IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-2138
[2015] NZHC 470

BETWEEN	AUCKLAND WATERFRONT DEVELOPMENT AGENCY LIMITED	
	Plaintiff	
AND	MOBIL OIL NEW ZEALAND LIMITED	
	Defendant	

Hearing: On the papers

Counsel: M C Smith for Plaintiff
P Rzepecky and J Greenwood for Defendant

Judgment: 13 March 2015

JUDGMENT OF KATZ J
(Costs)

This judgment was delivered by me on 13 March 2015 at 4:00 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Solicitors: Gilbert/Walker, Auckland
Greenwood Roche Chisnall, Wellington

Counsel: P Rzepecky, MGP Chambers, Auckland

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Introduction

[1] From the 1950s until 2011 Mobil Oil New Zealand Limited ("Mobil") leased two properties in the tank farm at the western end of the Port of Auckland. When Mobil's leases came to an end a dispute arose as to whether Mobil was contractually obliged to decontaminate the subsurface of the land.

[2] In a judgment dated 7 February 2014, I found that Mobil was not contractually obliged to decontaminate the subsurface of the land. It had not, however, been necessary for me to consider quantum issues. That was because, during the first week of trial, the parties had agreed that if Mobil were found liable, it would pay Auckland Waterfront Development Agency ("AWDA") $10 million in damages.

[3] Following the release of my substantive judgment the parties were unable to agree the issue of costs. Mobil now seeks costs and disbursements totalling $1,416,591.32. AWDA accepts liability for $276,730.26 of that sum.

[4] The parties are in agreement that the litigation was complex and time consuming and that category 3C is generally appropriate, with some matters being dealt with as category 3B. There is disagreement, however, on a number of matters. As a result, I must determine the following key issues:

(a) What are the appropriate costs in respect of Mobil's application for further particulars dated 11 April 2013?

(b) Can Mobil claim a time allocation of ten days for work undertaken by its lawyers on electronic discovery?

(c) Are Mobil's lawyers' costs of attendance at experts' meetings and preparing for those meetings recoverable?

(d) Should a significant uplift to scale costs be allowed for hearing preparation and preparation of briefs of evidence?

(e) What level of expert costs is Mobil entitled to claim as a disbursement?

(f) Should Mobil be able to recover the costs of contracting out electronic discovery to E-Discovery Consulting Limited ("E–Discovery Limited") and Law in Order Limited ("Law in Order"), as a disbursement?

[5] These questions fall into three broad categories: (a) to (c) into scale costs issues, (d) into increased costs issues, and (e) to (f) into disbursement issues. I will deal with each issue in turn.

What are the appropriate costs in respect of Mobil's application for further particulars?

[6] Mobil originally claimed costs of $11,687 in relation to its application for further particulars dated 11 April 2013. AWDA disputed that amount on the basis that the application was dealt with in a commercial list call along with other case management steps and was ultimately resolved by agreement.

[7] In Mobil's reply memorandum it reduced the claimed costs to $5,439, as a compromise. However, Mobil submits that it was forced to file the application, as AWDA would not provide the particulars sought. The application was dealt with as a fixture following initial callover in the Commercial List. AWDA's senior counsel appeared to oppose the application and made submissions. Over the course of the submissions and following comments from the Judge, AWDA conceded and agreed to provide the particulars.

[8] In my view scale costs of $5,439 are appropriate in respect of this application, in light of the attendances that were necessary to resolve the issue.

Can Mobil claim a time allocation of ten days for work undertaken by its solicitors on electronic discovery?

[9] Mobil's claim for scale costs for its first two lists of documents is not disputed. Its claim for ten days for its third list of documents, comprising its

electronic discovery, is disputed. Mobil claims for its electronic discovery as a separate item under Schedule 3, item 36. That item provides for "other steps in proceedings not specifically mentioned...As allowed by the Court".

[10] I accept AWDA's submission that electronic discovery is not an "other step" in the proceeding. That provision is a catch-all provision, intended to cover steps not already covered by the rules. Discovery (whether electronic or hard copy) is covered by the rules. The normal 3C allowance for a list of documents is seven days.

[11] Mobil submits that, if I find that electronic discovery was not an "other step" in the proceeding, I should uplift the time allowance for the third list of documents from seven days to ten days. I am satisfied that such an uplift is appropriate. The electronic discovery exercise was clearly a very significant one. The solicitors' time involved in the process would have substantially exceeded the seven days allowed for a list of documents under band C. An uplift is accordingly appropriate under r 14.6(3)(a).

[12] Mobil is accordingly allowed the ten day allocation it seeks for electronic discovery ($29,400).

Are Mobil's lawyers' costs of attendance at experts' meetings and preparing for those meetings recoverable?

[13] Mobil seeks to recover, as a disbursement, almost all of the sums it has paid to four consultancy firms that were involved in the preparation of Mobil's expert evidence. That claim is addressed at [30] to [62] below.

[14] In addition, Mobil claims the costs of its lawyers in preparing for and attending various experts' meetings. As there is no specific item covering such attendances, Mobil claims this as an "other step" under the rules. In particular, it claims a total of ten and a half days at 3C rates, amounting to $30,870. This comprises three and a half days of attendance at the meetings, and seven days preparation.

[15] Mr Wijnand Udema, the Environment Team Leader at GHD Limited ("GHD"), provides evidence in support of this aspect of Mobil's claim. Mr Udema was responsible for coordinating Mobil's team of specialists in the provision of expert evidence regarding the extent of subsurface contamination and the remedial steps required. He deposes that, following the exchange of evidence, Mobil's team of experts participated in four meetings with AWDA's experts to attempt to agree on any common ground and to identify the extent of continuing disagreement. The experts worked with Mobil's lawyers at the outset to identify the differences, noting 40 distinct areas in which there were significant differences in opinion between the two teams of experts as to the likely remedial specification and costs. With the input of the experts, Mobil's lawyers prepared extensive agendas and schedules to reflect those issues.

