

IN THE SUPREME COURT OF NEW ZEALAND

**SC 10/2006
[2006] NZSC 63**

BETWEEN ALAN JOHN SHIRLEY
 Appellant

AND WAIRARAPA DISTRICT HEALTH
 BOARD
 Respondent

Hearing: 1 June 2006

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: C J Hodson QC and C W James for Appellant
 M G Ring QC for Respondent

Judgment: 23 August 2006

JUDGMENT OF THE COURT

- A. The appeal is dismissed.**
- B. The appellant must pay costs in this Court in the sum of \$15,000 and reasonable disbursements.**

REASONS

(Given by Anderson J)

Introduction

[1] Mr Shirley, a surgeon employed by the Wairarapa District Health Board, carried out a vasectomy on a Mr Bensemman. The vasectomy failed. Mr Bensemman

and his wife then sued the Board, claiming it was liable for negligent advice given to them by Mr Shirley when they were contemplating the operation. The Board, with the consent of the Bensemans, had Mr Shirley joined as a defendant and then cross-claimed against him. The Board's purpose in having Mr Shirley joined was:¹

to bring Alan [Shirley] in and then to explore a settlement directly with the Bensemans. This would leave the case to continue against Alan without the hospital's involvement.

[2] Several months later, before the case came to trial, the Bensemans settled with the Board for \$20,000 and filed a notice of discontinuance against it. The Board filed a notice of discontinuance in respect of its cross-claim. The discontinuance against and by the Board does not affect the determination of costs.² Mr Shirley consented to the discontinuances, but specifically reserved his position against the Board should he be unsuccessful at trial. There was no reservation expressed in relation to a successful defence. He went to trial and successfully defended the Bensemans' claim.

[3] The Bensemans were legally aided and Mr Shirley has not been able to recover his costs from them. He sought them instead from the Board. His application related to costs he incurred after the discontinuances. Whether the Board should be required to contribute to Mr Shirley's costs is the principal issue in this appeal.

[4] Costs calculated in accordance with the High Court scale 2B amounted to \$34,691.55 and Mr Shirley sought an order for 50% of that sum. The trial Judge, Miller J, awarded 30%, which amounts to \$10,407.47, plus disbursements.³ The Board appealed to the Court of Appeal which by a majority⁴ allowed the appeal.⁵ Leave to appeal to this Court was granted on the ground of whether the Court of Appeal should have differed from the High Court's discretionary decision. That will require an examination of the reasons of each of the Courts below.

¹ Noted in an email from the Board's solicitors to Board members and forwarded to Mr Shirley on 7 November 2002.

² High Court Rules, r 476A(2).

³ HC WN CIV 2001-435-019 9 March 2005.

⁴ Baragwanath and Heath JJ, Robertson J dissenting.

⁵ (2005) 18 PRNZ 34.

The insurance arrangements of the parties

[5] The dispute is not one directly between an employer and employee. The parties now are, in reality, the respective insurers. The Board insures with QBE Insurance (International) Ltd. Its policy excludes cover for medical practitioners and other health professionals employed by it. They carry separate cover which the Board pays for as a term of their employment contracts. Such insurance arrangements are common in the health sector in New Zealand, largely because senior medical consultants, like Mr Shirley, wish to insure with the Medical Protection Society, which is a mutual society.

[6] The objectives of the respective insurers are not identical, as Heath J observed in his reasons for judgment. Whereas the Board's indemnifiers have commercial objectives, the Medical Protection Society's concerns include protecting the professional reputation of an insured. That explains not only why the Board's insurer sought to share the economic risk of the litigation with Mr Shirley's insurer, but also why the parties have brought the dispute as far as this Court. Our decision may have economic implications beyond the immediate dispute because of the prevalence in the health sector of insurance arrangements like those in this case. Miller J and the Court of Appeal considered that the insurance arrangements were irrelevant to the question of costs. Whether that view is correct is discussed later in this judgment.

