IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-007140
[2014] NZHC 3072

UNDER	the Tax Administration Act 1994
IN THE MATTER	of the Income Tax Act 2004
BETWEEN	TRUSTPOWER LIMITED Plaintiff
AND	COMMISSIONER OF INLAND REVENUE Defendant

Hearing: 13 October 2014

Appearances: G J Harley, S Armstrong, A F J Church for Plaintiff
D H McLellan QC, M J Andrews and C M Kern for Defendant

Judgment: 4 December 2014

(RESERVED) JUDGMENT OF ANDREWS J
[Costs]

This judgment is delivered by me on 4 December 2014 at 5 pm pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Contents

Introduction

[1] Judgment in this proceeding was given in favour of Trustpower on 12 November 2013.[1] The parties have not been able to agree on the quantum of costs and disbursements payable by the Commissioner of Inland Revenue ("the Commissioner") to Trustpower. Trustpower claims a total of $1,448,213 (comprising $1,021,631 costs, and disbursements of $426,582). The Commissioner accepts liability for (and has paid) a total of $639,967, comprising costs of $477,290 and disbursements of $162,677.

[2] I received written submissions from counsel for both parties, and heard oral submissions at a hearing on 13 October 2014.

The issues

[3] It was common ground that the litigation was significant, extensive, and intensive and, as such, required both parties to incur significant expenditure. While the proceeding was classed as category 3, band C, the Commissioner agrees that for some steps, costs should be awarded above the scale set out in Schedule 3 of the High Court Rules.

[4] The parties are not able to agree on the following claims by Trustpower for:

(a) increased costs for listing documents on discovery and preparing agreed statements of facts;

(b) increased costs for preparation of briefs of evidence;

(c) increased costs for preparation for trial;

(d) payment of a disbursement for $48,690, being fees charged by a witness, Mr Freeman;

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[1] *Trustpower Limited v Commissioner of Inland Revenue* [2013] NZHC 2970; [2014] 2 NZLR 502 (HC).

(e) payment of a disbursement of $67,640, being fees charged by a witness, Mr Kedian;

(f) payment of disbursements totalling $112,268 for litigation support services relating to electronic discovery; and

(g) payment of disbursements totalling $35,307, being travel and accommodation costs of Trustpower's senior counsel, Mr Harley.

Increased costs: relevant principles

[5] It was common ground that all matters relating to costs in a proceeding are at the discretion of the Court,[2] but that the Court should only depart from the costs regime set out in the High Court Rules in limited circumstances.[3] The regime will apply unless there is a reason to the contrary.

[6] Rule 14.6(3) allows the Court to order a party to pay increased costs in certain circumstances:

(a) if the nature of the proceeding, or the step in the proceeding, is such that the time required would substantially exceed the time allocated under band C (r 14.6(3)(a));

(b) the party against whom the costs are claimed has contributed unnecessarily to the time or expense of the proceeding or a step in the proceeding (r 14.6(3)(b));

(c) the proceeding is of general importance to persons other than the parties to it (r 14.6(3)(c)); or

(d) some other reason exists which justifies the court making an order for increased costs, despite the principle that the determination of costs should be predictable and expeditious (r 14.6(3)(d)).

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2 High Court Rules, r 14.1.

3 *Manukau Golf Club Inc v Shoye Venture Limited* [2012] NZSC 109, [2013] 1 NZLR 305 (SC) at [7].

[7] In *Holdfast NZ Limited v Selleys Pty Ltd*, the Court of Appeal set out the approach to assessing costs as being, first, to categorise the proceeding; secondly to assess a reasonable time for each step in the proceeding, including whether additional time is allowed; and thirdly to apply the applicable daily rate from the appropriate costs category to the time so fixed.[4] Additional costs can then be sought under the grounds set out in r 14.6(3)(b), all of which depend on a finding that a party has contributed unnecessarily to the time or expense of the proceeding.[5] The court's normal response, if such grounds are made out, is to allow an uplift on the scale costs assessed by way of the first three steps.[6]

[8] As *McGechan on Procedure* states, in ordering increased costs, "the courts uplift from scale, it is not a question of awarding a percentage of actual costs."[7] Pursuant to r 14.2(e) the reasonable time to be spent on a step, and the appropriate daily recovery rate "should not depend on the … time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs", because costs are "to represent a reasonable contribution to costs actually and reasonably incurred".[8]

Overview of Trustpower's claim for increased costs

[9] Trustpower claims to be entitled to an order for increased costs for listing documents on discovery and preparing agreed statements of facts, briefing witnesses, and preparing for trial, on two bases:

(a) pursuant to r 14.6(3)(a), to reflect the very significant amount of work required to complete each of these steps; and

(b) in addition (and in the alternative), pursuant to r 14.6(3)(b), on the grounds that the Commissioner contributed unnecessarily to the time and expense of the proceeding.

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4 *Holdfast NZ Limited v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA) at [43]–[44].
5 At [45].
6 At [46].
7 Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Thomson Reuters) at [HR14.6.02(1)].
8 At [HR14.2.01(4)].

[10] The Commissioner accepts that increased costs are appropriate, as a result of the nature of the proceeding and the time required to complete discovery, and to prepare the agreed statement of facts, common bundle, and for trial. She contends, however, that a smaller increase should be allowed than that sought by Trustpower. The Commissioner submitted that there are no grounds on which an order for increased costs could be made under r 14.6(3)(b).

