IN THE SUPREME COURT OF NEW ZEALAND

SC 79/2016
[2016] NZSC 132

BETWEEN	JEFFREY FRANCIS MCCLINTOCK Applicant
AND	THE ATTORNEY-GENERAL First Respondent
	THE BOARD OF TRUSTEES OF RED BEACH PRIMARY SCHOOL Second Respondent

Court:	Arnold, O'Regan and Ellen France JJ
Counsel:	R K Francois for Applicant P T Rishworth QC and M J R Conway for First Respondent P A Robertson for Second Respondent
Judgment:	4 October 2016

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B We award costs of $1,000 to the second respondent.

REASONS

[1] The applicant commenced proceedings in the High Court against the respondents, the Attorney-General and the Red Beach Primary School Board of Trustees (the Board).

[2] The background to this proceeding is that the applicant and his partner have a daughter who attended Red Beach Primary School. The Board has allowed the Life in Focus Trust (LIFT) to teach a programme ("Values in Action") in classrooms for 30 minutes each week. Attendance at the LIFT programme classes is optional and

the applicant opted that his daughter not attend, given his view that the programme is religious instruction. He says his daughter is treated unfairly as a result of her withdrawal from the LIFT classes.

[3] The applicant commenced judicial review proceedings against the respondents in February 2015, claiming breaches of the New Zealand Bill of Rights Act 1990 (Bill of Rights), Education Act 1964, Education Act 1989 and Care of Children Act 2004. Among the remedies he sought against the Attorney-General were a declaration of inconsistency between s 78 of the Education Act 1964, which permits religious instruction in some schools and ss 13, 14, 15 and 19 of the Bill of Rights and s 16 of the Care of Children Act. He also made claims against the Board. The Churches in Education Commission, representatives of the Secular Education Network and the Human Rights Commission were permitted to intervene in the proceedings.

[4] In August 2015, the proceeding was set down for hearing on 26 April 2016. Timetabling orders were made at the same time. These were subsequently modified, substantially to accommodate the applicant. The applicant did not comply with the modified timetable and, on 19 April, Peters J made an order striking the proceeding out because of the applicant's non-compliance.[1]

[5] The applicant appealed to the Court of Appeal. It allowed his appeal, set aside the striking out order and reinstated the proceeding, subject to conditions.[2] The first condition was that the applicant was to discontinue against the Board (in full and final satisfaction of his claim against it). The second was that he was to file an amended statement of claim against the Attorney-General complying with the High Court Rules. The third was that he was to pay all outstanding costs awards in the High Court. The Court of Appeal made no award of costs in view of the applicant's disentitling conduct in the High Court.

[6] The applicant seeks leave to appeal to this Court against the Court of Appeal decision. He argues that the second and third conditions set out above should be set

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1 The background to the making of this order is set out in the Court of Appeal judgment, *McClintock v Attorney-General* [2016] NZCA 274 [*McClintock* (CA)], at [6]–[11].

2 At [16]–[18].

aside.[3] He also seeks the setting aside of the Court of Appeal's order relating to costs in that Court. However, he seeks in its place an order allowing "costs to fall where they lie". The effect of the existing order is that costs lie where they fall. It is not clear to us whether the applicant's point is limited to a contention that there should be no reference in the order to disentitling conduct, or that he wishes to argue that the Court of Appeal ought to have made an award of costs in his favour. We will consider both of these alternatives.[4]

[7] The application for leave to appeal is opposed by both the Attorney-General and the Board.

[8] The applicant argues that the underlying claim raises important issues relating to religious freedom and that the Court of Appeal's decision creates impediments to his pursuit of his claim, contrary to the Bill of Rights. He also argues that a miscarriage of justice will occur if the appeal is not heard. He says that if given leave to do so, he would pursue nine grounds of appeal. We will address these briefly.

[9] The first and second grounds are that the three conditions imposed by the Court of Appeal to the reinstatement of the proceeding amount to an unreasonable limit on the applicant's right to bring proceedings under s 27(3) and s 27(2) of the Bill of Rights respectively. In relation to both these points, we do not see any point of public importance arising. The conditions imposed by the Court of Appeal are not generic restrictions on the exercise of rights under the Bill of Rights, but rather responses to the particular conduct of the present proceeding. Proceedings under the Bill of Rights are, of course, subject to the requirement that they be conducted in accordance with the rules of the Court and any procedural orders made by a Judge.

