**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 95/2006**
**SC 3/2007**
**SC 4/2007**
**SC 7/2007**
**[2007] NZSC 90**

**JOHN ANTHONY REID**
**PETER WILLIAM RUSSEL**
**PETER MICHAEL CONNOLLY**
**JOHN DAVID CURRIE**

v

**THE QUEEN**

| | |
|---|---|
| Hearing: | 10 and 11 October 2007 |
| Court: | Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ |
| Counsel: | C T Walker and N C Z Khouri for Mr Reid<br>J R Billington QC for Mr Russel<br>H Fulton for Mr Connolly<br>No appearance for Mr Currie<br>J A Farmer QC and M J Ruffin for Crown |
| Judgment: | 14 November 2007 |

---

## JUDGMENT OF THE COURT

---

**A** **All appeals are allowed.**

**B** **The costs orders made in the High Court are reinstated.**

**C** **Each appellant is to have costs in the Court of Appeal of $12,000 together with reasonable expenses as may be fixed, if necessary, by the Registrar of that Court.**

**D** **In this Court Mr Reid, Mr Russel and Mr Connolly are each to have costs of $20,000 together with reasonable expenses as may be fixed, if necessary, by the Registrar of this Court. Mr Currie is also entitled to reasonable expenses as may be fixed, if necessary, by the Registrar of this Court.**

## REASONS

(Given by Anderson J)

[1] This appeal is concerned with awards under the Costs in Criminal Cases Act 1967 to four acquitted defendants.

[2] In September and October 2004 the appellants were tried on indictment by Fogarty J on two counts of conspiracy to defraud[1] and, in the case of Mr Currie, Mr Reid and Mr Russel, various counts of money laundering.[2] The charges related to a tax avoidance scheme involving the purchase of shares by investors using loss attributing qualifying companies, with the bulk of the price deferred for ten years and hedged with a loss of profit insurance policy. The premium for the policy was to be paid by way of a relatively small cash payment and a loan for the balance. That loan was borrowed on an interest bearing but non-recourse basis, on the security of an assignment of the borrower's rights to complete the share purchase together with the benefit of the insurance policy. These arrangements meant that if, at the end of the ten year period, the share value should be less than the accrued debt, the purchaser could walk away without any personal liability.

[3] Plainly, the purpose of those arrangements was to incur a loss in respect of the insurance premium in the optimistic expectation that it could be immediately

---

1 Then, s 257 of the Crimes Act 1961.
2 Then, ss 257A(2) and 66 of the Crimes Act 1961.

offset against the investor's taxable income. But the Serious Fraud Office saw the promoters of the scheme not as merely facilitating tax avoidance, but as fraudsters. Their alleged criminality was conspiring to defraud the investors and, consequentially, the Commissioner of Inland Revenue as well. The basis upon which the Crown case was put is discussed later in this judgment. The money laundering charges relate to their dealings with the proceeds of investment.

[4] After the Crown case had closed and counsel for Mr Reid had addressed the Court, Fogarty J entered verdicts of acquittal on every count. The following week he delivered full written reasons comprising some 70 pages of close legal and factual analysis.[3]

[5] The preparation for and the conduct of the four week trial had cost the appellants dearly. They applied for costs pursuant to the Costs in Criminal Cases Act. Their applications were argued before Fogarty J on two days in August 2005.

[6] In December 2005, Fogarty J gave judgment in their favour.[4] He awarded Mr Connolly and Mr Currie their solicitor and counsel's costs at the Crown rate for the whole proceeding, except in relation to an admissibility issue which all the appellants had unsuccessfully opposed.[5] He held that although their conduct gave rise to scrutiny it should not have led to their being charged, given that "there was no proof at all" against them.

[7] As to Mr Reid and Mr Russel, Fogarty J also awarded solicitor and counsel costs at the Crown rate on all issues except the admissibility issue, but only for half the time. The Crown method of calculation would allow for the whole. The reason for that discounting was that in respect of one aspect of the prosecution, which he referred to as "the third limb", there was a prima facie case against those two appellants. That case had collapsed when severely critiqued by Mr Reid's counsel, but the critique relied on detailed information which neither Mr Reid nor Mr Russel had disclosed. Thus, they were entitled only to costs in respect of the first and

---

3 *R v Connolly* (2004) 21 NZTC 18,844 (HC).
4 *R v Connolly* (2006) 22 NZTC 19,844 (HC).
5 The admissibility decision is reported as *R v Connolly* [2004] 3 NZLR 794 (HC).

second limbs of the Crown case, which had occupied about half of the time involved in the prosecution.

[8] Disbursements were allowed at the Crown rate, as well as the reasonable travelling expenses and the allowances of the appellants and their counsel and/or solicitors.

