

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES REMAINS IN FORCE SO LONG AS THE SUPPRESSION ORDER MADE BY THE EMPLOYMENT RELATIONS AUTHORITY REMAINS IN FORCE. SEE [2021] NZSC 102 AT [138].

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 72/2019
[2021] NZSC 145**

BETWEEN FMV
Appellant

AND TZB
Respondent

Court: Winkelmann CJ, William Young, Glazebrook, O'Regan and Williams JJ

Counsel: R E Harrison QC for Appellant
T L Clarke for Respondent

Judgment: 2 November 2021

JUDGMENT OF THE COURT

The appellant must pay the respondent costs of \$13,300 plus disbursements of \$789.20.

REASONS

[1] In our judgment of 20 August 2021, we dismissed FMV's appeal to this Court and reserved costs.¹ TZB, the respondent, now claims costs of \$25,000 plus disbursements of \$789.20. FMV submits that costs should lie where they fall or, alternatively, that costs should be discounted in the context of this case.

¹ *FMV v TZB* [2021] NZSC 102 at [141]–[142].

TZB's submissions

[2] TZB submits that there are no reasons in this case to depart from the general rule that costs follow the event. Specifically, it says that it was completely successful in the appeal and had prevailed in the Courts below. Further, this was not a “test case” that might warrant departure from the general rule. Almost all appeals considered by this Court involve matters of general or public importance, and unlike the appellants in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*,² FMV was not a public interest litigant. The appeal was litigation brought in FMV’s personal interest, not to resolve an uncertainty in an area of law.

[3] TZB says it would not be just to require it to bear the full costs of the appeal, given the significant trouble and cost it has been put to.

FMV's submissions

[4] FMV opposes an award of costs, first because she says the outcome in the appeal was mixed. She notes that she was successful in overturning the High Court’s permanent suppression order, which is now only contingent on suppression remaining in the Employment Relations Authority. And as the Court did not deal with the abuse of process issue, neither party was successful or unsuccessful (although it is her belief that had the Court addressed this issue, she would have been successful).

[5] Second, FMV submits that the appeal could properly be regarded as a test case by the time the parties’ arguments had been fully elaborated. In any event, she says that the law relating to the Authority’s exclusive jurisdiction was unclear and has now been resolved to the broader public benefit. And *King Salmon* shows that the fact that a party brought a case in their own interest is not necessarily conclusive.³

[6] FMV submits that given she has already paid costs in the Courts below and given the obvious imbalance in financial resources of the parties, the Court should order that costs lie where they fall. Alternatively, if that is not accepted, she asks for costs to be discounted. She does not dispute the claimed disbursements of \$789.20.

² *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 167.

³ Quoting the passage at [28].

Our assessment

[7] The general rule is that costs should follow the event.⁴

[8] Contrary to FMV's submission, the present case did not produce a mixed outcome justifying an order that costs lie where they fall.⁵ The only point on which FMV was successful was suppression. This was not a significant aspect of the case. Even then, the identity of the successful party on this point is contestable because TZB did not specifically argue for permanent suppression either. It proceeded on the basis that suppression in the High Court was needed to protect the integrity of suppression in the Authority, which it also accepted would be lifted at some point in the course of the proceedings. This Court's variation of the suppression order was consistent with that position.

[9] On the test case point, the passage from *King Salmon* on which FMV relies does not assist, as it formed part of the minority reasons; the majority in that case considered that The New Zealand King Salmon Co Ltd was a company seeking to further its commercial objectives and was therefore in a different position from the public interest litigant opposing it.⁶ In any event, the minority considered it relevant that the legislation required King Salmon to demonstrate public interest in the consents it sought.⁷ That is not so in the present case.

[10] Almost all civil appeals in this Court involve a question of law of wider significance than the interests of the parties. There must be something more to mark an appeal as a test case or public interest litigation to justify departing from the ordinary principle for costs. That element is not present here.

⁴ *Prebble v Awatere Huata (No 2)* [2005] NZSC 18, [2005] 2 NZLR 467 at [3].

⁵ In *Houghton v Saunders* [2018] NZSC 112, the respondents argued that costs should lie where they fall because the outcome on appeal was mixed: the appellant had failed to demonstrate loss, his primary "but for" argument was rejected, and his personal claim survived only in a narrow sense. This Court held that although the failed "but for" argument was a significant aspect of the appellant's representative claim, that claim nevertheless succeeded on another significant aspect of the case. In those circumstances, the Court awarded costs of \$30,000 to the appellant for a three-day appeal "to recognise that success in relation to the issues before this Court": at [11]. That is \$15,000 less than the awards of \$45,000 for three-day hearings in *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 and *Trustpower Ltd v Commissioner of Inland Revenue* [2016] NZSC 91, [2017] 1 NZLR 155.

⁶ *King Salmon*, above n 2, at [41] per McGrath, Glazebrook and Arnold JJ.

⁷ At [28] per Elias CJ and William Young J.

[11] Having said that, this Court has discretion to make any costs orders “that seem just”.⁸ It is relevant here that FMV’s preference was to pursue her proceeding in the correct forum, that is, the Authority. She resorted to the High Court only because the Authority stayed her claim. While it might, in hindsight, have been wiser for her to appeal the Authority’s decision to the Employment Court, we can perhaps see why FMV chose instead to pursue her claim elsewhere. We are satisfied that this circumstance justifies a discounted costs award. We would discount costs by approximately one third.

[12] TZB claimed costs of \$25,000, which is the standard rate for a one-day appeal in this Court with two or more counsel. There being only one counsel appearing for TZB, we would award costs at \$20,000, discounted by \$6,700.

[13] The appellant is to pay the respondent costs of \$13,300, plus disbursements of \$789.20 as agreed.

Solicitors:
Davenports City Law, Auckland for Appellant
Bell Gully, Auckland for Respondent

⁸ Supreme Court Rules 2004, r 44(1).