IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 65/2017
[2019] NZSC 18

BETWEEN	ATTORNEY-GENERAL Appellant
AND	ARTHUR WILLIAM TAYLOR First Respondent
	HINEMANU NGARONOA, SANDRA WILDE, KIRSTY OLIVIA FENSOM AND CLAIRE THRUPP Second to Fifth Respondents

Hearing:	6 and 7 March 2018
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	U R Jagose QC, D J Perkins and G M Taylor for the Appellant First Respondent in person R K Francois for the Second to Fifth Respondents A S Butler, C J Curran and J S Hancock for the Human Rights Commission as Intervener
Judgment:	27 February 2019

JUDGMENT OF THE COURT

A **The appellant must pay to the first respondent usual disbursements.**

B **The appellant must pay the second to fifth respondents costs of $15,000 or such lesser figure as evidenced by invoices produced to the Registrar.**

C **Any issues arising as to costs in the Court of Appeal in respect of Mr Taylor are to be dealt with in that Court.**

REASONS

Introduction

[1] In a judgment delivered on 9 November 2018 we dismissed an appeal by the Attorney-General and allowed Mr Taylor's cross-appeal.[1] At issue on the appeal was whether the High Court had the power to make a declaration that the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 which extended the prohibition on voting to all prisoners was inconsistent with the New Zealand Bill of Rights Act 1990 (the Bill of Rights). The issue on the cross-appeal was whether the first respondent, Mr Taylor, had standing. The latter question arose because Mr Taylor had been prevented from voting under earlier legislation.

[2] The Court found the High Court had power to make the declaration sought and that Mr Taylor had standing. Costs were reserved and submissions sought in the event the parties were not able to agree on costs. Agreement has not been reached. We can address the submissions that have now accordingly been filed on costs under two headings.

A costs award for Mr Taylor?

[3] Mr Taylor was unrepresented. The general understanding is that a person in Mr Taylor's situation (a lay litigant who is not a lawyer) is entitled to recover disbursements but not costs.[2] The Court in *McGuire v Secretary for Justice* did not depart from that position. Mr Taylor's submission is that the Court should either find that *McGuire* is distinguishable because that case dealt with costs in the High Court or depart from *McGuire* and award costs to him as a lay litigant on the same basis as if he was a lawyer.

[4] Mr Taylor's principal argument relies on s 27(3) of the Bill of Rights. Section 27(3) provides that:

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1 *Attorney-General v Taylor* [2018] NZSC 104.

2 *McGuire v Secretary for Justice* [2018] NZSC 116 at [55] and [88]. See also *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA) at 441–442; A C Beck and others *McGechan on Procedure* (looseleaf ed, Thomson Reuters) at [HRPt14.10(1)(a)]; and *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500 at [162].

> Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

[5] Mr Taylor submits that he should accordingly be treated in the same way as the Attorney-General who would be entitled to an award of costs if successful. It is also submitted that the effect of s 27(3) was not considered in *McGuire*.

[6] In *McGuire* the Court concluded that if the law in this area was to be reformed, "this should be effected otherwise than by the courts".[3] The Court noted such reform could be by the legislature but that "such reform [was] probably within the competence of the Rules Committee".[4] Given the indication changes to the current position are best addressed through the law reform process it would not be sensible or appropriate for the Court now to revisit the matter. The arguments raised by Mr Taylor are ones no doubt that can be considered in the context of any law reform exercise.

[7] We do not accept Mr Taylor's submission that the approach in *McGuire* to costs for a lay litigant who is not a lawyer is distinguishable from the present case on the basis that it dealt with costs in the High Court. As indicated we do not consider it appropriate to depart from the approach in *McGuire*. This means that no order for costs can be made to Mr Taylor but he is entitled to be paid usual disbursements.

The approach to costs for the other respondents

[8] The primary issue that arises in relation to costs for the second to fifth respondents is whether there should be any discount in the amount awarded. It is accepted by the appellant that an award of costs is appropriate on the basis costs should follow the event. However, it is submitted the Court may consider a discount is appropriate to reflect the fact much of the argument for the respondents was carried by the other participants (primarily, the Human Rights Commission as intervener). Mr Francois for the second to fifth respondents submits there should be an award of $25,000, a figure which, on his analysis, reflects no discount.

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3 At [88] per William Young J delivering the reasons of Elias CJ, William Young, Glazebrook and O'Regan JJ and see at [90] per Ellen France J.

4 At [88].

[9] We agree costs should follow the event. Having succeeded, the second to fifth respondents are entitled to an award of costs in their favour. We accept however the submissions for the appellant that a discount is appropriate to reflect the fact other participants largely had the carriage of the hearing before us. An award of $15,000 is appropriate. We add that the exact basis of Mr Francois' engagement is unclear. Rule 14.2(1)(f) of the High Court Rules 2016 provides that a costs award "should not exceed the costs incurred".[5] In these circumstances, in order to establish there were actual costs incurred and what those costs were, we consider it appropriate to direct that invoices be provided to the Registrar.

[10] Finally, we note that a memorandum has been filed by counsel who was instructed to represent Mr Taylor in the Court of Appeal. Counsel advises that Mr Taylor was in receipt of legal aid for part of the proceedings in that Court. The Court of Appeal made no award of costs to Mr Taylor.[6] Any issue as to costs for Mr Taylor in the Court of Appeal are to be dealt with by that Court.

Result

[11] We make the following orders:

(a) The appellant must pay to the first respondent usual disbursements.

(b) The appellant must pay the second to fifth respondents costs of $15,000 or such lesser figure as evidenced by invoices produced to the Registrar.

(c) Any issues arising as to costs in the Court of Appeal in respect of Mr Taylor are to be dealt with in that Court.

Solicitors:
Crown Law Office, Wellington for Appellant
Amicus Law, Auckland for Second to Fifth Respondents
Russell McVeagh, Wellington for Intervener

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5 *McGuire*, above n 2, at [66] and [82]–[83]; and see for example *Karmarkar v Manda* [2018] NZHC 2081 at [19]–[20].

6 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24.