[16] AWDA disputes that these costs should be awarded. AWDA accepts that expert meetings occupying three and a half days took place, and that they were also attended by the parties' legal representatives. While r 9.44 provides for the Court to order such conferences, the standard costs schedule in the High Court does not provide for any costs award in respect of this step. No costs should accordingly be awarded.

[17] In the alternative, AWDA submits that if an award is made, it should be for attendance at the meetings only. It says that as the meetings took place after the exchange of briefs and in close proximity to trial there ought not to have been the need for separate extensive preparation as claimed by Mobil.

[18] Rule 9.44, which provides that the Court may direct a conference of expert witnesses, is silent on the issue of costs (other than when an independent expert is appointed). Item 36 of Schedule 3 of the Rules provides for costs for "other steps in proceeding not specifically mentioned" to be awarded, as allowed by the court. Ultimately the issue is what is fair and reasonable, in all the circumstances of the case.

[19] I have concluded that provision should be made for the costs of the lawyers' attendance at the experts meetings. Mobil's legal team clearly played a valuable role at those meetings. I accept AWDA's submission, however, that as the meetings took place after the exchange of briefs and in close proximity to trial there will have been significant overlap with the costs of trial preparation. As I propose to allow a significant uplift for trial preparation, I have concluded that no separate costs allowance should be made for preparation for the experts' meetings.

[20] I accordingly allow three and a half days for the attendance of Mobil's legal team at the expert meetings, totalling $10,290.

Should increased costs for trial preparation and briefs of evidence be allowed?

Increased costs - legal principles

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

(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)); and

(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)).

[22] In *Holdfast NZ Limited v Selleys Pty Ltd*, the Court of Appeal provided the following guidance on the correct approach to an award of increased costs:[1]

(a) Step 1: categorise the proceeding under r 14.3.

(b) Step 2: work out a reasonable time for each step in the proceeding under r 14.5.

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1 *Holdfast NZ Limited v Selleys Pty Ltd* (2005) 17 PRNZ 897.

(c) Step 3: as part of the step 2 exercise a party can, under r 14.6(3)(a) apply for extra time for a particular step.

(d) Step 4: the applicant for costs should step back and look at the costs award it could be entitled to at this point. If it considers it can argue for additional costs under r 14.6(3)(b) (on the basis that a party has contributed unnecessarily to the time or expense of the proceeding) it should do so.

[23] As the learned authors of *McGechan on Procedure* state, in ordering increased costs, "the courts uplift from scale, it is not a question of awarding a percentage of actual costs".[2]

Should increased costs be allowed under r 14.6(3)(a)?

[24] Mobil claims 40 days for preparation of briefs and another 40 days for preparation for the hearing, on the basis that the reasonable time required for those steps would substantially exceed the time allocated under Band C. 3C scale costs would allow five days for each of those steps.

[25] AWDA says that the uplift sought by Mobil is excessive. It submits that the scale allowance already reflects that the proceedings were of a complexity or significance requiring counsel to have special skill and experience in the High Court and that the preparatory steps required a comparatively large amount of time. The nature of the evidence from the witnesses actually called during the six day trial was not such as to warrant any uplift above the usual 3C allowance. AWDA says that the increased preparation time sought by Mobil is out of proportion to the costs awards in other major commercial cases such as:

(a) *Todd Pohokura Ltd v Shell Exploration NZ Ltd*:[3] Dobson J allowed a total of 108 days preparation time for a 41.5 day trial of very significant legal and technical complexity. This amounted to about 2.5 days of preparation per day of trial.

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2 Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Westlaw) at [HR14.6.02(1)]. At [HR 14.6.02 (1)].

3 *Todd Pohokura Ltd v Shell Exploration NZ Ltd HC Gisborne* CIV-2006-485-1600, 1 July 2011.

(b) *Sovereign Assurance Company Ltd v Commissioner of Inland Revenue*:[4] The Court allowed 50 days for a 21 day trial (covering both briefs of evidence and trial preparation) again amounting to about 2.5 days per day of trial.

[26] AWDA submits that these cases effectively set the upper bench mark of what the courts have considered to be reasonable. Taking a similar approach in this case, AWDA says, would only justify a total of 15 days for trial preparation and briefs of evidence, based on the actual hearing time of six days.

[27] I note that *Todd Pohokura v Shell* was decided under the previous costs schedule, which allowed for two days of preparation time to be claimed for each day of hearing at the substantive trial. Under the current regime, however, 3C scale costs provide for a standard default allocation of five days each for preparation of briefs and preparation for hearing, regardless of the length of the hearing. That default position can be altered, however, to reflect what the Court considers to be reasonable in the circumstances of a particular case. In the case of long trials an adjustment will often prove to be necessary.

[28] In this case the actual length of the trial was only six days. The parties prepared, however, for a four week trial. Based on a four week hearing, which would have traversed highly complex expert evidence, it is my view that an uplift is warranted under r 14.6(3)(a). In my view a reasonable time allocation for trial preparation in this case is 15 days ($44,100) and a reasonable time allocation for preparation of briefs is also 15 days ($44,100).

Is any further uplift appropriate under r 14.6(3)(b)?

[29] Mobil seeks a further uplift from scale, on the basis that AWDA pursued an unrealistic claim of nearly $50 million. The parties ultimately settled the quantum issue. In such circumstances I accept AWDA's submission that it would be inappropriate to infer from the settlement that the claim originally pursued by AWDA was so unreasonable and unrealistic as to warrant an increase in costs.

