IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 9/2004
[2005] NZSC 18

BETWEEN	RICHARD WILLIAM PREBBLE First Appellant
AND	KEN SHIRLEY Second Appellant
AND	RODNEY HIDE Third Appellant
AND	MURIEL NEWMAN Fourth Appellant
AND	DONNA AWATERE HUATA Respondent

Court: Elias CJ, Gault, Keith, Blanchard and Tipping JJ

Counsel: J E Hodder and B A Davies for Appellants
P J K Spring and A J Lloyd for Respondent

Judgment: 19 April 2005

JUDGMENT ON COSTS

REASONS

(Given by Elias CJ)

[1] Rule 44 of the Supreme Court Rules permits the Court to make "any orders that seem just concerning the whole or any part of the costs and disbursements of a civil appeal or an application to bring such an appeal". In the Court's judgment of 18 November 2004 it was held that the appellants, having been successful in the appeal, were entitled to costs. Counsel were invited to file memoranda as to quantum and disbursements. That course was adopted by the Court since the case

was the first substantive one to be determined by it and provided an opportunity for it to consider the general approach it should adopt to costs. For the future, it will usually be unnecessary for parties to make submissions on general approach unless the general approach outlined here is inappropriate in the circumstances of the particular appeal.

Costs will generally follow the event

[2] As invited, counsel have filed memoranda setting out their contentions as to the approach the Court should take in settling an award of costs. Counsel for the respondent has also submitted that no award of costs should be made. That submission is made on the basis that any private interest of the respondent in the outcome of the litigation was outweighed by the public interest in having public law issues of general importance raised by the case determined by the court of final appeal. Counsel relied on s 3 of the Supreme Court Act 2003 which provides that a purpose of the Act is to improve access to justice. We were also referred to *New Zealand Maori Council v Attorney-General*[1] where the Privy Council declined to award costs to the successful respondent. The Judicial Committee considered that the appellants in that case were acting to protect "part of the heritage of New Zealand" without any motive of personal gain. In addition, the different views expressed in the Court of Appeal meant that "an undesirable lack of clarity inevitably existed in an important area of the law which it was important that Their Lordships examine". In those circumstances the Judicial Committee considered it just that there should be no order as to costs.[2] It is argued on behalf of the respondent that it is consistent with the principle discussed in the *New Zealand Maori Council* case and with the purpose of the Act in securing better access to justice that litigants who act responsibly in litigation of general public interest and importance should not be deterred by the prospect of costs orders if the result is adverse to them.

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1 [1994] 1 NZLR 513.
2 At 525-6.

[3] The general rule that a successful party to an appeal will be entitled to costs was adopted as the practice of the English Court of Appeal in 1875.[3] It has been the invariable practice of the Court of Appeal in New Zealand. It is a presumption legislatively provided for in the High Court Rules.[4] It is consistent with the practice of the Privy Council. It is not suggested that any other approach should be applied by the Supreme Court. In those circumstances, if a party to an appeal wishes to raise a contention that costs should not follow the event, that submission should be raised at the hearing of the appeal. Without an application, an order that the unsuccessful party is to pay costs to be fixed if necessary by the Court is likely to be made, in application of the usual practice. Such order was made in the present case. We are not persuaded that it should be changed.

[4] Counsel for the respondent submits that her private interest in the litigation is outweighed by "the overwhelming public interest" in the interpretation and application of the legislation in issue. It is suggested that it is relevant that the appeal was not brought by the respondent and that she acted reasonably in supporting the majority decision of the Court of Appeal in her favour. It is submitted that Mrs Awatere-Huata had a duty to those who elected her to "uphold her seat by all lawful and proper means including participating in a legal process to determine her entitlement to do so". It is said that her participation, responsibly and in the public interest, provided the Court with opposing argument in a complex case involving constitutional issues.

[5] The Court's obligation under r 44 is to make such orders as are just. Requiring a successful party to bear the full costs of its case will seldom be just. That is the reason for the general rule that costs follow the event. In public law cases as well as in other civil litigation the rule that costs follow result will generally be just between the parties. Although unreasonable conduct in litigation or giving rise to it may affect the availability or the amount of costs,[5] departure from the usual practice is not justified merely because an unsuccessful party has acted responsibly or is the respondent on an appeal. The criteria for leave to appeal under s 13 of the

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3 (1875) 1 Ch D 41.
4 Rule 47.
5 *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 3 NZLR 457, 460 per Cooke P.

