IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 93/2019
[2019] NZSC 139

BETWEEN	PAUL NEVILLE BUBLITZ Applicant
AND	THE QUEEN Respondent

SC 94/2019

BETWEEN	LANCE DAVID MORRISON Applicant
AND	THE QUEEN Respondent

Court:	William Young and Ellen France JJ
Counsel:	R S Reed QC and H M Z Ford for Applicant in SC 93/2019 D H O'Leary for Applicant in SC 94/2019 R K Thomson for Respondent
Judgment:	9 December 2019

JUDGMENT OF THE COURT

A The applications for leave to appeal are dismissed.

B There is no order as to costs.

REASONS

Introduction

[1] The applicants, Mr Bublitz and Mr Morrison, initially faced a number of criminal charges arising out of the collapse of two finance companies, Viaduct

Capital Ltd and Mutual Finance Ltd.[1] Their trial was aborted by Woolford J after nine months because of disclosure failures by the Crown.[2] Costs were sought with regard to the aborted trial. Woolford J awarded Mr Morrison $75,000 under s 5 of the Costs in Criminal Cases Act 1967 (the 1967 Act) and made an award of $50,000 under s 364 of the Criminal Procedure Act 2011 (to be split between the four defendants and the Ministry of Justice for the Court).[3] The Court of Appeal dismissed the appeals of both applicants against the quantum of their awards (the costs appeals).[4]

[2] The Crown chose not to proceed against Mr Morrison again and the remaining charges against him were dismissed. It did proceed against Mr Bublitz on some of the charges and he was convicted after a Judge-alone trial on four charges of theft by a person in a special relationship and two charges of making a false statement. His appeal to the Court of Appeal on the latter two charges was allowed.[5]

[3] This judgment deals with the applications for leave to appeal against the dismissal of the costs appeals. Judgment in the application by Mr Bublitz for leave to appeal against conviction on the charges of theft by a person in a special relationship is being delivered contemporaneously.[6]

Background

[4] The background is set out in the judgment of the Court of Appeal and need not be repeated here.[7] It is sufficient to refer to the key points in the judgments in the Courts below.

[5] The application by Mr Bublitz for an award of costs in the High Court was dealt with under s 364 of the Criminal Procedure Act. Section 364(2) provides that a

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1 There were charges under ss 220 and 242 of the Crimes Act 1961; respectively, theft in a special relationship and false statements by promoters, as well as s 377 of the Companies Act 1993; false statements. Four others were also charged, one of whom pleaded guilty to all charges; a second man died shortly after he was charged, and two did not appeal the costs decision.

2 *R v Bublitz* [2017] NZHC 1059.

3 *R v Bublitz* [2018] NZHC 373 [Costs decision].

4 *Bublitz v R* [2019] NZCA 379 (Kós P, Winkelmann and Williams JJ) [CA judgment].

5 *Bublitz v R* [2019] NZCA 364.

6 *R v Bublitz* [2019] NZSC 138.

7 CA judgment, above n 4, at [4]–[14].

court may order the defendant, his or her lawyer, or the prosecutor "to pay a sum in respect of any procedural failure by that person in the course of a prosecution" where the court is satisfied that "the failure is significant and there is no reasonable excuse" for it. Section 364(3) states that the sum awarded must be "no more than is just and reasonable in the light of the costs incurred by the court, victims, witnesses, and any other person".

[6] There was no dispute that the threshold requirements of a "significant procedural failure" with "no reasonable excuse" were met. Woolford J determined costs orders should be made against the Financial Markets Authority (FMA) as the prosecutor to sanction the FMA's failures in carrying out the investigation and initiating the prosecution.

[7] As to what quantum was "just and reasonable" in the circumstances, the Judge saw s 364 as "primarily" punitive although it "may well offer some compensation to defendants and others who have incurred loss".[8] On a global basis an award of $50,000 was seen as an appropriate sanction, as noted to be split equally between the defendants and the Ministry of Justice. The FMA was accordingly ordered to pay $10,000 to Mr Bublitz.

[8] Addressing costs under the 1967 Act, Woolford J said that an award under that Act was available only to Mr Morrison. The Judge found that, for Mr Morrison, an award under s 5 of the 1967 Act was appropriate. Section 5(1) relevantly provides that where a charge is dismissed or withdrawn, the court may order the defendant "be paid such sum as it thinks just and reasonable towards the costs of his defence". Section 5(2) sets out a number of factors that may be considered by the court in deciding whether to make a costs award and the amount of an award. One of those factors is "whether the charge was dismissed because the defendant established … that he was not guilty".[9]

[9] In terms of the quantum of the award for Mr Morrison, Woolford J considered scale costs would not be sufficient. Taking into account the factors for

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8 Costs decision, above n 3, at [107].
9 Costs in Criminal Cases Act 1967, s 5(2)(f).

and against the application, including Mr Morrison's failure to establish his innocence despite dismissal of the charges, the Judge said Mr Morrison should have a substantial award, although not as high as indemnity costs. An award of $75,000 was seen as just and reasonable in the circumstances.