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4 *Sovereign Assurance Company Ltd v Commissioner of Inland Revenue* [2012] NZHC 3573.

Disbursements – What level of expert costs is Mobil entitled to?

[30] Mobil claims $821,883.99 for expert witness' costs. AWDA appears to accept (although it is not entirely clear) that it is liable for costs amounting to $42,458.40 in respect of Mr Beattie and Ms Carlyon, who both gave evidence during the trial. If so, it is the balance of $779,425.59 that is in dispute.

Legal principles

[31] Rule 14.12 of the High Court Rules relevantly provides as follows:

> **14.12 Disbursements**
>
> (1) In this rule,—
>
> **disbursement**, in relation to a proceeding,—
>
> (a) means an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs; and
>
> (b) includes—
>
> (i) fees of court for the proceeding:
> (ii) expenses of serving documents for the purposes of the proceeding:
> (iii) expenses of photocopying documents required by these rules or by a direction of the court:
> (iv) expenses of conducting a conference by telephone or video link; but
>
> (c) does not include counsel's fee.
>
> **relevant issue**, in relation to a disbursement, means the issue in respect of which the disbursement was paid or incurred.
>
> (2) A disbursement must, if claimed and verified, be included in the costs awarded for a proceeding to the extent that it is—
>
> (a) of a class that is either—
>
> (i) approved by the court for the purposes of the proceeding; or
>
> (ii) specified in paragraph (b) of subclause (1); and
>
> (b) specific to the conduct of the proceeding; and
>
> (c) reasonably necessary for the conduct of the proceeding; and
>
> (d) reasonable in amount.

(3) Despite subclause (2), a disbursement may be disallowed or reduced if it is disproportionate in the circumstances of the proceeding.

[32] The expert costs sought by Mobil fall within the definition of disbursement in r 14.12(1). They do not, however, fall within any of the categories within 14.12(1)(b) and accordingly they need to be approved by the court under r 14.12(2)(a)(i). The court has a discretion to grant such approval if the following criteria are met:

(a) the disbursement is specific to the conduct of the proceeding; and

(b) the disbursement was reasonably necessary for the conduct of the proceeding; and

(c) the disbursement is reasonable in amount.

[33] The expert costs incurred by Mobil were clearly specific to the conduct of the proceeding. AWDA disputes, however, that they were reasonably necessary for the conduct of the proceeding and reasonable in amount.

The work undertaken by Mobil's experts

[34] Mr Cameron Taylor, a director of Mobil, deposes that the issues raised by AWDA's experts required GHD to ascertain the nature and extent of subsurface contamination in various areas (and at various depths) of the two sites. This necessitated a careful analysis of a significant volume of historic and current data from the sites, by experienced environmental scientists. Further, determining the relevant standards to which the sites would need to be remediated in order to meet the requirements of the various intended uses required detailed expert scientific analysis. Isolating the incremental costs of development attributable solely to hydrocarbon-derived contamination required expert opinion from specialists from a wide range of backgrounds. GHD accordingly took a multi-disciplinary approach and involved other experts as required.

[35] To undertake the relevant work, it was necessary to involve GHD personnel from Australia and also experts from outside GHD. In this regard experts were retained from Golder Associates, URS and Vuksich & Borich. A total of ten briefs of evidence relating to the remedial specification and estimated costs were prepared.

[36] Those in the GHD led team who prepared briefs of evidence for trial relied on others within their firms to provide support in a range of areas, including collection and analysis of data, review of previous site reports, research into scientific literature and regulatory standards, accessing council records of the two sites and the area, obtaining quotes for services relating to remedial specifications, and providing photographs, plans, maps and diagrams relating to the sites.

[37] Following the exchange of evidence, Mobil's team of experts participated in four meetings with AWDA's experts to attempt to agree common ground. Mobil's experts worked with Mobil's lawyers prior to those meetings to identify the differences between the experts. Opposing teams of experts worked through the specific issues at the meetings, with the help of a facilitator.

[38] It was then necessary for Mobil's lawyers to prepare revised briefs of evidence for all but two of the expert witnesses. In addition, Terry Small, a civil contracting engineer, prepared a draft brief when it became clear that differences in opinion between the two teams of experts as to the rate at which soil could be excavated and removed from the two sites gave rise to a difference in estimated costs of many hundreds of thousands of dollars.

[39] Mobil received reply briefs of evidence from AWDA's experts shortly before trial, and Mobil's solicitors instructed the GHD team led team to undertake a separate review of these. In addition, on the eve of trial, AWDA served expert briefs from two new witnesses in relation to issues not previously canvassed by experts by either team. Mobil did not agree with much of this evidence. It was therefore necessary to involve two further specialists, on an urgent basis to begin preparing evidence to address these issues.

[40] Mr Udema's affidavit annexes a schedule that sets out the names of the various staff involved in the GHD led team, their particular area of focus and their role within the team. Mr Udema also annexes a bundle of GHD's monthly invoices to Mobil's solicitors, together with the invoices of the other three consultancy firms and supporting time sheets. Mobil's lawyers have reviewed those timesheets and removed various items from them which, in their view, may not have been necessary for preparation of evidence.

[41] Mr Udema deposes that he has reviewed the GHD invoices (as marked up by Mobil's solicitors), and is satisfied that all remaining fees relate directly to the work described in his affidavit. He says that he has also reviewed the invoices of Golder Associates, URS and Vuksich & Borich. He confirms that the fees included in those invoices relate to the work undertaken by the GHD led team. He deposes that the fees of those three consultants are, in his view, reasonable for the work undertaken, in line with his experience of working in the industry. He is silent as to whether he believes that GHD's own fees are also reasonable, but I infer that he does.