Supreme Court Act 2003 will usually mean that in the cases heard by the Court wider public interests will be engaged than the interests of the individual litigants. The present case, in which the respondent initiated litigation in part to protect interests of benefit to her against a private organisation, is far removed from the circumstances of *New Zealand Maori Council v Attorney-General.* We consider that it is just that the respondent pay costs as ordered in the judgment of 18 November 2004.

"Reasonable contribution" or closer reflection of actual costs?

[6] In New Zealand, costs have not been awarded to indemnify successful litigants for their actual solicitor and client costs, except in rare cases generally entailing breach of confidence or flagrant misconduct. Except in such cases, in both the Court of Appeal and the High Court orders for party and party costs have been limited to a reasonable contribution to the costs of the successful party.[6] That approach is of long-standing and may have been adopted partly for reasons of access to justice, as Williams J suggested in the course of argument in *Sargood v Corporation of Dunedin.*[7] In the United Kingdom, costs are settled by the Registrar on a taxation. Such approach uses actual costs as the initial point of reference. Although r 21(2) of the Court of Appeal (Civil) Rules 1997[8] provides for taxation of costs (as r 44 (2) of the Supreme Court Rules also permits), by 1991 no such taxation had been known "in living memory".[9] In that Court the general practice in recent years has been to apply a standard rate of $6,000 a day for the hearing (set to include contribution to the costs of preparation), without attempting any other relativity with actual costs and without reference to levels of complexity or skill. In the High Court, a reasonable contribution has been settled with reference to a scale enacted in the Rules. In their current form they require assessment of the complexity of the litigation (at three levels) and attempt to match an appropriate daily recovery rate for

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6 *Morton v Douglas Homes Ltd (No 2)* [1984] 2 NZLR 620; *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd.*

7 (1887) NZLR 5 SC 461, 462. The comment was referred to in *Envirotech Australia Pty Ltd v Martin* (Christchurch, A 282/75 per Casey J) and in *Morton v Douglas Homes Ltd* at 624 per Hardie Boys J.

8 To be replaced by r 53(2) of the Court of Appeal (Civil) Rules 2005 as from 1 May 2005, in identical terms.

9 *Kuwait Asia Bank EC v National Mutual Life Nominees* Ltd at 458 per Cooke P.

legal fees (set by the scale to reflect a judgment of what constitutes two-thirds of a reasonable actual daily rate) with a reasonable allowance of time for the various steps in the litigation.

[7] Counsel for the appellants submits that the Supreme Court should follow the approach taken by the Privy Council and award costs more nearly reflecting the actual costs of a successful party than has been the New Zealand practice. On that basis he advises that the appellants' actual costs of something slightly over $47,000 plus disbursements of $2000 would appropriately result in an award of $45,000 plus actual disbursements. If that approach is not accepted, he suggests that costs orders should be set at a reasonable proportion of actual costs in the particular case (in approximation of the approach in the High Court) rather than on the flat rate approach adopted by the Court of Appeal. On a "reasonable proportion" basis, argued to be an "inferior approach", the appellant by approximation with the highest recovery rate in the High Court scale seeks costs of $20,000 together with disbursements of $2,000. According to the schedule provided, this amount is calculated on the basis of preparation time of two days for the leave application, two days for preparation of a memorandum relating to the appropriate appellants, slightly less than one day for appearance at the leave hearing, two days for preparation for the hearing, one day for the hearing, and half of a day for second counsel, all at the daily rate of the 3C scale under the High Court Rules of $2150.

[8] The departure from the reasonable contribution standard generally applied by New Zealand courts is said to be required for costs in the Supreme Court for two reasons. First, because of the inherent importance of cases decided in this Court as a result of the leave criteria under the Act: it is submitted that the cases for which leave is appropriate will be inherently challenging and will take time to prepare; a costs award should recognise the importance of the issues being argued. Secondly, it is suggested that the Court in ordering costs should recognise "the real world financial burden placed on the successful party to a final appeal": awarding costs significantly below actual costs does not lower the real cost of litigation but simply allocates the difference, perversely, to the successful litigant.

[9] In response, counsel for the respondent submits that, of the three approaches available, the practice of the Court of Appeal is most appropriate because of the legislative policy that the establishment of the Supreme Court is to improve access to justice in New Zealand and because of the general public significance of cases heard by the Supreme Court. It is argued that the daily rate method adopted in the Court of Appeal is well-established and should be applied by this Court as just. Counsel submits that a daily rate of between $8,000 to $12,000 would reflect the position of the Supreme Court, with the upper range reserved for "commercial causes with substantial sums at stake".