[10] On the appeal, the Court of Appeal concluded the "primary purpose" of s 364 was "penal, for non-compliance, rather than compensatory".[10] The Court continued:[11]

> In determining what is a just and reasonable award, the court will have regard to all relevant factors, including the extent of non-compliance, its effect on the administration of justice and also upon the participants in the proceeding. Just what weight will be given to these various factors will depend upon the particular circumstances of the case assessed against the purpose of incentivising compliance with the parties' procedural obligations.

[11] Applying these principles to the question of quantum, ultimately, the Court was "not persuaded the Judge erred in principle in setting a more modest sanction".[12] And, the Court said, whether an award "equal to the actual costs incurred could ever be warranted as the appropriate punitive response to ensure a fair trial is best left for a case where the issue is determinative".[13]

[12] Addressing then the High Court's assessment of Mr Morrison's award, the Court said the Judge "was entitled to make his own assessment"[14] and the Court was "not persuaded the Judge" had erred in exercising the discretion under s 5(1) in deciding an award of $75,000 was appropriate.[15]

Proposed appeal

[13] In relation to Mr Bublitz, it is noted, first, that the costs award to Mr Bublitz was $10,000 against an application for just over $1 million. Against that background, Mr Bublitz wants to argue the Court of Appeal erred as a matter of principle in its conclusions as to the purpose of s 364 and in its assessment of the

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10 CA judgment, above n 4, at [44].
11 At [44].
12 At [50].
13 At [50].
14 At [56], citing *R v Reid* [2007] NZSC 90, [2008] 1 NZLR 575 at [21].
15 At [56].

award as against the statutory test. In particular, the argument is that what is "just and reasonable" requires some reference to the costs actually incurred and that ignoring actual costs is unfair.[16]

[14] Mr Bublitz also seeks to challenge the weight and consideration (or lack of consideration) given to various factors. Finally, it is submitted the award of $10,000 is plainly wrong.

[15] Mr Morrison's proposed appeal would focus on the challenge to the finding he had not established his innocence and the impact of this aspect on what was a "just and reasonable" award. He notes that he was never able to present his defence in respect to some of the charges prior to their dismissal.

Discussion

[16] The Court may well wish to consider at some point the extent to which s 364 of the Criminal Procedure Act has a compensatory as well as a punitive purpose. However, the circumstances in which questions of the statutory purpose would arise in this case are so specific to its very particular procedural background. Further, the underlying complaint is that the Court should have given more consideration to actual costs. That is, to some extent at least, a challenge to the weight accorded to this factor and is a question specific to these facts. These factors mean the present case is not an appropriate one to address broader issues.[17] Nor do we see any appearance of a miscarriage of justice.[18]

[17] In these respects, Woolford J in the High Court referred to the "unique" circumstance of the case.[19] Further, as the respondent submits, Mr Bublitz has had the benefit of a sentence reduction because of the delays and wasted costs due, albeit in part, to the failures of disclosure and the aborted initial trial.[20] Finally, the High

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16 The submission is made that an approach which does not take account of the consequences of a breach to a defendant undermines the ability to present an effective defence where, as here, resources are exhausted due to procedural failure on the part of the prosecutor.

17 Senior Courts Act 2016, s 74(2)(a).

18 Section 74(2)(b).

19 Costs decision, above n 3, at [36] and see [37].

20 *R v Bublitz* [2019] NZHC 592. Toogood J in sentencing allowed a discount of 30 per cent (19 months) in recognition of the way the prosecution was conducted. The Court of Appeal said that a 19 month discount was appropriate, although the Court disagreed that it should be

Court left open the possibility that Mr Bublitz could apply for costs under the 1967 Act after the final outcome of the second trial.

[18] The proposed appeal by Mr Morrison does not raise any question of general or public importance. Nor do we see any appearance of a miscarriage of justice if this Court does not hear this appeal. The matters raised by Mr Morrison seek to reprise the careful evaluation of the Courts below and we see no basis for doing so.

[19] The applications for leave to appeal are dismissed. In the circumstances we make no order as to costs.

Solicitors:
Beca & Co, Auckland for Applicants
Crown Law Office, Wellington for Respondent

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calculated as a percentage of the starting point: *Bublitz v R*, above n 5, at [164].