[11] I turn first to consider Trustpower's claim for increased costs under r 14.6(3)(a) where, as noted earlier, the only issue is as to quantum.

Discovery and agreed statements of facts

[12] Pursuant to item 20 in Schedule 3 of the High Court Rules the time allocation for listing documents on discovery in a band C proceeding is seven days. When the category 3 daily recovery rate ($2940) is applied, the standard costs award is $20,580. There is no specific allocation for "preparing an agreed statement of facts", although time may be allocated, "as allowed by the court", under item 36. For this reason, although counsel made submissions under this heading as if both limbs were covered by item 20, I consider it appropriate to deal with them separately.

Discovery

[13] Trustpower seeks an order for payment of $275,772, which represents 3C scale costs for 93.8 days. The Commissioner contends that an order should be made for only 20 days ($58,800). In submissions, the Commissioner had argued for an order for 40 days. However, that included time for preparation of the agreed statement of facts. I therefore take the discovery portion submitted for the Commissioner to be 20 days.

[14] For Trustpower, Ms Armstrong submitted that Trustpower seeks a reasonable contribution for completion of the substantial task of listing documents in this proceeding. In support of her submission as to the extent of the task, she referred to affidavits sworn by Mr Robert Farron (Trustpower's Chief Financial Officer) on 17 December 2012, and Mr Kevin Palmer (Trustpower's Financial Controller) on 7 February 2014.

[15] Mr Palmer stated that the Commissioner had requested that a broad range of categories of documents be discovered, over an extended date range (back to the early 2000's). He also stated that further discovery requests by the Commissioner, many of which fell outside the categories agreed between the parties, added substantially to the time required. In all, Trustpower's solicitors (Russell McVeagh) calculated that the time they actually spent on discovery was 1,612.7 hours (or 201.6 8-hour days).

[16] In describing the discovery process in his affidavit of documents for Trustpower, Mr Farron said that Russell McVeagh had interviewed Trustpower employees who had been involved with any of the four projects in dispute, to discuss their roles, the location of any potentially relevant documents, what key words were used in emails or other relevant correspondence, and whether they were aware of any other documents that might be relevant, or any other staff involved in any of the projects. As a result, more than 24 million files were collected from Trustpower and key-word searched using forensic IT support. The list of key words was provided to the Commissioner's solicitors (Crown Law) before the word search was undertaken. The search identified 21,505 files, which were reviewed by Russell McVeagh to remove irrelevant material (that determination again being made after consultation with Crown Law). Trustpower and senior solicitors from Russell McVeagh undertook a legal review of some 70,000 documents.

[17] Ms Armstrong submitted that the discovery exercise was of such an extent, and the proceeding of such a significant commercial scale, that a "realistic and pragmatic" approach to costs is required. She submitted that the Commissioner's approach (to allow only 13 days above the scale allocation of seven days) is "an extremely small allowance in respect of a significant amount of work".

[18] For the Commissioner, Mr McLellan QC submitted that Trustpower's claim is too high. He submitted that it equated to approximately $367 per hour which was "a very high rate for discovery". He further submitted that it is apparent that approximately half of the discovery work was done by litigation support staff and graduate-level employees. The cost of such work should properly be regarded as an

internal cost of Russell McVeagh (albeit on a large scale), which should not be claimed as costs, or as a disbursement.

[19] Mr McLellan further submitted that Trustpower's claim represented a "multiplier" above the standard 3C time allocation of 22.31, whereas the Commissioner's suggested allowance represented a more reasonable multiplier of 5.7 above the 3C time allocation.

[20] I note that the Commissioner's multiplier made no distinction between discovery and preparation of the agreed statement of facts. If the multiplier calculations are applied solely to discovery, Trustpower's claim for 93.8 days represents a multiplier of 13.4 over the 3C scale allowance, and the Commissioner's suggested allowance of 20 days represents a multiplier of 2.86. However, I do not consider that a comparison of multipliers is a useful tool for assessing costs, or that it is what the High Court Rules require to be assessed. As the Court of Appeal said in *Holdfast*, the focus is on determining what is a reasonable time allocation for the particular steps in the proceeding, and then applying the appropriate daily rate to that "reasonable time".

[21] *McGechan on Procedure* notes in respect of r 14.2 (which sets out the principles applying to the determination of costs) that the aim of referring to "an appropriate daily rate" in r 14.2(d) and (e) "is to allow two-thirds of costs considered reasonable for the proceeding, or the particular step in the proceeding, as opposed to the actual costs incurred."[9] This is in order to balance objectives of access to justice, avoiding the successful party being "seriously out of pocket", encouraging attempts to resolve litigation, and discouraging inefficiency, overcharging, and 'overkill'."[10]

[22] The actual time spent on a step in the proceeding is relevant to determining the reasonable time for a step in a proceeding. The "reasonable time for that step" is calculated according to the times specified in Schedule 3 and with reference to the appropriate band.[11] This does not mean that the actual time spent on a particular step is irrelevant in determining costs. The time actually spent on a step in the

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9 At [HR14.2.01(4)].
10 Ibid.
11 High Court Rules, r 14.5.

proceeding may be a useful tool for assessing the complexity and significance of the proceeding, and as a starting point for determining whether the nature of the proceeding, or the step, is such that the time required by the party claiming costs would substantially exceed the time allocated under band C, and increased costs should be granted.[12]

