

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Leslie James Mackie (Applicant)  
**AND** Raymond Realty Limited (Respondent)  
**REPRESENTATIVES** Lynda Emmerson, Counsel for Applicant  
George Swanepoel, Counsel for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 10 and 15 May 2006  
**DATE OF DETERMINATION** 18 May 2006

**DETERMINATION OF THE AUTHORITY ON COSTS**

[1] In a determination of the above, dated 19 April 2006, I concluded the parties were deemed to be in a relationship of contractor and principal by virtue of s 51A of the Real Estate Agents Act 1976. Costs were reserved and memoranda have been filed.

**Legal Aid**

1. Effect of legal aid status

[2] Mr Mackie was in receipt of a grant of legal aid. Under s 40(1) and (2) of the Legal Services Act 2000, his liability to pay under any order for costs is limited to the amount of his contribution to the Legal Services Agency except in exceptional circumstances.

[3] Section 40(3) provides that any order for costs against an aided person may specify that amount that would have been awarded if s 40 had not affected that person's liability.

[4] Counsel for Raymond Realty Limited submitted that exceptional circumstances existed here. If I am persuaded of that, then any award in excess of the contribution remains an award against Mr Mackie. I was not asked to make an order under s 40(3). Such an order would involve a limited award against Mr Mackie, with the assessment of liability for payment of any supplementary amount identified by the Authority being in hands other than the Authority's.

[5] Counsel also asked that any award be made against 'Legal Aid'. The relevant provision is s 41. I do not construe it as allowing the Authority to make an order for costs against the Legal Services Agency. Rather it permits a party who is prejudiced by the operation of s 40 to apply to the Agency for payment by the Agency of some or all of the difference between costs actually awarded and costs that would otherwise have been awarded.

## 2. Exceptional circumstances

[6] The 'exceptional circumstances' here are really concerned with the failure to identify and address the key issue on which Mr Mackie's application turned, even after the Authority pointed it out, until the day of the investigation meeting. Then, a legal argument was raised but the evidence in support was not persuasive. I do not regard those circumstances as exceptional.

[7] Mr Mackie is therefore ordered to pay to Raymond Realty Limited an amount equivalent to the contribution he paid to the Legal Services Agency. I am not aware of the details but assume the amount was \$50.

## 3. Conduct of the case

[8] If s 40 had not affected Mr Mackie's liability, my approach to costs would have been this. Mr Mackie's claim that he was an employee might have had a chance of success with particular reference to **Challenge Realty Limited v Commissioner of Inland Revenue** [1990] 3 NZLR 42. However s 51A of the Real Estate Agents Act was enacted in response to the outcome of that case, and - bearing in mind too the effect of s 6(4) of the Employment Relations Act 2000 - Mr Mackie had no chance of success unless he could persuade the Authority that s 51A did not apply.

[9] Despite my express request for submissions on the point prior to the investigation meeting, the effect of s 51A was not addressed by counsel for Mr Mackie - let alone was there any indication of why s 51A might not apply. Had the issue been addressed as I asked, the need for an investigation meeting could have been obviated and costs should have been significantly reduced.

[10] Instead, as at the commencement of the investigation meeting Mr Mackie still had no case because nothing had been said to indicate why s 51A did not apply. On the undisputed facts, it was apparent that the section did apply. Not only that, counsel who had been handling the matter on behalf of the applicant did not appear. When I raised s 51A again at the meeting, further costs were incurred unnecessarily because I had to explain the position again and Mr Henderson (who appeared in counsel's place) was obliged to seek an adjournment to take instructions. Once he had done so he attempted valiantly to persuade me that the parties' written agreement should be set aside on the grounds of duress and undue influence, but Mr Mackie's evidence in support fell a long way short of being persuasive.

[11] In short, Mr Mackie's claim that he was an employee had no merit. It was pursued in the face of attempts to draw attention to and address the flaw in it prior to the investigation meeting. The failure to address s 51A must also have substantially lessened the chance of settlement during mediation or at any other time prior to the investigation meeting. Eventually, at the meeting, probably the only available legal argument was raised for the first time, and I have already commented on the strength of the evidence in support. In addition more time was expended unnecessarily while Mr Henderson sought instructions.

[12] As a result Raymond Realty Limited has been forced to incur a significant amount of costs it should not have had to incur. Mr Swanepoel says those costs amounted to \$5,320 plus GST, with a further \$450 for the preparation of costs submissions.

[13] I accept the costs were reasonably incurred. The range of costs usually awarded in the Authority for a half-day meeting is \$1,000 - \$1,500, but in appropriate circumstances the Authority makes awards outside that range. In the light of that approach, the applicant's conduct of the case means I would have ordered Mr Mackie to pay Raymond Realty Limited the sum of \$3,500 were it not for s 40(2).

**Statements about mediation**

[14] Mr Swanepoel's submissions contained statements about comments allegedly made by the mediator in mediation. They should not have been made, and I have disregarded them.

**Summary of award**

[15] Mr Mackie is to pay to Raymond Realty Limited the sum of \$50, or such other sum as he was obliged to contribute to the Legal Services Agency under s 15 of the Legal Services Act.

[16] Were it not for the application of s 40 of the Legal Services Act, I would have ordered Mr Mackie to pay to Raymond Realty Limited the sum of \$3,500.

**R A Monaghan**  
**Member, Employment Relations Authority**