[9] The costs judgment, like the acquittal, was fully reasoned, comprising 28 pages. It thoroughly examined the Costs in Criminal Cases Act and carefully applied its principles, particularly those prescribed by s 5 which is in these terms:

> **5 Costs of successful defendant**
>
> (1) Where any defendant is acquitted of an offence or where the information charging him with an offence is dismissed or withdrawn, whether upon the merits or otherwise, or where he is discharged under section 167 of the Summary Proceedings Act 1957 the Court may, subject to any regulations made under this Act, order that he be paid such sum as it thinks just and reasonable towards the costs of his defence.
>
> (2) Without limiting or affecting the Court's discretion under subsection (1) of this section, it is hereby declared that the Court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate) to—
>
> (a) Whether the prosecution acted in good faith in bringing and continuing the proceedings:
>
> (b) Whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence:
>
> (c) Whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty:
>
> (d) Whether generally the investigation into the offence was conducted in a reasonable and proper manner:
>
> (e) Whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point:
>
> (f) Whether the information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty:
>
> (g) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the

> investigation and proceedings was such that a sum should be paid towards the costs of his defence.
>
> (3) There shall be no presumption for or against the granting of costs in any case.
>
> (4) No defendant shall be granted costs under this section by reason only of the fact that he has been acquitted or discharged or that any information charging him with an offence has been dismissed or withdrawn.
>
> (5) No defendant shall be refused costs under this section by reason only of the fact that the proceedings were properly brought and continued.

[10] The Crown appealed to the Court of Appeal which, by a majority, set aside the costs orders.[6] Gendall and Heath JJ were of opinion that Fogarty J had erred in the exercise of his discretion in two ways, which they identified in these terms:

> (a) First, by subdividing the Crown case into three limbs, he changed the focus of his inquiry from whether prosecution of the conspiracy charges was justified to whether the Crown could have succeeded in proving the charges on each theory of the case.
>
> (b) Second, the Judge failed to take account, in making what was a significant order for costs, the public interest in not inhibiting prosecution of serious crime through disproportionate adverse costs orders.

[11] The majority held that because Fogarty J had erred in principle it was open to the Court of Appeal itself to exercise the statutory discretion as to costs and that it should do so. They were not prepared to disagree with the trial Judge's view that there was no proof against Mr Connolly and Mr Currie but considered that in order to avoid the possibility of inhibiting the prosecutorial function of the Serious Fraud Office, and having regard to the impact of a large award of costs on that Office's annual budget, those two appellants should each receive a global contribution of $50,000 towards their costs and disbursements. As to Mr Reid and Mr Russel, the majority were of opinion that they had brought the charges on their own heads. Further, an award of costs in their favour could, inappropriately, lead to greater caution being exercised in the investigation and prosecution of alleged serious and complex fraud, and that would not be in the public interest. Therefore neither Mr Reid nor Mr Russel should receive any costs.

---

6 *R v Connolly* (2007) 23 NZTC 21,172 (CA).

[12] Dissenting, Ellen France J considered that Fogarty J had made no error in his approach to the exercise of his discretion under s 5 of the Act. She considered the decision under appeal to be a careful and reasoned judgment by a trial Judge who had treated the question of costs as a related but fresh and separate issue from the acquittals.

**Fiscal considerations**

[13] The concern of the majority of the Court of Appeal about the fiscal impact of costs awards on the prosecutorial function was misplaced. It overlooks s 7(1)(a) of the Act which provides:

> **7 Payment of defendant's costs**
>
> (1) Subject to subsection (2) of this section, where any order is made under section 5 or section 6 of this Act the amount ordered to be paid to the defendant shall—
>
> > (a) If the prosecution was conducted by or on behalf of the Crown, be paid by the chief executive of the Ministry of Justice out of money appropriated by Parliament for the purpose and may be recovered as a debt due by the Crown:

[14] The Law Commission explained the purpose of that subsection in its report, *Costs in Criminal Cases*, as follows:[7]

> Section 7(1)(a) of the Act provides that where the prosecution is conducted by or on behalf of the Crown, a successful defendant's costs are met by the Crown through a neutral source, namely, the Department for Courts, out of money appropriated by Parliament for the purpose. This reflects the principle that prosecutions are brought in the public interest and therefore the prosecuting agency should not be inhibited in bringing a prosecution by an adverse inference which might be drawn from an award of costs against it. This provision was recommended by the 1966 Committee[8] because it was concerned that awards of costs would be an expense to the police and thus a source of anxiety and therefore a deterrent to some officers. The provision highlights the intention that the costs are a payment *to the defendant* not *against the prosecuting agency*.

---

7 (NZLC R60, 2000), para [95].

8 This was a Committee representing the Department of Justice, the Police, the Crown Law Office and the legal profession, which produced a report on the issue of costs in criminal cases in September 1966.

[15] It should be noted that where a court is of the opinion that any person has acted negligently or in bad faith in bringing, continuing, or conducting a prosecution, it may, in any order made under s 5, direct that the defendant's costs shall be paid by the prosecuting agency or prosecutor personally, instead of by the Department of Courts.[9] There was no such order in this case.