[23] Counsel referred me to many costs judgments where increased costs were sought. Inevitably, such cases are heavily fact-specific, and not readily applicable to the present case. Two decisions referred to claims for increased costs for discovery. In *Todd Pohokura Ltd v Shell Exploration (NZ) Ltd,* Dobson J noted that the actual time spent reviewing and listing Shell's documents was over 100 days.[13] The 3C scale at the time allowed for six days. His Honour awarded 3C costs uplifted by 30 per cent for the additional scope of the work, noting that a somewhat larger uplift would have been warranted, but for the fact that he intended "allowing as disbursements some outsourcing of the costs of the extensive discovery process."[14]

[24] In *N-Tech Ltd v Abooth Ltd*, Kós J considered an award of costs for a discontinued proceeding.[15] In that case, his Honour declined to order increased costs, but allowed scale costs for discovery in favour of each of the 60 defendants remaining at the time of the costs judgment, provided that that did not result in an over-recovery as against the actual costs incurred in providing discovery.[16]

[25] Trustpower claims for half of the amount of time actually spent on discovery, less the seven days allowed under the 3C scale. Its claim is for nowhere near the "two-thirds recovery" envisaged under the scale. Does Trustpower's claim represent a reasonable contribution to a reasonable time allocation for discovery in this proceeding? If Trustpower is not awarded the claimed costs, will that result in it being "seriously out of pocket"?

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12 High Court Rules, r 14.6(3)(a).
13 *Todd Pohokura Ltd v Shell Exploration (NZ) Ltd* HC Wellington CIV-2006-485-1600, 1 July 2011 at [11].
14 At [22]–[23].
15 *N-Tech Ltd v Abooth Ltd* [2012] NZHC 1167.
16 At [132].

[26] I accept Trustpower's submission that discovery in this proceeding required a very substantial amount of work, far in excess of the seven days provided for under the scale. While the parties agreed that tailored discovery was to be given, that did not lessen the task of ensuring that the discovered documents were drawn from all documents relating to each project. Discovery was clearly a huge, and complex, task.

[27] The nature of the proceeding was such that the 3C scale does not begin to approach being a reasonable time allocation for discovery in this proceeding. A realistic and pragmatic approach is required as an award of costs without an uplift would not "reflect the complexity and significance of the proceeding."[17] The Commissioner's suggested allocation of 20 days falls well short of being either a reasonable assessment of the time required for discovery, or a reasonable contribution, particularly in light of the Commissioner's requirements as to the breadth and time-range of discovery.

[28] I have concluded that the determination of costs payable for discovery must be made on the basis of the following:

(a) the complexity of the discovery exercise in this proceeding (involving four separate generation projects undergoing feasibility analysis);

(b) the breadth and time-range of discovery required;

(c) being careful to guard against the possibility of there being any overlap between discovery work undertaken by Trustpower's solicitors and that which was outsourced (which will be considered as a disbursement); and

(d) guarding also against the possibility of any double-recovery (for example more than one person undertaking the same work).

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[17] High Court Rules, r 14.2(b).

[29] Bearing those matters in mind, I have concluded that the reasonable time for completing discovery in this proceeding is 70 days, representing 35 percent of the actual days spent on discovery. Applying the applicable daily rate under category C, that results in an award of $205,800.

Preparation of agreed statements of facts

[30] At the start of the substantive hearing, Trustpower produced, by consent, a folder of agreed statements of facts (ASoF) for each of the four projects in dispute. These, and the process of preparing them, were described by Mr Palmer in his affidavit of 7 February 2014 as follows:

> The ASoF set out the various work streams undertaken by consultants in relation to the four projects in dispute and the underlying engagement/instruction documents relating to that work. The relevant consultants were identified using the invoices in dispute and interviews with Trustpower employees involved in the development of the projects. Trustpower's legal advisers reviewed all the potentially relevant documents (identified by a combination of both hardcopy and electronic searches) for the consultants that had worked on each project and created a summary. This was then confirmed with Trustpower staff (and former employees when relevant).
>
> At the request of the Commissioner, Trustpower verified the entries in respect of two consultants per project with the relevant third party service provider to ensure that the ASoF contained an accurate description of the work carried out and on what terms. The original intention of the ASoF was to replace the need to locate, discover and then work through all of the engagement documents at trial. …

[31] Ms Armstrong submitted that preparation of each of the agreed statements of facts was a very involved and extensive process, resulting in four statements comprising in total 186 pages. She further submitted that the Commissioner had properly acknowledged that they added value for the parties and the Court, and that an allocation of time should be made for them.

[32] Using the same methodology as for discovery, Trustpower calculated that 110.8 days were spent on preparing the agreed statements of facts. Trustpower seeks an order for 55.4 days, at the category 3 daily recovery rate, being a total of $162,876.00. She submitted that Trustpower's claim is a reasonable and pragmatic

approach to calculating the Commissioner's proper contribution to the costs of this task.

[33] Mr McLellan submitted that the Commissioner's suggested 20 days ($58,800) was appropriate for the preparation of the agreed statements of facts. In essence, the Commissioner's submissions opposing Trustpower's discovery claim applied also to Trustpower's claim in relation to the agreed statements of facts.

[34] As noted earlier, Schedule 3 does not contain an item specifically relevant to preparing agreed statements of facts. However, item 36 allows time to be allocated (as allowed by the court), for "other steps in proceeding not specifically mentioned". I accept that the agreed statements of facts were prepared with the Commissioner's knowledge and involvement, and that they were of value both to the parties and to the court. I am satisfied that preparation of the agreed statements of fact is a "step in the proceeding" which is not specifically mentioned in Schedule 3, and that there should be a time allocation for that work.