The High Court's reasons for judgment

[7] Miller J held that the Board procured the Bensemans to join Mr Shirley, a step which they would otherwise not have taken, and that but for the Board's actions the costs in respect of which Mr Shirley sought an order would not have been incurred. He said:⁶

Further, the Board's motivation was unashamedly tactical. It wanted to force Mr Shirley to contribute to a settlement. It was inherent in joinder that Mr Shirley would incur costs and confront trial risk unless he settled. That, rather than pursuit of indemnity, was the Board's real rationale for joining

⁶ At [34].

him. It is why the Board chose to expose him to independent liability by having him joined as a defendant, instead of issuing a third party notice. As Mr Ring argued, there is nothing wrong with that. But having behaved in that way, the Board cannot complain when Mr Shirley seeks costs resulting from the Board's decision. The connection between its conduct of the litigation and his costs is sufficiently direct to establish causation.

[8] The Judge took account of the fact that Mr Shirley, for reasons of personal vindication of his professional reputation, chose to go to trial. Miller J was of the view that costs awards should assume a reasonable approach to litigation in which financial considerations play a part. He concluded that he should make an award of 30% of an appropriate scale of costs in the unusual circumstances of the case. He summarised his reasons for that conclusion:⁷

At the end of the day, the dominant consideration is that Mr Shirley was involved in the litigation only because of the Board's decision to join him ...in that way to exert pressure on him. Had he been joined as a third party, he very likely would have avoided the costs he now claims since he would have benefited from any settlement between plaintiff and defendant. Alternatively, he would have been entitled to claim costs against the Board had it gone to trial. I attribute no fault to the Board, but neither do I see that it should avoid a contribution to costs resulting from its decision, merely because it settled before trial and he did not.

[9] The Judge's reasons assume that if Mr Shirley had been joined as a third party the Board would have reached a settlement with the Bensemans without Mr Shirley being joined as a defendant. We question that assumption. It would often be prudent for a plaintiff suing in respect of related causative incidents to join as a defendant a party brought in under a third party procedure. Although the indications for such a course may be less obvious where the original defendant's liability is said to be vicarious, the facts that the Bensemans were legally aided and that Mr Shirley was insured may have led them to join Mr Shirley as a defendant anyway, if he had been brought into the proceedings as a third party.

[10] It is reasonable to assume that the Bensemans settled with the Board for the sum they did because they were left with a defendant worth suing. The Board's solicitors made a settlement offer to the Bensemans' solicitors⁸ in which they argued that now Mr Shirley was a defendant there was no need for the Board to

⁷ At [40].

⁸ Letter dated 29 November 2002.

remain a party, whether the Bensemans were to succeed or fail against Mr Shirley; that the additional involvement of the Board would add to legal costs; and that the Bensemans, although legally aided, would ultimately have to carry those as a deduction from any judgment or as a charge on their property. This shows, as one would expect, that the addition of Mr Shirley as a defendant altered the tactical landscape. Therefore it is speculative whether, and if so at what stage of the litigation, the Board may have reached a compromise with the Bensemans if Mr Shirley had been joined as a third party rather than as a defendant.

[11] Miller J was of the view that if the Board had gone to trial Mr Shirley would have been entitled to claim costs against it. His view assumes that Mr Shirley would have been given costs when an employer, allegedly liable vicariously, had, in terms of its contract of employment, paid for the cost of insurance cover for the personal liability of its relevant employees. That assumption, also, is questionable.

The reasons in the Court of Appeal

[12] The majority Judges in the Court of Appeal placed emphasis on r 47(a) of the High Court Rules. That states a general principle applicable to the determination of costs that the party who fails with respect to a proceeding should pay costs to the party who succeeds. Although r 46, which was cited by Miller J, provides that all matters relating to the costs of and incidental to a proceeding or a step in a proceeding are at the discretion of the Court it would almost invariably be wrong, in the majority's opinion, to depart from the general principles the purpose of which was to reduce uncertainty and consequential expense and delay. The Board's legitimate tactical step did not warrant a departure from the general principle that the loser pays. Further, it would be a disincentive to settlement if all necessary parties were not brought into a proceeding, and if a party which settled were to have a continuing liability for future costs over which it had no control.

[13] Robertson J would have dismissed the appeal. He said there was no dispute over the High Court's jurisdiction to make the order and the only question was whether making it was a principled exercise of discretion. An appellate court should

be slow to interfere with the exercise of a discretion unless some error of principle can be demonstrated.