Were the expert disbursements reasonably necessary for the conduct of the proceeding, and reasonable in amount?

[42] In order for the expert disbursements claimed to be recoverable Mobil must establish, on the balance of probabilities, that the particular attendance (or category of attendances) was reasonably necessary for the conduct of the proceeding and that the sum claimed for those attendances is reasonable in amount.

[43] Assessing the reasonableness of the costs charged by 51 different fee earners from four different firms is no easy task. Their relevant areas of expertise are wide ranging and highly specialised. They include planners, environmental scientists, engineers, a soil scientist and a hydrogeologist. Further, I face the difficulty that quantum issues settled during the first week of trial. I have not therefore heard the relevant evidence and cannot draw my own conclusions as to how helpful it was in determining the issues at trial. Nor have I even seen most of the expert briefs. I am therefore almost entirely dependent on the evidence filed by Mobil in support of its claim for disbursements in deciding whether the expert fees incurred were reasonably necessary and reasonable in amount.

[44] AWDA submits that the approach I should take to assessing the reasonableness of Mobil's expert costs should be similar to that taken to assessing the reasonableness of solicitor-client costs. There is some merit in that submission. On that basis, the following broad approach would be appropriate:[5]

(a) Determine whether a particular attendance (or category of attendances) was reasonably necessary for the conduct of the proceeding. This requires a sufficient description of the particular work undertaken. A supporting affidavit from an independent expert practising in the same field may be necessary or appropriate when the quantum claimed is significant.

(b) Consider the amount of time claimed for the relevant attendance (or category of attendances) and whether it is reasonable, allowing for the significance and complexity of the particular work. A table showing the various steps taken and the costs associated with each step may assist.

(c) Consider the hourly rate charged for each author and whether that is reasonable, relative to the experience of that author and the complexity of the work undertaken.

(d) Consider any additional evidence which is relied upon to show that the rate charged is a reasonable one (or that the overall costs are reasonable). Again, in some cases (such as where the quantum claimed is particularly large) it may be necessary to file a supporting affidavit from an independent person practising in the same field as the relevant expert(s), deposing that the hourly rates claimed are appropriate and in accordance with industry standards.[6]

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5 These steps are adapted from *Bradbury v Westpac Corporation* (2008) 18 PRNZ 859 (HC) at [207] – [214], *Crown Money Corp Ltd v Grasmere Estate Trustco Corp Ltd* (2008) 19 PRNZ 591 (HC) at [14] and *Re Medforce Healthcare Services Ltd (in liq)* [2001] 3 NZLR 145 (HC) at [27].

6 See for example *Re Medforce Healthcare Services Ltd (in liq)*, above n 5, at [27]. There, when assessing the reasonableness of liquidator's fees, the full Court endorsed as appropriate an affidavit from an experienced practitioner, not being a partner or associate of the liquidator concerned, deposing that the hourly rates were appropriate for the particular liquidator and his employees.

[45] AWDA submits that the evidence of Messrs Taylor and Udema is wholly insufficient to enable the court to undertake such an analysis. There is some force in that submission. Although Mr Udema annexes a large bundle of invoices and timesheets to his affidavit, there is little or no supporting analysis. There is no list of the hourly rates of the various fee earners, together with details of their seniority or experience. Nor is there any breakdown of the time taken in relation to the various stages of the expert evidence process. No independent supporting evidence is provided, despite the fact that the claim exceeds $800,000. Obviously, it is unlikely that one person would have been able to depose as to the reasonableness of the fees charged by all of the fee earners, across a range of specialties. Nevertheless, some independent evidence as to the usual basis on which such firms charge, what the normal range of hourly charge rates is, and whether the fees charged in this case appear to be reasonable, would have been helpful.

[46] My own attempt to analyse and, to some extent, reverse engineer the expert invoices raises more questions than it answers. For example:

(a) Three GHD invoices are marked up "at 150 per cent rates as agreed with Mobil and outlined in the GHD service agreement". I have not been provided with a copy of that agreement. Mr Udema deposes that:

> GHD and Mobil agreed that work undertaken by primary witnesses in preparing briefs of evidence and appearing in Court would be charged at a higher rate (50 per cent above normal rates).

No explanation is offered, however, as to why the Court should consider this to be reasonable. I am not satisfied that it is. Further, the relevant timesheets include time entries from people who do not appear to have been "primary witnesses", if that phrase is intended to refer to people who actually provided briefs of evidence.

(b) The GHD invoices have little separation of the disbursements required by the expert witnesses for photocopying and travel time, compared to the actual charges for their time. The timesheets have no total recording of the hours worked by the expert witnesses.

(c) There are inconsistencies in the hourly rates of some GHD fee earners (putting aside the invoices that were marked up to 150 per cent). For example Peter Nadebaum and Barry Mann have been charged out at different prices at different times. No explanation is given for this. Peter Nadebaum's rates appear to change regularly, with a wide variation.

(d) The hourly rates on GHD Invoice 5173512, dated 30/08/2013, are lower than that on other invoices. That invoice was described, however, as "at 100 per cent".

(e) Two documents headed 'Job Transaction Sheets' appear, somewhat randomly, in the midst of the bundle of GHD invoices. These appear to detail hours worked and charge out rates in relation to the expert work undertaken by GHD. The Transaction Sheets do not appear, however, to match the information in any particular invoice. Even more puzzlingly, the Job Transaction Sheets set out two different hourly rates for the relevant fee earners - a "cost price" and a "retail price". The retail price is about 25 per cent higher than the cost price. Both of these rates are, however, significantly less than the hourly rates that appear to have been charged to Mobil.