[35] There is no analogous step in Schedule 3 and so in determining a reasonable time, regard must be had to the actual time spent in preparing the greed statements of facts.[18] I have concluded that a reasonable time allocation for preparing the agreed statements of facts is 40 days which, when the category 3 daily recovery rate is applied, results in an award of $117,600.

Preparation of briefs of evidence

[36] Pursuant to Schedule 3, item 30, the time allocation for preparing briefs of evidence in a band C proceeding is five days. Ms Armstrong submitted that Russell McVeagh spent 89.7 days preparing briefs of evidence. Trustpower seeks a time allocation of 39.85 days, being half of the time actually spent, minus the five days allowed under the scale.

[37] Ms Armstrong submitted that an allocation of time substantially over the scale is justified on the basis of the work required to brief four witnesses of fact and

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[18] High Court Rules, r 14.5(1)(b) and (c).

one expert witness.[19] The 300 pages of briefs of evidence covered an extensive and technical range of topics, and referred to a large number of documents.

[38] Mr McLellan submitted that the proper allocation of time is 14 days. In particular, he submitted that no time allocation should be given for the primary briefs of evidence of Dr Harker and Mr Kedian, although he submitted that an allocation should be made of 1.5 days each, for their reply briefs. The reason for submitting there should be no allocation for the primary briefs of evidence was that draft witness statements for each had been provided to the Inland Revenue Adjudication Unit, as part of the earlier disputes process. Referring to Mr Palmer's statement in his affidavit of 7 February 2014 that "there was essentially no difference between how Trustpower's business was described in those draft witness statements, in Trustpower's pleadings, and in the evidence of Dr Harker and Mr Kedian at trial", Mr McLellan submitted that the briefs of evidence were a duplication.

[39] Mr McLellan submitted that the proper time allocation for other briefs of evidence was: Mr Campbell, 5 days; Mr Palmer, 3 days; and Mr Hagen (an expert witness), 3 days.

[40] In response to Mr McLellan's submissions concerning the evidence of Dr Harker and Mr Kedian, Ms Armstrong submitted that while the briefs of evidence were consistent with the earlier draft statements, there was no duplication of work. Substantial further work was required to brief and prepare their evidence to respond to the Commissioner's change in position from asserting at the adjudication stage that Trustpower was committed to each of the four projects, which was rejected in the adjudication report, to asserting at trial that the resource consents applied for by Trustpower during the feasibility process were stand-alone capital assets. Ms Armstrong further submitted that Trustpower had not claimed in respect of any work done at the time of the disputes process. Trustpower is not seeking to recover twice.

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[19] Mr Freeman, who was called to give evidence as an accounting/audit expert, appeared under subpoena, so no brief of evidence was prepared.

[41] I accept Trustpower's submission that there is no duplication of work, and that the briefs of evidence of Dr Harker and Mr Kedian required a substantial amount of work, as did those of Mr Campbell and Mr Palmer. That work was necessary so that Trustpower met its burden of proof. It will be recalled that I noted in the substantive judgment, at [30], that "the Commissioner put in issue (by denying or asserting having no knowledge of allegations) the majority of Trustpower's allegations."

[42] I accept that the nature of the proceeding was such that the time required by Trustpower for this step substantially exceeded the time allocated under band C. I have concluded that the reasonable allocation of time is as follows: Dr Harker, 7 days; Mr Kedian, 7 days; Mr Campbell, 7 days; Mr Palmer, 5 days; Mr Hagen, 3 days. When the category 3 daily recovery rate is applied to the total allocation of 29 days, the resulting order is $85,260.

Preparation for trial

[43] Pursuant to Schedule 3, item 33, five days is allowed for preparation for trial in a band C proceeding. Ms Armstrong submitted that Russell McVeagh had spent 116.2 days preparing for trial. Trustpower seeks an order for costs for 53.1 days, being half of the time actually spent, less the five days allocated under the scale.

[44] Ms Armstrong submitted that significant work was required in respect of the preparation of comprehensive chronologies (an agreed chronology was prepared for each project), land access schedules (again, for each project), preparation for cross-examination of witnesses, and document organisation and management. Ms Armstrong stressed that (as was the case in respect of Trustpower's other claims) the time spent by Russell McVeagh did not include any attendances by senior counsel.

[45] Ms Armstrong further submitted that the substantial number of documents included in the common bundle (which comprised some 60 Eastlight folders) and the need to deal with issues raised by the Commissioner's expert witnesses in their briefs of evidence, impacted on the time spent preparing for trial.

[46] Mr McLellan submitted that 20 days is a reasonable allocation for trial preparation. He referred me to the Rules Committee Consultation Paper on time allocations and daily recovery rates, dated 7 September 2011.[20] He referred in particular to paragraph 7 of the paper, which refers to preparation for trial. The paper notes that under the then current Schedule 3, trial preparation was allowed on the basis of two days preparation for each day of trial. The Rules Committee suggested that preparation for trial be provided for as a specified time allocation, rather than by reference to trial duration. Mr McLellan submitted that the allocation of five days under item 33 (inserted as from 14 June 2012 pursuant to r 5 of the High Court Amendment Rules 2012), was fresh at the time of the trial of this proceeding. He submitted that this is further reason for exercising caution as to Trustpower's claim.