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[3] In both his original notice of appeal and his amended notice of appeal he gives no indication of seeking the setting aside of the first condition set out above (discontinuing against the Board), but his submissions refer to all three conditions as being impediments to the pursuit of his claim. We will therefore consider his application on both bases.

[4] In his amended application for leave, the applicant argues that the Court of Appeal erred in refusing to make an order for costs in his favour and in his submissions in support of the application, the applicant refers to "the Normal Rule that costs follow the Result". Both indicate that he considers he should have been awarded costs, having been successful in the Court of Appeal.

The requirement to discontinue against the Board does not limit the applicant's ability to pursue his claim under the Bill of Rights against the Attorney-General.

[10] The third, fourth and fifth grounds of appeal relate to comments made by the Court of Appeal about the responsibility of the applicant for delays that occurred in the conduct of the proceeding in the High Court. The matters the applicant seeks to raise involve factual disputes which are not suited for a further appeal.

[11] The sixth ground is that the determination made by the Court of Appeal will prejudice the applicant in responding to a costs application by the second respondent in the High Court. This is not a ground of appeal, but rather a statement of the consequence of the Court of Appeal decision. The procedural difficulties that affected the proceeding in the High Court are matters of record to which the Judge in the High Court dealing with any costs application can refer. There will be nothing to stop the applicant from putting before the High Court any relevant argument about the appropriateness and/or quantum of a costs order. We do not see this point as providing a proper basis for a further appeal to this Court.

[12] We should add that we see the third condition in the Court of Appeal judgment as referring to an obligation by the applicant to pay any costs that were outstanding when the Court of Appeal decision was made. As we understand it, the High Court has not yet made any order for costs. The applicant will, of course, have an obligation to pay any future award of costs (if any such order is made), but we do not see his compliance with that obligation as a condition of the reinstatement of the proceedings.

[13] The seventh ground is that the Court of Appeal erred in refusing to make an order for costs on the basis of "disentitling conduct". As noted earlier, we are unsure whether the applicant wishes to argue that he should have been awarded costs in the Court of Appeal. If so, we do not see the issue as of sufficient importance to justify a further appeal. The Court of Appeal's approach reflected the reality that an appeal would not have been necessary if the timetable orders made in the High Court had been adhered to. We do not see any miscarriage of justice arising. If not, the point he would pursue on appeal if leave were given would be limited to the reference to

disentitling conduct. The comments we have made in relation to the third, fourth and fifth grounds of appeal apply equally to that.

[14] The eighth point of appeal is that the Court of Appeal erred by failing to determine the applicant's allegation of bias against the High Court Judges involved in the proceeding. This Court has clearly stated the test for the determination of bias in the *Saxmere*[5] litigation, and we see no point of public importance arising. Nor do we see any appearance of a miscarriage if leave is not given on this point.

[15] The ninth ground is that the Court of Appeal Judges themselves were subject to apparent bias. The comments we have made in relation to the eighth ground apply equally to this ground.

[16] None of the points that the applicant wishes to raise are points on which we see any matter of public importance sufficient to justify the grant of leave of appeal arising. Nor do we see any appearance of a miscarriage in the event that leave is not granted. In those circumstances, we dismiss the application for leave to appeal.

[17] As we see it, the discontinuance condition does not affect the claim against the Attorney-General. The costs condition does not appear to bite as there do not appear to be any outstanding costs awards. So the only substantive condition relates to the need to replead in compliance with the High Court Rules, which we do not see as onerous.

[18] The Board seeks costs. In the circumstances, we see an award of $1,000 being appropriate as the application has been unsuccessful and the Board was required to make submissions in opposition to it. The Attorney-General did not seek costs.

Solicitors:
Warren Simpson, Papakura for Applicant
Crown Law Office, Wellington for First Respondent
Heaney & Partners, Auckland for Second Respondent

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5 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35; and *Saxmere Company Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76.