[10] The New Zealand approach that, in general, orders for costs are a reasonable contribution to actual costs, rather than an attempt at closer restoration to a successful litigant, is of long-standing. It was described by the Court of Appeal in *Kuwait Asia Bank v National Mutual* as a "guiding principle", "represented in the prescribed scales" and "followed for many years":[10]

> It reflects a philosophy that litigation is often an uncertain process in which the unsuccessful party has not acted unreasonably and should not be penalised by having to bear the full party and party costs of his adversary as well as his own solicitor and client costs. If a party has acted unreasonably, for instance by pursuing a wholly unmeritorious and hopeless claim or defence – a more liberal award may well be made in the discretion of the judge, but there is no invariable practice.

The approach continues to be applied in the High Court and Court of Appeal, in the High Court with legislative approval through the setting of scales for recovery. The general approach yields where it does not deliver a just result. The discretion of the Court to make "any orders that seem just" cannot be displaced. It is adequate to deal with the risk adverted to by counsel for the appellants of "perverse incentive in favour of the continuation of already prolonged litigation by parties who have a less than robust case", should leave be sought to appeal or if leave is granted in such a case. We are of the view that a reasonable contribution to costs is just in most cases and that it would not be appropriate for us to depart from the long-established New Zealand practice in the High Court and Court of Appeal.

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[10] *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* at 460 per Cooke P.

Approach

[11] Despite the suggestion of the appellants, the approach in assessing reasonable costs is not substantially different in the High Court and Court of Appeal. Both adopt a presumptive calculation based on a reasonable daily rate, applied to the necessary steps in the litigation. In the High Court more elaboration is necessary because of the interlocutory processes and the wide variation in types of case and hearing times. In the Supreme Court, as in the Court of Appeal, there is much less scope for variation. In all cases application for leave will be required, which may or may not entail oral argument but which will usually require written submissions. All cases, because of the nature of the leave criteria, are likely to raise substantial issues of principle. There is no occasion to make the general distinction, suggested by counsel for the respondent, between public law and family cases and commercial litigation. But because in most cases the Supreme Court hears a second appeal, substantial preparation of argument on the issues for hearing will usually have been undertaken before the hearing in the Court of Appeal. And because appeals to the Supreme Court will generally have the advantage of an earlier considered appellate judgment and entail points of principle settled by the leave hearing, it is reasonable to expect that preparation and argument will be focussed and economical. In those circumstances, a flat daily rate for legal costs such as is generally applied in the Court of Appeal can be more readily set than is the case with High Court litigation. Such a rate has the advantages of predictability and certainty. It does not prevent application for costs to be awarded on a different basis where the circumstances make it just.

[12] Some assistance in fixing a reasonably daily recovery rate for legal costs can be had from the enacted scale in the High Court Rules. Given the significance of the issues for which leave is likely to be given to appeal to the Supreme Court, it is appropriate that the daily rate be adopted by reference to the highest scale in the High Court Rules. At present that is set at $2150. We think that a proper indicative rate to reflect the responsibilities of counsel in the Supreme Court is $2500. Given the scale of preparation for a second appeal, we think it appropriate to take an

indicative reasonable preparation time of three days together with one day of preparation and hearing for leave, a total of four days for the stages leading to the appeal hearing itself. If additional preparation time for second counsel is not allowed for, it is appropriate to allow for second counsel at the hearing at the same rate as senior counsel. In the present case, where two counsel were engaged for the appellants in a substantive hearing of one day, the reasonable time allowance would amount to 6 days. At the suggested indicative rate, a reasonable contribution to legal costs in a one-day case would be $12,500 for one counsel and $15,000 for two counsel, together with reasonable disbursements. Where an appeal is heard over more than one day, a daily rate of $2500 should be added for each counsel (to a maximum of two).

[13] In the present case there is no occasion to depart from such standard. We are of the view that it is just that the respondent is ordered to pay to the appellants towards their costs the sum of $15,000 together with disbursements of $2,000 (comprising court fees of $1700 and photocopying costs of $300), a total of $17,000.

Solicitors:
Chapman Tripp, Wellington for Appellants
Keegan Alexander, Auckland for Respondent