[47] Both counsel referred to the judgment of Dobson J in *Sovereign Assurance Co Ltd v Commissioner of Inland Revenue*, in which his Honour considered a claim made by the Commissioner for trial preparation costs.[21] In that case, the Commissioner claimed for 60 days for trial preparation (which was specified as comprising "26 days for each of preparation of briefs of evidence and preparation for trial, plus eight days for preparation of the common bundle").[22] The Commissioner indicated that 100 days had actually been spent on the exercise. His Honour allowed 50 days, but did not specify the particular award for trial preparation. In allowing 50 days, his Honour noted the complexity of the issues involved ("the arcane practices involved in reinsurance, and applying those to the arcane accruals rules").[23]

[48] In the course of Mr McLellan's submissions I raised with him the fact that this proceeding involved four separate, and factually very different projects, and whether that would have any impact on the determination of costs, particularly with respect to preparation for trial. Mr McLellan's response was that there was a distinct commonality between the two wind projects and the two hydro projects, and that the basic issue for trial (as to the tax treatment of expenditure on obtaining resource

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20 Rules Committee "Proposals for Reform of Schedule 3 High Court Rules (Time Allocations) and Review of Schedule 2 High Court Rules & Schedule 2 District Court Rules (Daily Recovery Rates)", issued 7 September 2011.

21 *Sovereign Assurance Co Ltd v Commissioner of Inland Revenue* [2012] NZHC 3573.

22 At [11].

23 At [12].

consents) was common to all four. He pointed out that in the substantive judgment, I reached the same conclusion in respect of all four projects.

[49] I take Mr McLellan's points as to exercising caution before ordering costs above scale, and in relation to the substantive judgment. However, the determinations required in this proceeding (that is, whether the resource consents were stand-alone assets; and if so, whether they were capital or revenue assets) were fact-specific. Because factual matters were put in dispute, the particular facts for each project had to be considered and determined.[24] For that reason, while I would not go so far as to say that the reasonable time allocation for preparation for trial should be arrived at as if there were four trials, not one, preparation in this case was necessarily extensive.

[50] I have concluded that the nature of the proceeding was such that the time required by Trustpower substantially exceeded the time allocated under band C, and a reasonable time allocation for preparation for trial is 30 days. Applying the category C daily recovery rate results in an award of $88,200.

Trustpower's claim for increased costs under r 14.6(3)(b)

[51] As noted at [9], above, Trustpower sought (in addition and in the alternative) an order for increased costs on the grounds that the Commissioner contributed unnecessarily to the time and expense of the proceeding.

[52] For Trustpower, Mr Harley submitted that the Commissioner's conduct in the litigation is an important and relevant consideration in the costs application. He submitted that, from the outset of the litigation, the Commissioner had taken an overly expansive and undiscriminating approach to the factual matters she chose to put in dispute, and had failed to accept incontrovertible facts. This approach contradicted express and implied factual findings and determinations in the adjudication report.

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[24] See the Appendix to the judgment, setting out a description and chronology of each project.

[53] Mr Harley submitted that the efforts Trustpower was required to go to as a result of the Commissioner's approach, and the associated cost and expense of placing extensive documentary material and factual evidence before the Court was unjustified and excessive on any reasonable measure. This was because every aspect of Trustpower's feasibility analysis process was in issue on the pleadings, notwithstanding that the adjudication report had earlier accepted Trustpower's position.

[54] Mr Harley referred me to a letter from Russell McVeagh to Crown Law dated 22 December 2011, in which Russell McVeagh set out "key areas" in which the Commissioner's statement of defence dated 13 December 2011 directly contradicted the evidence expressly or implicitly accepted by the Commissioner in the adjudication report. The letter concluded by expressing the view that the Commissioner's approach amounted to an abuse of process, and stating that if the Commissioner continued to defend the proceeding on that basis, Trustpower would seek increased or indemnity costs at trial in respect of those significant areas of factual dispute.

[55] A further aspect of the Commissioner's conduct of the proceeding referred to by Mr Harley was her approach to expert evidence. Russell McVeagh had recorded its concerns in relation to evidence as to the value of resource consents in a letter to Crown Law dated 27 October 2012. Mr Harley submitted that Russell McVeagh's observations had proved to be prescient as Professor Evans, the witness called by the Commissioner, could not provide evidence as to a monetary value, and had come close to admitting that some resource consents may have a negative value.

[56] In the same letter, Russell McVeagh expressed concern at the Commissioner's intention to call evidence as to the resource management consenting processes, observing that, as the issue is fact-specific to Trustpower, an expert witness was unlikely to be able to add any value.

[57] Mr Harley submitted that Crown Law's response, on 19 March 2013, was simply to the effect that the evidence would be called, and did not engage with the question whether it would be useful. He referred to Russell McVeagh's further letter

of 11 April 2013 (following a meeting with Crown Law) reiterating their concern as to the intended valuation and consent process evidence.

[58] Mr Harley further submitted that novel and unforeshadowed arguments had been raised in the evidence of Mr Hucklesby, who was called to give expert accounting evidence for the Commissioner. He raised issues as to Trustpower's accounting treatment of costs incurred in relation to the projects, and asserted that Trustpower's financial statements were misstated and inappropriately biased. Mr Harley submitted that this made it necessary for Trustpower to call evidence from Mr Freeman, the senior audit partner at PricewaterhouseCoopers, which firm had audited Trustpower's financial statements during the years in question.