[14] In the view of Robertson J, it was open to Miller J to regard the circumstances of this case as exceptional. There was no need, as a matter of law, to join Mr Shirley as a party and, said Robertson J:⁹

it was not unreasonable that the Board, which orchestrated Mr Shirley's direct involvement in the litigation, should be required to make a contribution to his legal costs.

An award of costs involves a principled discretion

[15] The traditional view that costs orders involve the exercise of a discretion is confirmed by r 46(1) and reflected in s 51G of the Judicature Act 1908. Therefore an appellate court should not interfere unless satisfied that the Judge who made the order acted on a wrong principle, or failed to take into account some relevant matter, or took account of some irrelevant matter, or was plainly wrong.¹⁰

[16] But although the costs jurisdiction is discretionary, it is not unprincipled, or else it would be unacceptably arbitrary. As Lord Halsbury LC pointed out in *Sharp v Wakefield*:¹¹

when it is said that something is to be done within the discretion of the authorities ...that something is to be done according to the rules of reason and justice, not according to private opinion ...according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular.

[17] The discretion in respect of costs is no exception. The Court of Appeal has held on several occasions¹² that the discretion is to be exercised generally in accordance with rr 47-48G. Rule 47(a) applies the general principle that:

The party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds.

⁹ At [29].

¹⁰ *Alex Harvey Industries Ltd v Commissioner of Inland Revenue* (2001) 20 NZTC 17,286 at [13]-[15].

¹¹ [1891] AC 173 at 179, cited in *Cates v Glass* [1920] NZLR 37 at 57-58 per Edwards J.

¹² *Body Corporate 97010 v Auckland City Council* (2001) 15 PRNZ 372 at [19]; *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd* (2002) 16 PRNZ 662 at [27]; *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 at [19].

Here, the Board is not a party which has failed with respect to the proceeding. The Bensemans were unsuccessful and, but for the overlaying of s 40 of the Legal Services Act 2000, a costs order against them alone would certainly have been made.

[18] It is not unusual for an unsuccessful defendant to pay the costs of a successful defendant, either by way of a Bullock Order¹³ (where the Court orders the plaintiff to pay a successful defendant's costs, but requires the unsuccessful defendant to pay the same amount to the plaintiff), or more usually, by way of a Sanderson Order¹⁴ (where the Court orders the unsuccessful defendant to pay the successful defendant's costs directly). There is authority suggesting it is at least doubtful whether an unsuccessful party could be ordered to pay the costs of another unsuccessful party.¹⁵ However, the discretionary jurisdiction under r 46 might theoretically allow for that course, although there would have to be exceptionally bad conduct on the part of the defendant ordered to pay.¹⁶ Similar considerations must apply as between defendants who were not unsuccessful. Counsel were unable to refer this Court to a precedent where a party which had been successful was ordered to pay costs when the unsuccessful party was not good for costs.

[19] Rule 47(a) reflects the longstanding principle that, unless there are exceptional reasons, costs should follow the result. That is, the loser, and only the loser, pays. Miller J's order departs from that approach. The English Court of Appeal discussed the issue of good cause to depart from the ordinary course in *Forster v Farquhar* where Bowen LJ said:¹⁷

We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success.

[20] What makes it more fair as between Mr Shirley and the Board that he should get costs from a party against whom he has not succeeded and which itself was not

¹³ *Bullock v Condon General Omnibus Co* [1907] 1 KB 264.

¹⁴ *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.

¹⁵ *Morton v Douglas Homes Ltd (No 2)* [1984] NZLR 620 at 634 (HC); *Schollum v Barrripp (No 2)* [1917] NZLR 448 (SC).

¹⁶ An example might be where one of the unsuccessful defendants has conducted itself at trial in an irresponsible way which unnecessarily prolonged the hearing.

¹⁷ [1893] 1 QB 564 at 569, cited by Edwards J in *Cates v Glass* at 68.

unsuccessful? Miller J's reasons are grounded on causation – the Board caused the Bensemans to join Mr Shirley who thereby incurred costs in defending.