[47] Fortunately, the invoices provided by Golder, URS and Vuksich & Borich are somewhat more transparent, with consistent hourly rates charged throughout the relevant period (with one exception, whose charge out rate presumably increased due to a change in seniority).

[48] My analysis of the invoices that have been provided indicates that GHD charged a total of $578.305.33 for 1935.43 chargeable hours, resulting in an average charge out rate of $226. Golder charged a total of $138,869.60 for 687.55 hours work, resulting in an average hourly charge out rate of $157.70. URS charged a total of $60,217.80 for 185.75 hours work, resulting in an average charge out rate of $194.45. Vuksich & Borich charged $2,372.50 for 18.25 hours work, resulting in an average charge out rate of $130 per hour.

[49] I have no specific evidence before me as to the "normal" charge out rates for planners, environmental scientists, engineers, soil scientists or hydrogeologists. However the "average" hourly rates charged by the four firms do not appear to be obviously outside a reasonable range for highly qualified professionals (and their supporting fee earners). The fees of some individual fee earners do, however, appear to be on the high side. In particular, it appears that the charge out rate for one GHD fee earner was, at various times, $502, $539.45, $578, $791.59 and $809.17. This appears to be at the high end. Some explanation should have been provided for the variation, and why the charge out rates are reasonable. It is also difficult for me to assess whether the number of hours of work undertaken (2827) in the preparation of expert evidence ultimately comprising 256 pages was reasonable, on the information before me.

[50] Mobil bears the onus of satisfying me, on the balance of probabilities, that the expert disbursements it seeks to recover were reasonably necessary for the conduct of the proceeding and reasonable in amount. A significantly more detailed analysis, possibly along the lines set out at [44] above and supported by some independent evidence was appropriate. This is particularly so in circumstances where Mobil's costs claim dwarfs the quantum of many substantive claims heard in this Court and I have not had the benefit of hearing or reading the relevant evidence. Further, disclosure of the service agreement (on terms of confidentiality, if necessary) may well have been of assistance. I note that this document is expressly referred to in a number of invoices.

[51] On the basis of the information that has been provided, I am not satisfied that the entirety of the expert fees Mobil seeks to recover were reasonably necessary for the conduct of the proceeding and reasonable in amount. They may well have been, but the evidence before me is not sufficient to prove that to be so. A simple assertion from the leader of Mobil's team of experts that the fees charged are reasonable is insufficient, given the very large quantum of fees in issue. My own analysis of the expert invoices Mobil has provided has raised a number of queries and concerns.

[52] AWDA submits that if Mobil fails to satisfy me that $821,883.99 in expert costs is properly recoverable, then Mobil should be awarded nothing in respect of its expert costs. It has failed to discharge the onus of justifying its claim for expert costs, on the balance of probabilities.

[53] In my view such an approach is overly simplistic. It is often necessary in a costs context to take a pragmatic approach in order to ensure that justice is done between the parties. The court has an over-riding discretion on costs issues. I am satisfied that Mobil is entitled to be reimbursed for a significant portion of its expert costs, despite not proving that they are recoverable in their entirety. I take into account that the remediation issues were clearly very complex. Mobil had little or nothing to gain by investing in the preparation of evidence that was not necessary.

[54] I am satisfied that a reduction of 30 per cent of the total expert costs claimed would ensure that Mobil is only reimbursed for its necessarily incurred and reasonable expert costs. To the extent that there may be inefficiencies, duplication, charge out rates that are at the high end of industry norms, or unjustified uplifts (including those attendances charged at 50 per cent above normal rates) an overall reduction of 30 per cent should account for all those factors. Indeed a 30 per cent reduction is possibly on the high side. It is appropriate to err on the side of caution, however, given that Mobil carries the burden of proving the reasonableness of its expert disbursements, on the balance of probabilities.

[55] Applying a 30 percent reduction, I award $575,318.79 in respect of the expert witness disbursements claimed by Mobil.

Should the expert costs award be adjusted to reflect the fact that quantum issues settled during trial?

[56] AWDA originally claimed remediation costs of $50 million. This was subsequently revised downwards and in his brief of evidence Mr Moore of Tonkin & Taylor estimated that the remediation costs would be $40 million. Mr Udema, on the other hand, estimated on behalf of Mobil that remediation costs would be $5 million. The parties ultimately agreed, following extensive expert meetings, on a figure of $10 million.

[57] AWDA submits that any award in respect of expert costs should be reduced by 20 per cent to reflect the fact that quantum issues were resolved during trial and that it achieved a measure of success on the issue. Further, as a result of the issues being resolved, most of the expert evidence was not called at trial. AWDA relies, by analogy, on *Yang v Chen,* where the expert costs otherwise recoverable were reduced by 50 per cent to reflect that the claimant succeeded on only one of two matters in issue.[7]

[58] In my view AWDA's reasoning is flawed. It did not achieve partial success in the litigation, it was entirely unsuccessful. Mobil has not been required to contribute $5 million, $10 million, $40 million or $50 million towards remediation costs. The consequence of my findings on liability is that Mobil's required contribution to remediation costs is zero. All of Mobil's expert costs are therefore "wasted". It is ultimately irrelevant to Mobil how much remediation of the sites may cost, because Mobil has no liability to pay it.

[59] In some cases an adjustment to costs may nevertheless be appropriate. This may occur if, for example, a party took an unreasonable position that escalated costs. In this case, however, Mobil's position on the costs of remediation was clearly a responsible one. The figure ultimately agreed was much closer to that advanced by Mobil than that advanced by AWDA.