[59] Mr McLellan rejected Mr Harley's criticisms. He first submitted that the adjudication report was non-binding. However, he submitted, the Commissioner had accepted the central feature of the report, that Trustpower had not committed to proceeding with the projects themselves, and it was open to the Commissioner to defend the proceeding on the basis that expenditure on resource consents was on capital account. He submitted that the Commissioner's pleadings were detailed and responsive, and left no room for doubt as to the central issue. It was open to the Commissioner to put Trustpower to proof on factual matters relevant to whether expenses incurred in obtaining resource consents were capital or revenue.

[60] Mr McLellan further submitted that this was hard fought litigation on disputed facts, involving the application of established principles to a novel situation. He submitted that the parties' cases differed greatly as to the legal relevance of Trustpower's pipeline argument. He further submitted that there is no basis to suggest that the Commissioner had required Trustpower to prove uncontroversial facts.

[61] Mr McLellan submitted that the evidence given by Professor Evans was directly on point, and relevant to the Commissioner's assertion, in her statement of defence, that the resource consents had a separate value, independent of the projects to which they related. He submitted that on the overall contest as to whether the

expenses incurred in obtaining the resource consents were capital or revenue, it was, on the evidence, a reasonably close contest on which experts differed.

[62] Mr McLellan further submitted that the criticism of Mr Hucklesby's evidence was misplaced. While accepting that the nature of his evidence had not been detailed in advance, he submitted that there could be no complaint about that, when briefs of evidence are provided before trial. Further, there was no objection to Mr Hucklesby's evidence before trial. There was nothing unnecessary, irresponsible, or out of the way in calling his evidence.

[63] As noted at [7], above, an award of costs under r 14.6(3)(b) can be made in addition to an award of increased costs under r 14.6(3)(a). In *Todd Pohokura Ltd v Shell Exploration NZ Ltd*, Dobson J applied an uplift of ten per cent from the 3C scale on account of the mode of conduct of Todd's case, which had unnecessarily contributed to the expense of the proceeding, in addition to the uplift of 30 per cent warranted by the breadth and complexity of the issues.[25]

[64] In this case, I accept that the Commissioner's approach warrants an additional uplift. Determination of the central issue as to whether expenditure on the resource consents was capital or revenue did not require the Commissioner to put Trustpower to proof on the majority of the allegations in its statement of claim. I referred in the substantive judgment to the Commissioner's denial of Trustpower's allegation of a three-step feasibility process (and positive assertion of a four-phase 24-step process). I accept Mr Harley's submission that other examples can be given of the Commissioner's pleadings denying, or asserting no knowledge of and therefore denying, allegations of factual matters which had been accepted in the adjudication report. The extensive evidence given by Dr Harker, Mr Kedian, and Mr Campbell was required to deal with those matters. I accept Mr Harley's submission that in large part, they were required to give evidence as to matters which had been accepted by the Commissioner in the adjudication report.

[65] I also accept that the Commissioner's approach to the litigation was demonstrated in relation to discovery. While it can be acknowledged that a litigant

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[25] *Todd Pohokura Ltd v Shell Exploration NZ Ltd,* above n 13 at [14] and [22].

in the position of the Commissioner "does not know what she does not know", I accept the force of Trustpower's submission that the breadth and extent of discovery was considerably greater than necessary. So, too, was the common bundle. It is fair to say that only a very small number of documents were referred to out of the 60 Eastlight folders of documents presented in Court. The overwhelming majority were never referred to.

[66] To some extent, the awards made in respect of discovery, preparing the agreed statements of facts and briefs of evidence, and preparing for trial have addressed the Commissioner's conduct. However, I have concluded that an uplift of ten per cent on each of those individual awards is warranted.

Trustpower's claim for disbursements

[67] Pursuant to r 14.12(2), disbursements (that is, expenses paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional fees in a solicitor's bill of costs)[26] must, if claimed and verified, be included in the costs awarded in the proceeding to the extent that they are:

(a) approved by the Court for the purposes of the proceeding, or specified in r 14.12(1)(b);

(b) specific to the conduct of the proceeding;

(c) reasonably necessary for the conduct of the proceeding; and

(d) reasonable in amount.

[68] The Commissioner challenges Trustpower's claim in respect of witness expenses for Mr Freeman and Mr Kedian, the fees paid to PricewaterhouseCoopers for forensic litigation support (in relation to discovery), and travel and accommodation costs for Trustpower's senior counsel, Mr Harley.

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[26] High Court Rules, r 14.12(1)(a).

Witness expenses

[69] I note, first, that there is nothing in r 14.12 that restricts claims for witnesses' expenses to those of expert witnesses. There is no definition of "witness" restricting it to expert witnesses. The only reference to expert witnesses is in r 14.12(5) which provides:

> When considering whether a disbursement paid or payable for an expert witness' fee or expenses is reasonable for the purposes of subclause (2)(d) a Judge or an Associate Judge may—
> (a) call for a report or an assessment from a professional organisation or otherwise; and
> (b) make any incidental order considered just, including an order as to the cost of that report or assessment.

[70] Plainly, r 14.12(5) cannot be construed as restricting recovery of witnesses' expenses to those of expert witnesses.

