IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 141/2016
[2018] NZSC 70

BETWEEN	NEW HEALTH NEW ZEALAND INCORPORATED Appellant
AND	SOUTH TARANAKI DISTRICT COUNCIL First Respondent
	ATTORNEY-GENERAL FOR AND ON BEHALF OF THE MINISTER OF HEALTH Second Respondent

Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	M T Scholtens QC, L M Hansen and T Mijatov for Appellant D J S Laing and H P Harwood for First Respondent A M Powell and S K Jameson for Second Respondent
Judgment:	7 August 2018

JUDGMENT OF THE COURT (AS TO COSTS)

New Health is to pay costs of $5,000 to the second respondent.

REASONS

Introduction

[1] In our judgment delivered on 27 June 2018, we dismissed two appeals by New Health New Zealand Inc (New Health), the appellant.[1] Costs were reserved. The parties have been unable to reach agreement as to costs and now seek orders from the

[1] *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 60.

Court. In particular, the Attorney-General, the second respondent, seeks costs of $5,000. The appellant opposes on the basis costs should lie where they fall.

Background

[2] The first of the two appeals challenged the validity of the Medicines Regulations 2015 (the Regulations appeal). Broadly speaking, the Medicines Regulations made it clear that fluoridating agents for use in fluoridating drinking water are not medicines for the purposes of the Medicines Act 1981. The Court rejected New Health's claim noting, amongst other matters, that there was no improper purpose where the effect of the Medicines Regulations is prospective. The second of the appeals related to whether or not specified fluoridating agents were medicines for the purposes of the Medicines Act (the Medicines Act appeal). The Court found that appeal was moot given the making of the Regulations.

[3] At the same time as the judgment in the Regulations and Medicines Act appeals was delivered, the Court also delivered its judgment in *New Health New Zealand Inc v South Taranaki District Council.*[2] That judgment related to New Health's challenge to the statutory authority of the South Taranaki District Council to fluoridate the water supplies for Patea and Waverley (the fluoridation appeal). New Health's appeal was unsuccessful. But, in the course of finding there was statutory authority to fluoridate the water supplies, the Court (William Young J dissenting) found that the fluoridation of water medical treatment for the purposes of s 11 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). New Health was ordered to pay the South Taranaki District Council costs of $20,000 plus usual disbursements. The Attorney-General did not seek costs, counsel having accepted the Attorney-General's role was akin to that of an intervenor.

Arguments as to costs

[4] Against this background, counsel for the Attorney-General seeks a reduced award of costs of $5,000. That award is sought on the basis that costs should follow the event in the usual way.

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2 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59.

[5] An award of costs is resisted by the appellant on two bases. First, it is submitted that New Health is a public interest litigant and has brought the litigation in the public interest to test the view that fluoridation was not medical treatment without consent and did not involve the delivery of a medicine. Counsel for New Health submits that the appellant was ultimately successful on the former question. Secondly, New Health maintains that the outcomes could have been different if the finding that fluoridation was medical treatment had been made earlier. The submission is that the Crown has been the beneficiary of the fact that this finding was not made earlier.

Our assessment

[6] We see no basis to depart from the usual position that costs follow the event. To the extent that there is a public interest aspect to these two appeals that interest is met by reducing the award of costs to $5,000.[3] But to require the Crown to meet all of the costs of these two appeals would not be just in the circumstances of the case. The Regulations appeal had little merit with an inevitable effect on the Medicines Act appeal. The Court's finding in the fluoridation appeal as to s 11 does not alter that.[4] Against that background, it is speculative to suggest the approach to the Medicines Regulations may have been different had the position with respect to s 11 been clarified earlier.

[7] For these reasons, New Health must pay the second respondent costs of $5,000.

Solicitors:
Wynn Williams Lawyers, Christchurch for Appellant
Simpson Grierson, Wellington for First Respondent
Crown Law Office, Wellington for Second Respondent

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3 In a case of this duration with two counsel involved, an award of $15,000 would normally be made.

4 By a majority, albeit for different reasons, the Court concluded that although s 11 is engaged the statutory power to fluoridate is not constrained by s 11 of the Bill of Rights.