Should the expert costs award be adjusted to reflect the fact that Mobil resisted AWDA's attempts to, in effect, have a split trial on liability and quantum issues?

[60] AWDA submits that it was only at Mobil's instigation that any costs in respect of evidence relating to breach and loss were incurred. AWDA's preference was to proceed first to determine the correct interpretation of the tenancy agreement by way of declaratory judgment proceedings, with a hearing on quantum to follow only if AWDA's interpretation were upheld. AWDA argues that Mobil should not now be able to transfer to AWDA costs that would never, or not yet, have been incurred on AWDA's preferred approach.

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7 *Yang v Chen (No 6)* HC Auckland CIV-2007-404-1751, 20 December 2011.

[61] I accept Mobil's submission that this argument is also flawed. The background, as outlined by counsel for Mobil, is as follows. Mobil applied to strike out AWDA's declaratory judgment proceedings on the grounds that the procedure was inappropriate and that AWDA should have to bring all issues to court. Ultimately Miller J declined to grant Mobil's application, instead treating the issue as a case management issue, and agreeing with Mobil that AWDA should bring all issues in one proceeding. This placed pressure on AWDA to put all issues before the court, which ultimately it did voluntarily. No application was made, following the abandonment of the declaratory judgment procedure, to have issues of liability and quantum severed.

[62] I am not persuaded that anything in this case management history justifies a reduction in costs. In any event, it seems fairly clear that these proceedings were never well suited to the declaratory judgment procedure, given the contested evidence and need for cross-examination.

Disbursements – Should Mobil be able to recover the costs of outsourcing aspects of the electronic discovery process?

[63] Mobil seeks to recover disbursements of $150,416.27 in relation to electronic discovery costs incurred with two external providers, E-Discovery and Law in Order. Costs of $93,557.92 were incurred with Law in Order, with the balance of $56,858.35 being incurred with E-Discovery.

Mobil's electronic discovery process

[64] Details of Mobil's electronic discovery process are set out in Mobil's third affidavit of documents (sworn by Mr Taylor on 12 August 2013), Mobil's memorandum in support of its costs application of 29 May 2014 and Andrew King's affidavit of 27 June 2014. Mr King is the founder and Managing Director of E-Discovery.

[65] Potentially relevant electronically stored information ("ESI") was located in a number of repositories within the control of not only Mobil, but the ExxonMobil group of companies globally. Mobil therefore took the approach of extracting

information from all relevant data storage repositories and undertaking the search and review process within an external platform. ExxonMobil's Melbourne and US-based IT staff worked with a number of different employees to identify all potentially relevant ESI for which they had responsibility. All documents within the relevant repositories were copied to external media to ensure the preservation of metadata. E-Discovery assisted with this process, including liaising with ExxonMobil's international IT department as to the use of the correct software and methodology to ensure the integrity of the documents was maintained in the extraction process.

[66] Once this process was completed the external drives were provided to Mobil's solicitors. The total initial collection of ESI comprised almost seven million documents, of which 3.6 million were later identified as duplicates. Mobil's solicitors than undertook an initial review of the number, size and type of files, with some assistance from E-Discovery. Where Mobil's solicitors identified files as irrelevant they were removed from the data set.

[67] Mobil's solicitors then sent the documents to Law in Order, a Sydney based specialist litigation support company, for hosting. The data was loaded into a system called Venio. During this process, exact duplicates and inoperative file types were removed. This process reduced the number of files to around 2.6 million. Single and multi-level keyword searches were then undertaken using Venio software, across all documents. After some refinement, the final search returned approximately 158,000 documents, of which about 45,000 were "direct hit" returns and the remainder were documents related to the documents that had been returned as direct hits. Mr King deposes that E-Discovery's role included the co-ordination and guidance of all work undertaken by Law in Order throughout this process.

[68] The subset of 158,000 documents was then migrated into a system called Relativity, for further electronic review. Following further review, using Relativity Assisted Review software, the remaining potentially discoverable documents numbered about 19,000. Those documents were then individually reviewed for relevance, privilege, and duplication with previous hard copy discovery that had been provided.

[69] Because Relativity Assisted Review was very new at the time, and there was little or no experience of its use in New Zealand, Mobil relied on E-Discovery to provided a detailed explanation of the methodology used by the software so that a properly informed decision could be made regarding its use. The Assisted Review process required considerable initial work to test and substantiate the approach. E-Discovery also provided quality control and oversight during the Relativity Assisted Review process being undertaken by Mobil's solicitors.

[70] E-Discovery also apparently attended two meetings with AWDA's solicitors to discuss the ESI search process, to ensure that both parties were adopting methodologies that would meet the requirements of the High Court Rules and the discovery orders. AWDA took a different approach to electronic discovery than Mobil did, conducting searches of its ESI at source, rather than in an external platform.

[71] Mr King deposes that aspects of the electronic discovery process in these proceedings involved specialised skills and expertise that are, in his experience, well beyond the in-house capability of most New Zealand companies and law firms.

AWDA's position regarding Mobil's electronic discovery costs

[72] In its initial costs claim Mobil provided very little information in support of this head of its claim. In terms of evidence it relied solely on Mobil's third affidavit of documents (sworn by Mr Taylor) as providing details of the electronic discovery process. That affidavit did not refer to E-Discovery, but only Law in Order.

[73] On the basis of that information, AWDA submitted in its initial costs memorandum that the Court had insufficient information to assess the claim for reimbursement of E-Discovery's costs. In particular, AWDA submitted that the services provided by E-Discovery related to services a party would ordinarily be expected to manage internally, which are not generally recoverable.[8] In relation to the Law in Order's costs, AWDA's position was as follows:

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[8] *Greenpeace of New Zealand Inc v The Environmental Protection Authority* [2014] NZHC 999 at [14].