[71] Secondly, it is clear that a party claiming disbursements which meet the criteria set out in r 14.12(2) is entitled to recover actual expenses. The predecessor of r 14.2 (r 48H), which was inserted in 2002, overruled previous authorities to the effect that there should be a less than full recovery.[27]

(a) Mr Freeman

[72] Mr Freeman gave expert evidence as an auditor and accountant. In order to comply with External Reporting Board Regulations (under the Financial Reporting Act) Mr Freeman gave evidence under subpoena. Trustpower incurred costs of $48,690 for fees rendered by Mr Freeman, relating to his review of briefs of evidence of the Commissioner's witnesses in relation to issues raised by Mr Hucklesby as to the accuracy of Trustpower's accounting for resource consent costs, preparing to give evidence, and attending at Court to give evidence. As a subpoenaed witness, there was no brief of Mr Freeman's evidence.

[73] Mr McLellan submitted that, as Mr Freeman had not been required to prepare a brief of evidence, the claim for reimbursement of his fees should be disallowed. He further submitted that Mr Freeman's evidence was unnecessary (in particular,

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[27] See *Air New Zealand Ltd v Commerce Commission* [2007] NZCA 27, [2007] 2 NZLR 494 (CA) at [47]-[48].

because Mr Hagen was also called by Trustpower to give expert accounting evidence) and was not of substantial help.

[74] In large part, Mr McLellan's submissions reflected those he made when challenging the admissibility of Mr Freeman's evidence. They were rejected in an oral ruling on 20 August 2013.[28] In that ruling I accepted that Mr Freeman's evidence was likely to be of substantial help in determining the issues arising in the proceeding.

[75] I have reviewed the transcript of Mr Freeman's evidence. His examination-in-chief, in large part, focused on establishing the independence of two opinions provided to Trustpower concerning issues raised by the Commissioner, which put in issue whether Trustpower's accounting treatment of the costs of obtaining resource consents was correct.[29] The opinions themselves were before the Court.

[76] I am satisfied that Mr Freeman's evidence was reasonably necessary for the conduct of the proceeding, that his expenses were for the purposes of, and specific to, the conduct of the proceeding, and reasonable in amount. I allow Mr Freeman's expenses of $48,690.

(b) Mr Kedian

[77] Mr Kedian was formerly General Manager, Generation, of Trustpower. He retired on 1 April 2011 and has since worked on his own account as an engineering consultant. He was engaged by Trustpower and gave extensive factual evidence as to Trustpower's business, the feasibility analysis process, and the four projects. He charged for his attendances at $200 per hour. His charges totalled $67,640.

[78] Mr McLellan submitted that as a witness of fact, Trustpower cannot claim Mr Kedian's fees as a disbursement. He submitted that r 14.12 only allows for expert witnesses' fees to be claimed as a disbursement. Mr McLellan further submitted that

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[28] See *Trustpower Limited v Commissioner of Inland Revenue* Oral Ruling (Reasons) (No. 2) HC Auckland CIV-2011-404-7140, 21 August 2013.

[29] It will be recalled that the manner of accounting treatment of expenditure is one of the indicia set out in *BP Australia Ltd v Commissioner of Taxation for the Commonwealth of Australia* [1966] AC 224 (PC) for determining whether expenditure is capital or revenue.

Mr Kedian could readily have been subpoenaed, and thus compelled to attend but not required to prepare a brief of evidence.

[79] Ms Armstrong acknowledged that factual evidence would usually be given by a party, or employees of a party – as here, in the case of Dr Harker and Mr Campbell. However, Mr Kedian had had a crucial role in respect of the projects in dispute. He had authored or received a number of documents relied on by the Commissioner. He was the most appropriate witness to give his evidence. As he was no longer an employee of Trustpower, he was entitled to charge, as a professional, for his attendances, and Trustpower was entitled to recovery under r 14.12.

[80] I reject Mr McLellan's submission that r 14.12 allows recovery of expert witnesses' expenses, only. As noted earlier, there is nothing express or implicit to that effect in the rule. In *Harper v Beamish*, Gendall J observed that, under r 14.12, "witnesses' expenses, including the fees of expert witnesses, are disbursements."[30] In *Body Corporate 396711 v Sentinel Management Ltd*, Woolford J allowed payment of fees charged by a factual witness, noting that "while Mr Plummer was not an expert witness, he was a professional person entitled to charge the plaintiffs for his time."[31]

[81] I also reject Mr McLellan's submission that Mr Kedian "could readily have been subpoenaed". Mr Kedian's evidence was extensive, and he referred to a large number of documents. His brief of evidence comprised 150 pages. The Court and the parties were substantially assisted by having the brief of evidence. The submission that Mr Kedian "could readily have been subpoenaed" lacks reality.

[82] I am satisfied that Mr Kedian's evidence was necessary for the conduct of the proceeding. It was referred to extensively in the substantive judgment. Further, I am satisfied that the expenses incurred in relation to Mr Kedian's evidence were for the purposes of the proceeding, were specific to the conduct of the proceeding, and reasonable in amount. I allow Mr Kedian's expenses of $67,640.

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30 *Harper v Beamish* HC Napier CIV-2009-441-636, 27 March 2012 at [16].
31 *Body Corporate 396711 v Sentinel Management Ltd* [2012] NZHC 2556 at [30].

Litigation support

[83] Trustpower engaged a specialist PricewaterhouseCoopers team ("the PwC team") to provide expert information technology assistance and support for the process of discovery. Mr Palmer described the work done by the PwC team in his affidavit of 7 February 2014. He said that he Commissioner had raised concerns in late July 2012 as to the robustness of Trustpower's discovery process, on the basis that "you don't know what you don't know". Mr Palmer said that the PwC team was engaged to address the Commissioner's desire for a robust and transparent search and collection process to support the tailored discovery approach. He also noted that Russell McVeagh had kept the Commissioner appraised of the steps taken in the discovery process.