[21] However, all the costs sought by Mr Shirley were incurred at the suit of the Bensemans, who could have desisted at any time. The costs in issue were incurred at a time when they alone conducted and shaped the relevant litigation. They, not the Board, were the substantial cause of Mr Shirley's incurring the costs in issue. That of itself is, in our view, sufficient to make Miller J's order wrong in principle.

[22] That being the case, it is immaterial whether Mr Shirley would have been able to recover costs against the Board on the hypothesis of his having been joined as a third party, ultimately successful against the Board, rather than the actuality of his having been joined as a defendant, ultimately successful against the Bensemans. We think it more likely that when, as here, a defendant has properly joined a third party and the plaintiff fails, the plaintiff would be ordered to pay the costs of both the defendant and the third party.¹⁸ In the present case Mr Shirley was a proper party to the litigation, whether as a defendant or as a third party.

What is the relevance of the insurance arrangements?

[23] In the High Court, Court of Appeal and this Court, Mr Ring's submissions emphasised that the insurance arrangements were a relevant consideration. Miller J expressly disagreed with that, as did the majority Judges in the Court of Appeal.

[24] Mr Ring argued that, the dispute being essentially between insurers, it should be Mr Shirley's insurer which should bear his costs because that was a risk the Board paid it to cover; this is not one of the situations in which the insurance position should be ignored. Mr Hodson's position is that the conventional disregarding of insurance arrangements is appropriate.

¹⁸ "A successful defendant should only be called on to meet a third party's costs if the joinder was unnecessary or was for some other reason unjustified." *Money World NZ 2000 Ltd v KVB Kunlun NZ Ltd* HC AK CIV-2003-404-2452 23 September 2005 at [33] per Laurenson J.

[25] Ordinarily, the fact of insurance cover or its absence is considered irrelevant to the issues of liability or damages in a proceeding. Viscount Simon said in *Lister v Romford Ice and Cold Storage Co Ltd* that:¹⁹

as a general proposition it has not, I think, been questioned for nearly 200 years that in determining the rights inter se of A and B the fact that one or other of them is insured is to be disregarded. ...I cannot wholly ignore a principle so widely applicable as that a man insures at his own expense for his own benefit and does not thereby suffer any derogation of his rights against another man.

[26] Similarly, the liability or otherwise of a party to meet another party's costs is not affected by the mere fact of one or other being insured. But that does not mean that the insurance arrangements between the Board and Mr Shirley are irrelevant. There is no general rule that the fact of a party's being insured is irrelevant to litigation.

[27] The arrangements in this case represent an agreement between the Board and Mr Shirley that Mr Shirley would meet the risk of any claim against him personally, including a claim for costs, by means of insurance cover paid for by the Board. The Board thereby discharged itself from the risk that it might have to pay for Mr Shirley's costs. He cannot now ignore this arrangement on the maturing of the insured risk and ask to be paid again when the Board has already covered him for his costs. This must particularly be the case when the Board was not the substantial cause of his incurring those costs. Mr Shirley's insurer can have no greater rights by way of subrogation than Mr Shirley has in person.

Conclusions

[28] In the result we hold that Miller J erred in the following material respects, warranting appellate correction. First, he regarded the Board as having caused Mr Shirley's costs when all it did was have him joined as a defendant. The costs Mr Shirley seeks were incurred in litigation conducted by him and the Bensemans after the Board had ceased to participate. His costs were substantially caused by the Bensemans. Next, the Judge failed to take into account the relevance of the

¹⁹ [1957] AC 555 at 576-577.

agreement that the Board would cover Mr Shirley's costs by paying for his insurance cover. By awarding costs against the Board, Miller J was effectively requiring the Board to meet a cost for which it had already provided indemnification. Third, if it were appropriate that a party be joined at all, it would be illogical that a not unsuccessful party's risk in respect of costs should vary according to whether the joinder were as a defendant or as a third party, when the not unsuccessful defendant's conduct after joinder was irrelevant to the incurring of those costs.

[29] The appeal is dismissed. The appellant must pay costs in this Court in the sum of \$15,000 and reasonable disbursements.

Solicitors:
Bartlett Partners, Wellington for Appellant
Duncan Cotterill, Nelson for Respondent