

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 66/2018
[2019] NZSC 155

BETWEEN DOUGLAS CRAIG SCHMUCK
Appellant

AND OPUA COASTAL PRESERVATION
INCORPORATED
First Respondent

FAR NORTH DISTRICT COUNCIL
Second Respondent

Court: Glazebrook, O'Regan, Ellen France, Williams and Arnold JJ

Counsel: J A Browne and C H Prendergast for Appellant
T H Bennion for First Respondent
J E Hodder QC, J G A Day and S W H Fletcher for Second
Respondent

Judgment: 23 December 2019

JUDGMENT OF THE COURT

- A The first respondent must pay costs of \$20,000 plus usual disbursements to the appellant and \$15,000 plus usual disbursements to the second respondent.**
- B The award of costs and disbursements made in favour of the first respondent in the Court of Appeal is quashed. That Court should redetermine costs in that Court in light of this Court's judgment allowing the appeal.**
- C The High Court should now determine costs in that Court in light of this Court's judgment allowing the appeal.**
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REASONS

[1] The appellant, Mr Schmuck, was successful in his appeal to this Court.¹

[2] We reserved costs and sought submissions from the parties.² We have now received those submissions.

Costs in the High Court and Court of Appeal

[3] Mr Schmuck was successful in the High Court, but costs were reserved in that Court and we are told that no award has yet been made.³ We direct the High Court to now determine costs, in light of the outcome of Mr Schmuck's appeal to this Court.

[4] The first respondent (the Society) was successful in the Court of Appeal and that Court ordered costs in its favour.⁴ As Mr Schmuck has been successful in this Court, we quash the award of costs made by the Court of Appeal in favour of the Society and direct the Court of Appeal to now determine costs in light of this Court's judgment in the substantive appeal and in this judgment.

Costs in this Court

[5] Mr Schmuck seeks costs in this Court. He also foreshadows the possibility of a non-party costs application against individuals associated with the Society, who he says initiated, funded and pursued the litigation through the Society. The second respondent (the Council) also seeks costs against the Society. Further, it argues that increased costs are justified because of the way the Society conducted the litigation. It also foreshadows the possibility of a non-party costs application.

[6] The Society argues that costs should lie where they fall in all Courts. It argues that the litigation was public interest litigation. This is strongly contested by both Mr Schmuck and the Council. Mr Schmuck argues that those behind the Society were acting in their personal interests and were motivated by personal animosity towards

¹ *Schmuck v Opuia Coastal Preservation Inc* [2019] NZSC 118.

² At [143].

³ *Opuia Coastal Preservation Inc v Far North District Council* [2017] NZHC 154 (Fogarty J) at [91].

⁴ *Opuia Coastal Preservation Inc v Far North District Council* [2018] NZCA 262, [2018] 3 NZLR 538 (Winkelmann, Brown and Gilbert JJ) at [124].

him. The Council argues that, even if the case did involve a matter of public interest, the manner in which the Society conducted the litigation disentitles it to any costs concession. The Council does, however, accept that the Court's clarification of the role of the Council as grantor of an easement over the reserve and as delegate of the Minister to consent to such a grant is helpful beyond this case.

[7] We do not intend to engage with the allegations of animosity between the parties. We acknowledge that the Society was successful in the Court of Appeal and was therefore involved in the appeal to this Court to defend the judgment it had obtained in the Court of Appeal. But we accept the submissions made by both Mr Schmuck and the Council that the Society broadened the scope of the proceeding in this Court by its notice that it supported the Court of Appeal judgment on other grounds which raised a number of issues, some of which had not been considered in the Courts below.⁵ We are not, however, persuaded that this necessitates or justifies an award of increased costs.

[8] We accept there was some public interest aspect to the Society's position, but we agree with both Mr Schmuck and the Council that this was limited and would not justify making an order that costs should lie where they fall.

[9] The hearing in this Court took one and a half days, and both Mr Schmuck and the Council were represented by three counsel. Normally this would lead to an award of costs in the order of \$30,000 to the successful party. In this case there are two "successful parties", Mr Schmuck and the Council. The Council correctly accepts its interest in, and level of participation in, the appeal was more limited than that of Mr Schmuck. Making a small allowance for the public interest aspect of the appeal and reflecting the differing roles of Mr Schmuck and the Council, we award costs to Mr Schmuck of \$20,000 and to the Council of \$15,000. Both are also entitled to usual disbursements.

[10] Mr Schmuck and the Council concede that this Court is not in a position to deal with any application for an award of non-party costs on the material it has before it. If they wish to pursue this course, they should make an application in the High Court.

⁵ Supreme Court Rules 2004, r 20A.

We do not express any view about the appropriateness of such an application or the chances of success if one is made.

Solicitors:
Henderson Reeves Lawyers, Whangarei for Appellant
Bennion Law, Wellington for First Respondent
Law North Lawyers, Kerikeri for Second Respondent