs for reasons outlined in her memorandum.
12. I consider the "connection with the proceedings" as provided in s 102(3)(b) RTA to have commenced from when Mr Bain lodged his application with Tenancy Services on 12 August 2020. There was prior engagement of Ms Clarisse by the respondent regarding the issues with this tenancy. The first invoice of \$753.45 was for services during July – predating the application. I have also allowed for some downward adjustment to the August invoice, using a one-third reduction on a calendar basis for the same reason. This reduces the August invoice from \$1,618.05 to \$1078.69. Invoices presented for September and October totalled \$2,788.75 and \$3,530.57 respectively. A final approximate cost for unbilled time of \$1,700 (ex GST) was claimed for costs incurred in "pursuing an agreement between the parties as to costs" (\$1000) and preparation (\$700).
13. The application for costs is considered per s 102(2)(b) RTA. While I gave some consideration to a possible application of s 102(2)(a) where "the proceedings are frivolous or vexatious or ought not to have been brought", I did not find that the proven here given one claim that was struck out for lack of jurisdiction.
14. While I accept the basis of the invoices claimed, there are some considerations not addressed in the memorandum, that I believe have some bearing on any final quantum ordered. Some were raised in Mr Gaines memorandum in response. Specifically:
 - a. The request for representation also cited the immense workload on Ms Thomas at the time as another reason for representation. As a farmer, and it being the middle of the farming season, Ms Thomas was not sure she would be able to attend. Representation allowed Ms Thomas to prioritise her conflicting work demands but the convenience of that increased some of the legal costs incurred and claimed; such costs I do not believe Mr Bain should carry.
 - b. The respondent submitted this Tribunal did not have jurisdiction. Given this belief, some mitigation of further legal costs may have arisen from a request

for this jurisdiction question to be determined at an initial hearing, with a continuation or striking out as appropriate to follow. Subsequent costs may then have been incurred appropriately.

- c. While the claim for exemplary damages was within this jurisdiction and was dismissed after being heard, there remains the claim for defamation that was struck out for a lack of jurisdiction. I recognise some costs claimed as more appropriately being incurred for the later and I do not believe it right to make an order for costs in relation to that. The same consideration applies to any costs incurred in the consideration of a cross-application (which was not filed) nor consideration or preparation for any claim in another jurisdiction.
 - d. The second application for representation created some duplication of effort and I have considered whether that is reflected in any of the invoicing tabled.
 - e. Lastly, the cost of preparing the memorandum of costs appears excessive. Not so much about the completed memorandum, which is through, but rather what was reasonably required to assist me in my determination of costs. I agree with Mr Gaines that there is additional information included in the submission that was not required by me in determining costs. Any additional information that might be considered by some as further evidence is considered of no bearing as I have made my order already on the substantive, and I have not derived anything further from the additional information, in particular Annex D, the purpose of which in the context of this consideration I remain unsure about.
15. For a cost claim of this nature in this Tribunal, a submission for context, and detailed invoices will generally suffice.
 16. Mr Gaines, in his memorandum response, raised a number of issues regarding any award.
 17. His first contention was that the supporting evidence for costs (that is, lawyers invoices) are not acceptable as the invoices are made out to Big Bush Farm and not Ms Thomas. He further raised GST implications if these invoices were accepted
 18. Ms Thomas was Mr Bain's chosen respondent in his application. However, in emails between the parties the existence of Big Bush farm appears common knowledge, even prior to Mr Bain lodging his application. The example below illustrates this:

Big Bush Farm

From: Robert Bain <[REDACTED]@bigbush.school.nz>
Sent: Wednesday, 29 July, 2020 5:37 p.m.
To: Big Bush Farm
Cc: Peter Eastgate
Subject: Re: Notice of 4 week termination to 46 Ward street
Attachments: Rental agreement pg #1.jpg; Rental agreement pg #2.jpg; Rental agreement pg #3.jpg; Rental agreement pg #4.jpg

Hello David and Sonya

19. The submission of Mr Gaines regarding the invoiced party as provided is acknowledged and could constitute grounds for his submission that the respondent did not evidence incurring any actual cost. However, this Tribunal has some flexibility as it pertains to evidence, in particular s 97(4) which allows the Tribunal to receive as evidence any statement, document, information, matter, or thing that in its opinion may assist it to deal effectually with the matters before it, whether or not the same would be admissible in a court of law.
20. Any potential interest of Inland Revenue notwithstanding, I am satisfied the invoices as presented can accurately establish the tasks completed and costs incurred by the named respondent as may pertain to this matter. I consider them adequate as a basis for my determination of costs. I believe I do have jurisdiction to award costs on the evidence provided. In the alternative, if the invoices were deemed to have been incorrectly addressed and were resubmitted, such an exercise would likely result in a mere delay in considering the same issues regarding costs. This order is not made in favour of the company named in the invoice but to the respondent named by Mr Bain, Ms Sonya Thomas. The invoices are enough evidentially, and detailed tax implications do not need to be addressed as part of this order – apart from confirming the award is GST inclusive. The final cost awarded in this order is not exact and forms a part-contribution only. Ms Thomas is significantly out of pocket, regardless of any possible tax benefit from the cost award here.
21. Mr Gaines provided a procedural alternative in the event his submission regarding the invoicing was not successful; that being Mr Bain did not receive notice of the approval of representation. I understand a copy of this notice has subsequently been provided to Mr Gaines by the Registry (as he requested). I believe Mr Bain was served appropriately and was not disadvantaged at the hearing.
22. Mr Bain did not exercise his right to apply for a rehearing, exercise his right of appeal if any such perceived failures in service disadvantaged him.