[84] Mr Palmer further said that there is no way that Trustpower could itself have searched across the volume of material collected from Trustpower using its own IT infrastructure. Even if its own IT systems had been sufficient for the task, Trustpower did not have a permanent staff member with the necessary level of expertise to carry out the sophisticated searches that PwC were able to carry out. Had they been able to hire somebody with that expertise, Trustpower would not have been able to give the assurance as to the robustness of the process that PwC could give.

[85] Trustpower claims recovery of $112,268 in relation to this work.

[86] Mr McLellan submitted that this could not be claimed as a disbursement. He first submitted that it was Trustpower's choice to outsource the work, rather than do it internally. Had the work been done internally, no disbursement could have been claimed. Secondly, he submitted that it is necessary to distinguish between charges related to *extracting* documents for listing (which cannot be claimed as a disbursement) and the process of *listing* them.

[87] In *Todd Pohokura Ltd v Shell Exploration (NZ) Ltd*, Dobson J commented:[32]

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[32] *Todd Pohokura Ltd v Shell Exploration (NZ) Ltd*, above n 13, at [64]-[65].

> [64] … The cost of complying with discovery obligations in complex commercial cases, and then efficiently keeping track of discovered and inspected documents through subsequent stages of the litigation, is a formidable challenge. Disproportionate costs for this aspect of litigation have been identified as discouraging formal, principled resolution of genuine disputes that involve burdensome volumes of documentary records.
>
> [65] Rules on the scope and manner of completing discovery need to keep pace with the form in which records are kept. Innovation in that regard ought to be encouraged, and can justify reimbursement of disbursements reasonably incurred in such attempts. In other contexts, it may be necessary for a claimant to establish that the extent of such contractual costs represented an efficient solution in terms of cost, and caution is required in not giving credit twice, under both the costs allowance and recognition of such outsourcing costs. …

[88] His Honour went on to observe that claiming such costs should "reasonably be offset against what might otherwise be a claim in the fees component of a costs claim, for increased allowance for an unusually large discovery and inspection task". In that case, his Honour applied such an offset.[33]

[89] I have made a significant order for Trustpower's costs in relation to listing documents on discovery. I therefore approach the claim for recovery of the PwC litigation support expenses with caution. In the end, I have concluded that the engagement of PwC was in relation to work that was distinct from that undertaken by Trustpower. Furthermore, the PwC work was of distinct benefit to both Trustpower and the Commissioner, as it produced a robust product by way of a transparent process. I am satisfied that the disbursement was for the purposes of the proceeding, specific to and reasonably necessary for the conduct of the proceeding, and, without reference to the award already made for increased costs for discovery, reasonable in amount.

[90] I am satisfied that the Commissioner should be required to contribute to these costs. However, bearing in mind the award already made, I have concluded that the Commissioner should be ordered to pay half of the costs of PwC's litigation support. I order payment of $56,134.

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[33] See [23] and [66].

Counsel's travel and accommodation expenses

[91] Mr McLellan accepted that the Commissioner could be ordered to meet these costs, insofar as they related to the trial. He submitted that Mr Harley's invoices did not allow the trial costs to be distinguished from other costs. He gave as an example Mr Harley's having attended at Trustpower board meetings. These costs, he submitted, were not properly related to the proceeding, so could not be recovered.

[92] Ms Armstrong submitted that all of Mr Harley's attendances (including at Trustpower board meetings) were for the purposes of the proceeding. In any event, Mr Harley had used his travel to Trustpower's offices in Tauranga for the purpose of briefing witnesses, as well as reporting to the Trustpower board.

[93] In his affidavit of 7 February 2014, Mr Palmer noted that:

> Trustpower was invoiced in excess of $35,307.13 by Dr Harley for travel and accommodation expenses incurred in relation to the proceeding. The full amount invoiced for these costs is unclear as the costs were not broken out in a number of the earlier invoices Trustpower received. Only those costs that were included in invoices as identifiable line items have been claimed by Trustpower.

[94] I am satisfied that Mr Harley's travel and accommodation expenses were incurred for the purposes of the proceeding, and were specific to, and reasonably necessary for, the conduct of the proceeding, and reasonable in amount. I allow the disbursement of $35,307.

Summary of orders

[95] I have ordered the Commissioner to pay costs to Trustpower, in respect of the items in dispute, as follows:

(a)	Listing documents on discovery:	$205,800
(b)	Preparation of agreed statements of facts:	$117,600
(c)	Preparation of briefs of evidence:	$85,260
(d)	Preparation for trial:	$88,200

(e)	Uplift on each of the above four orders:	10%

I have ordered that the Commissioner is to pay Trustpower, by way of recovery of disbursements, in respect of the disputed disbursements, as follows:

(a)	Mr Freeman:	$48,690
(b)	Mr Kedian:	$67,640
(c)	PwC litigation support:	$56,134
(d)	Mr Harley's travel and accommodation:	$35,307

[96] My preliminary view as to costs in respect of this application is that Trustpower is entitled to costs on a 2B scale. I encourage the parties to agree as to the quantum of such costs. Should costs not be agreed, memoranda may be filed.

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Andrews J