> Mobil has provided some information about the services provided by the other consultant, Law in Order. It appears to have provided a "discovery database" of the kind that has been made necessary by the new electronic discovery rules and was also utilised by AWDA in this case. A disbursement of this nature was allowed in *Todd Pohokura*. AWDA therefore accepts that Law in Order's invoices of $93,557.92 are recoverable in this case.

[74] In response to AWDA's (well founded) criticism that it had provided insufficient evidence to justify its disbursements claim (both in relation to expert evidence and electronic discovery) Mobil sought, and was granted, leave to file further evidence. This included an affidavit from Mr King, which I have summarised above. Based on that affidavit, AWDA now submits that E-Discovery's work falls into two broad categories:

(a) gathering Mobil's electronically stored information from multiple sources into a single database, including maintaining the security and integrity of the information during that process; and

(b) assisting in the de-duplication and electronic keyword searching process.

[75] AWDA submits that services in the first category are not properly the subject of a disbursements claim. Rather, they are services of a nature that a party would ordinarily be expected to manage internally. AWDA accepts, however, that the portion of E-Discovery's work in the second category is properly claimable, provided the costs incurred in respect of it are reasonable in amount. AWDA says that Mobil has not provided any basis for the services to be apportioned between these two categories.

Discussion

[76] I have set out r 14.12 of the High Court Rules at [31] above. Mobil claims electronic discovery outsourcing costs as a disbursement. A disbursement is defined in r 14.12 as meaning "an expense paid or incurred for the purposes of the proceedings that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs".

[77] In my view E-Discovery's work does not fall neatly into the two categories identified by Mobil, with one category falling on the disbursement side of the line and one not. Such an approach is overly simplistic. Electronic discovery is a rapidly developing area and the support provided by outsourcing firms ranges from highly specialised information technology services that would be well beyond the capability of most law firms, to much more routine document gathering and review tasks that could be conducted in-house, but may be more efficiently outsourced.

[78] There is no uniform practice across the legal profession as to what electronic discovery work is undertaken in-house and what is outsourced. This is an area where law firms' capabilities and in-house expertise and resources vary widely. Going through the invoices of a firm that provides electronic discovery services, on a line by line basis, and trying to identify precisely what work might "ordinarily" be done in-house and what might be reasonably outsourced, will be a difficult, if not impossible, exercise. What is ordinary for one firm may well not be ordinary for another. Further, as Dobson J observed in *Todd Pohokura Ltd v Shell Exploration NZ Ltd*:[9]

> [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. Here, OMV's predicament satisfies me on those concerns.

[79] The overall objective of the High Court Rules, as set out in r 1.2, is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory

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9 *Pohokura Ltd v Shell Exploration NZ Ltd*, above n 3.

application. This rule is the governing "yardstick" by which all the High Court Rules are to be interpreted.[10] As Jeffries J observed in *Schmidt v BNZ Ltd*:[11]

> Procedural rules are the servants of Court proceedings to achieve just, speedy, and at the least cost, expedition of cases. The construction of Court rules should always be approached with care but with a readiness to apply them to meet the justice of the case which is manifest before a Court … Procedural rules are to a very significant degree generalised in their words, for they are to cover all situations for which they are to be applied. For that reason alone such an injunction as is contained in r 4 [now r 1.2] enjoins a liberal and large construction.

[80] The costs rules must therefore be interpreted and applied in such a way as to best secure the just, speedy and inexpensive determination of proceedings. In *British Columbia (Minister of Forests) v. Okanagan Indian Bank*[12] the Supreme Court of Canada considered the functions and objectives of costs rules in that jurisdiction and concluded that modern costs rules should serve purposes beyond the traditional objective of indemnifying the prevailing party for the costs and expenses it has incurred in the lawsuit. The court suggested that costs should be used for two additional functions: behaviour modification and access to justice. In my view those observations are equally apt in a New Zealand context and are consistent with the just, speedy and inexpensive determination of proceedings.

[81] Discovery and its associated costs pose very significant challenges for parties, their lawyers, and the courts. International case law is replete with examples of the high costs of electronic discovery.[13] It is therefore imperative that costs rules should, so far as is possible, be applied in such a way as to encourage behaviour by litigants that will further the efficient and orderly administration of justice. The parties should be incentivised to adopt the most efficient and cost effective approach to electronic discovery in each particular case. If they do so, this should be appropriately recognised in any costs award.

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10 Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Westlaw) at [HR1.2.01].

11 *Schmidt v Bank of New Zealand Ltd* [1991] 2 NZLR 60 at 63.

12 *British Columbia (Minister of Forests) v Okanagan Indian Bank* 2003 SCC 71, [2003] 3 SCR 371.

13 For example, in *Rowe Entertainment, Inc v William Morris Agency, Inc* 205 FRD 421 (SDNY 2002), one of the parties estimated that production in response to a single document request could cost as much as US$9.75 million.

[82] In *Todd Pohokura* Dobson J awarded the full amount of the electronic discovery outsourcing costs that OMV had incurred with Streamline Litigation Support. More recently, in *Trustpower v Commissioner of Inland Revenue*,[14] Andrews J allowed Trustpower 50 per cent of the costs it claimed in respect of electronic discovery support that had been outsourced to PWC. In reaching this figure her Honour took into account that she had also allowed a very significant uplift over scale for the costs incurred by the solicitors in relation to discovery.