23. In the final alternative, Mr Gaines responds regarding the applicability and reasonableness of any costs awarded.
24. I have already raised in 14. above some considerations in my determination of costs. I acknowledge Mr Gaines submissions regarding potential weightings on costs that might be putative or uplift. These have also been considered.
25. Generally, parties in this Tribunal are expected to self-represent. The actual issues in this application were not that different from other such applications that have been successfully self-represented by the actual parties.
26. My declining of the first request for representation reflected that.
27. However, the more detailed request for representation raised an important point. It was Mr Bain who instigated the legal processes, he claimed a particular knowledge that I accepted could have been intimidating to a lay respondent and he insisted on legal involvement from the start of this dispute, refuting what I consider were genuine attempts from Ms Thomas to resolve the situation, even prior to the settlement offer.
28. Ultimately, Mr Bain is responsible for a part of the costs incurred. It was at his instigation that this application escalated beyond the landlord/tenant representation to one involving lawyers.
29. The adjusted costs considered are outlined in the following table:

Date	Claimed	Awarded
July Invoice	\$ 753.45	\$ -
August Invoice	\$ 1,618.05	\$ 1,078.69
September Invoice	\$ 2,788.75	\$ 1,394.38
October Invoice	\$ 3,530.57	\$ 1,765.29
Unbilled (ex GST)	\$ 1,700.00	\$ 250.00
		\$ 4,488.35
	weighting	60%
	Award	\$ 2,693.01

30. As the table shows, the July invoice is declined, and the August invoice adjusted for reasons already covered in this order. I have applied 50% of the September and October invoices as actual costs; this adjusts for time and effort on tasks not directly attributable to this proceeding, as well any cost/time savings Ms Thomas gained through having Ms Clarisse represent her at the hearing. Regarding the unbilled costs for preparation, I have provided \$250.00, my concerns regarding the full claimed cost already expressed.
31. Ms Clarisse submitted an order close to 70% of the actual costs would be appropriate here. Having considered the submissions of both counsels, I have settled on 60% as appropriate, for while Mr Bain has been unsuccessful, and I

consider him the instigator of the resulting legal overhead, I have also considered his declining of the settlement offer and genuine grievance in his pursuing his application.

32. Accordingly, the cost award is \$2,693.01 GST Inclusive.

Bond

33. As provided for in the last order, there is a landlord retained bond of \$300.00. This is applied against the cost award, making the final amount payable by Mr Bain \$2,393.01.



M Brennan
9 December 2020

Please read carefully:

Visit justice.govt.nz/tribunals/tenancy/rehearings-appeals for more information on rehearings and appeals.

Rehearings

You can apply for a rehearing if you believe that a substantial wrong or miscarriage of justice has happened. For example:

- you did not get the letter telling you the date of the hearing, **or**
- the adjudicator improperly admitted or rejected evidence, **or**
- new evidence, relating to the original application, has become available.

You must give reasons and evidence to support your application for a rehearing.

A rehearing will not be granted just because you disagree with the decision.

You must apply within five working days of the decision using the Application for Rehearing form: justice.govt.nz/assets/Documents/Forms/TT-Application-for-rehearing.pdf

Right of Appeal

Both the landlord and the tenant can file an appeal. You should file your appeal at the District Court where the original hearing took place. The cost for an appeal is \$200. You must apply within 10 working days after the decision is issued using this Appeal to the District Court form: justice.govt.nz/tribunals/tenancy/rehearings-appeals

Grounds for an appeal

You can appeal if you think the decision was wrong, but not because you don't like the decision. For some cases, there'll be no right to appeal. For example, you can't appeal:

- against an interim order
- a final order for the payment of less than \$1000
- a final order to undertake work worth less than \$1000.

Enforcement

Where the Tribunal made an order about money or property this is called a **civil debt**. The Ministry of Justice Collections Team can assist with enforcing civil debt. You can contact the collections team on **0800 233 222** or go to justice.govt.nz/fines/civil-debt for forms and information.

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.

If you require further help or information regarding this matter, visit tenancy.govt.nz/disputes/enforcing-decisions or phone Tenancy Services on 0800 836 262.

Mēna ka hiahia koe ki ētahi atu awhina, kōrero ranei mo tēnei take, haere ki tenei ipurangi tenancy.govt.nz/disputes/enforcing-decisions, waea atu ki Ratonga Takirua ma runga 0800 836 262 ranei.

A manaomia nisi faamatalaga poo se fesoasoani, e uiga i lau mataupu, asiasi ifo le matou aupega tafailagi: tenancy.govt.nz/disputes/enforcing-decisions, pe fesootea mai le Tenancy Services i le numera 0800 836 262.