[16] It follows, contrary to the view of the majority of the Court of Appeal, that Fogarty J did not err in principle in relation to fiscal consequences for the Serious Fraud Office and its prosecutorial function. Counsel for the respondent candidly accepted that they could not support the reasons of Gendall and Heath JJ on that issue, and had not in fact presented such an argument to the Court of Appeal.

[17] As to the other basis upon which Gendall and Heath JJ considered the trial Judge had erred, some explanation is needed in respect of the so-called "three limbs".

[18] In his acquittal judgment Fogarty J stated that during the trial the Crown case had separated out into three separate contentions. We summarise these as follows:

1 The insurance and loan transactions were entirely fictional, their nature being concealed by a deliberately manufactured paper trail. They were fictional because they were circular and were not real loans and real premiums.

2 They were also fictional because the instruments used to settle the loan were defective or did not exist.

3 Members of the conspiracy dishonestly represented in various communications and contract documents, and by concealing the truth that the loan and insurance transactions were real.

[19] It is unnecessary to record the detail of Fogarty J's examination and rejection of the Crown case in terms of that analysis, which the Judge referred to in his costs judgment as the "three limbs" of the Crown case. It is sufficient to repeat that he

---

9 Section 7(2).

found “no proof at all” against Mr Connolly and Mr Currie and that they should not have been charged. As to Mr Reid and Mr Russel, he found that in respect of the third limb there was a prima facie case, “but just”. The other two limbs were “counter intuitive”, and, in the Judge’s view, not supported by the Inland Revenue Department. The relevance of the reference to the IRD is that there was some evidence that the IRD may have regarded the template as tax effective to the extent that the expenditure on the insurance premium may have been progressively deductible over the ten year term. Tenuous though that evidence may have been, it is plain from a consideration of both of Fogarty J’s judgments that he considered the Serious Fraud Office remiss in not sounding out the IRD’s attitude to the arrangements. Had they done so their assessment would not have been counter intuitive.

[20] The Judge’s analysis in terms of the three limbs was a method of evaluating the appellants’ claims for costs by reference to the criteria described in ss 5(2)(b), (c) and (d), as his costs judgment makes clear. Such evaluation led him to the view that costs should be paid and that the inadequacies of the Crown case in terms of the first two limbs meant that half the trial time was dissipated unnecessarily. The prima facie case on the third limb, and the conduct of Mr Reid and Mr Russel in respect of it, was justification for not awarding costs for the trial and preparation time it represented.

[21] We cannot agree with the view of the majority of the Court of Appeal that by subdividing the Crown case into three limbs Fogarty J changed the focus of his inquiry from whether prosecution of the conspiracy charges was justified to whether the Crown could have succeeded in proving the charges on each theory of the case. As we have mentioned, Fogarty J made it plain that he was examining the Crown case by reference to ss 5(2)(b), (c) and (d). Given that the case as presented by the Crown was lengthy and complex, the Judge cannot be criticised for adopting a reasonably structured, rather than a generalised, examination. Put at its highest, the Crown only just had a prima facie case and even then in only one aspect of its extensive evidence and multiple accusations. In any event, Fogarty J applied the stipulated statutory criteria. What weight he may have given to any particular factor does not engage matters of principle affecting the validity of his statutory discretion.

[22] In this Court counsel for the Crown traversed a number of factual matters with a view to persuading us that the Crown case was not as weak as Fogarty J perceived it to be. Some of the material included concocted documentation prepared, apparently, as a defensive strategy against any investors who, although apparently not deceived by the appellants concerning the nature of the scheme, might become disaffected with their investment. The creation of documents for a future seemingly dishonest use is far from creditable and was apt to raise suspicions about the bona fides of those involved. But Fogarty J was aware of that conduct and did not disregard it.

[23] Counsel for the Crown accepted that the verdicts of acquittal cannot be challenged by a collateral impugning of the costs orders. That constrains the ability of an appellate court to examine the relative strength of a prosecutor's case. But, in any event, an appellate court cannot hope to capture the ephemeral but significant impressions which inform the assessments and discretions of the trial judge. That is why, of course, a challenge to the exercise of discretion must demonstrate what would be termed, generally, an error of principle.

[24] The Court of Appeal majority thought that Fogarty J erred in principle in two respects, but they were wrong. We have not been persuaded that the Judge erred in principle in any other respect.

[25] In the result, all the appeals are allowed. The costs orders made in the High Court are reinstated. Each appellant is to have costs in the Court of Appeal of $12,000 together with reasonable expenses as may be fixed, if necessary, by the Registrar of that Court. In this Court Mr Reid, Mr Russel and Mr Connolly are each to have costs of $20,000 together with reasonable expenses as may be fixed, if necessary, by the Registrar of this Court. We record that Mr Currie was not represented before us although he made submissions in writing. He also is entitled to his reasonable expenses as may be fixed, if necessary, by the Registrar of this Court.

Solicitors:
Gilbert Walker, Auckland for Mr Reid
Castle Brown, Auckland for Mr Russel
McCabe & Co, Wellington for Mr Connolly
Serious Fraud Office, Auckland for Crown