[83] As Dobson J noted in *Todd Pohokura,* caution is required in not giving credit twice, under both the costs allowance and recognition of such outsourcing costs. This does not mean, however, that it is not appropriate to both uplift the solicitors' costs and make provision (partial or full) for outsourcing costs. Rather, the aim should be to make an overall award of costs that appropriately recognises and encourages efficiency, collaboration and cost-effectiveness.

[84] In some cases full recovery of electronic outsourcing costs may be appropriate, for example because the work undertaken was all in the nature of highly specialised IT work that was entirely outside the scope of a law firm's expertise. The costs of such work is likely to be largely outside the control of the party (or their lawyers) and is analogous in many respects to a disbursement for expert witnesses, in respect of which full recovery is allowed.

[85] In other cases, for example where an outsourcing firm has had a much wider role, including information gathering and review, a partial costs award may be more appropriate. This reflects that at least some of this work could probably be undertaken in-house. A neutral costs regime which allows for partial recovery whether this work is undertaken in-house or outsourced should incentivise the work being done in the most efficient manner in any given case. Further, as with legal costs, if at least some of the costs burden remains with the successful party this will also help incentivise efficiency.

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[14] *Trustpower v Commissioner of Inland Revenue* [2014] NZHC 3072.

[86] Applying the general principles I have outlined to this case, the electronic discovery exercise undertaken by Mobil was clearly a very significant one, involving a number of entities within the wider ExxonMobil Group internationally. Performing electronic discovery to a high standard (commensurate with the fact that this was originally a $50 million claim) required the involvement of specialist external expertise. The overall exercise appears to have been undertaken in a relatively efficient and cost effective way, although there were potentially some inefficiencies due to the "learning curve" of upskilling in relation to an unfamiliar software programme (Relativity Assisted Review).

[87] There are three costs components of the electronic discovery exercise:

(a) The in-house costs of Mobil's solicitors. Mobil sought an uplift from scale (from seven days to ten days) for these costs, and I have allowed that uplift at [11] above.

(b) Law in Order's costs of $93,557.92, which AWDA accepts liability for on the basis that Law in Order's role appears to have been to provide a "discovery database" of the kind that has been made necessary by the new electronic discovery rules.

(c) E-Discovery's costs of $56,858.35, which AWDA says fall partly within the definition of disbursement and partly not.

[88] It is only the third component that is in issue, although to ensure that the overall costs awarded in respect of the electronic discovery process are appropriate, it is necessary to have regard to the costs agreed or awarded in respect of the first and second components.

[89] In this context I note that the uplift for the in-house costs of Mobil's solicitors, given the magnitude of the discovery exercise, was modest at three days. A much more substantial uplift was allowed in *Trustpower* for a major electronic discovery exercise, although it may be that Trustpower's solicitors had a greater involvement in the overall process than Mobil's solicitors did.

[90] On the other hand, AWDA's concession that Law in Order's costs of $93,557.92 are recoverable in their entirety was probably a generous one. While Law in Order did provide the necessary platform for the electronic discovery database, it also worked with Mobil's solicitors and E-Discovery on document review.

[91] In terms of the third component, E-Discovery's costs, it is my view that a partial costs award of 50 per cent ($28,429.18) is appropriate. Such an award, when combined with the other two components (Law in Order's costs and the ten day allocation for solicitors' costs) results in a total award for electronic discovery costs that I am satisfied is reasonable and proportionate in all the circumstances.

Result

[92] The consequence of the various findings I have made is that AWDA is ordered to pay total costs and disbursements to Mobil in the sum of $930,691.71, as more particularly set out in the attached schedule.

Katz J

SCHEDULE

(All attendances are category 3)

Costs of proceedings			
Application for further particulars			
Item	**Description**	**Time**	**Amount**
22	Filing application	B 0.6	$1,764*
11	Filing memorandum for first or subsequent case management conference or mentions hearing	C 1	$2,940
26	Appearance at application hearing	0.25	$ 735
		Total	**$ 5,439**
Attendances at old rate			
2	Commencement of defence	C 6	$ 16,680*
7	Notice of appearance	B 0.2	$ 556*
11	Memorandum for case management conference	B 0.4	$ 1,112*
11	Memorandum for case management conference	B 0.4	$ 1,112*
20	List of documents on discovery	C 6	$ 16,680*
		Total:	**$ 36,140**
Attendances at new rate			
9	Pleading in response to amended pleading	C 2	$ 5,880
9	Pleading in response to amended pleading	C 2	$ 5,880
11	Memorandum for case management conference	B 0.4	$ 1,176
11	Memorandum for case management conference	B 0.4	$ 1,176
12	Appearance at mention or call over	B 0.2	$ 558

12	Appearance at mention or call over	B 0.2	$ 558
15	Pre trial conference	C 1	$ 2,940
20	List of documents on discovery	C 10	$ 29,400
32	Preparation of issues list, authorities and bundles	B 2	$ 5,880
34	Appearance at trial	C 6	$ 17,640
35	Appearance for second counsel	C 3	$ 8,820
Other	Attendance at experts' meetings	C 3.5	$ 10,290
		Total:	**$ 90,198**
Increased costs			
30	Preparation of briefs	C 15	$ 44,100
33	Preparation for hearing	C 15	$ 44,100
		Total:	**$ 88,200**
		Total proceeding costs:	**$219,977**
Disbursements			
	Filing fees		$ 1,051.40
	Travel		$ 569.57
	Copying		$ 11,787.88
	Expert witnesses		$575,318.79
	Electronic discovery		$121,987.10
		Total disbursements costs:	**$710,714.74**
		TOTAL COSTS AWARD TO MOBIL:	**$930,691.74**

* indicates the rate calculated is based off the Daily Discovery rate as set out in the Second Schedule to the High Court Rules prior to 11 October 2013.