IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-202
[2022] NZHC 2801

BETWEEN	SARAH GORDON First Applicant
	GILES NEWTON-HOWES Second Applicant
AND	ATTORNEY-GENERAL First Respondent
	DIRECTOR-GENERAL OF HEALTH Second Respondent

Hearing (Teams): 10 October 2022

Appearances: I H V Reuvecamp for the Applicants
D R La Hood for the Respondents

Judgment: 27 October 2022

JUDGMENT NO 2 OF PALMER J

Solicitors
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What happened?

[1] In these proceedings the plaintiffs, Associate Professor Sarah Gordon and Associate Professor Giles Newton-Howes, seek declarations about the interpretation of provisions of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Act). The proceedings are now set down to be heard for up to two days in the Wellington High Court commencing 13 February 2023.

[2] The plaintiffs sought a protective costs order that no award of costs would be made against them if they are unsuccessful. I am not aware of the High Court making a protective costs order previously in New Zealand. In a judgment decided on the papers and issued on 26 August 2022, I accepted that the Court has jurisdiction to make protective costs orders.[1] As the Supreme Court stated in *Environmental Defence Society v New Zealand King Salmon*, protective costs orders are only made:[2]

> … in the extreme case that a public interest point which ought to be heard is likely not to be ventilated if a party without any personal stake is at risk of an undetermined exposure to costs.

[3] I observed that the outcome is determined by the particular circumstances of the case and that relevant factors are:[3]

> (a) While not fatal to an application, does the claimant have a private interest in the outcome of the case?
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> (b) Will the claimant have to discontinue the proceedings without such an order?
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> (c) Are the issues of general public importance and resolution of them in the public interest?
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> (d) Is it fair and just to make the order, having regard to the financial resources of all parties?
>
> (e) Are those acting for the claimant doing so on a pro bono basis?

[4] I said:

> [12] I am not persuaded that the circumstances of this case are of such an extreme nature as to qualify for a protective costs order. I accept the claimant

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1 *Gordon v Attorney-General* [2022] NZHC 2143 [*Gordon v Attorney-General (No 1)*].

2 *Environmental Defence Society Inc v New Zealand King Salmon* [2014] NZSC 167, (2014) 25 PRNZ 637 at [21].

3 *Gordon v Attorney-General (No 1)* at [11] (footnote omitted).

> does not have a direct private interest at stake in the litigation and that counsel are acting pro bono. The issues are currently of general public importance. But that importance, and the public interest in resolving them, is somewhat diminished by the current public policy process regarding these issues, which is intended to yield reform of the relevant law.
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> [13] Also, it is not clear that the proceedings will not be pursued without a protective costs order. Ms Gordon is not definitive in her affidavit:
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> > The fees and risks associated with an aware of costs are potentially prohibitive in that I may not be able to proceed with the proceedings in the absence of some sort of assurance that the fees and costs will not ultimately be a personal cost to myself and my family.
>
> [14] Ms Reuvecamp similarly goes only so far as to say the applicant "may not be in a position to proceed". The applicants and counsel have been sufficiently motivated to incur the time and expense of getting this far in the proceedings, with a trial scheduled for 7 November 2022. Court fees have been waived.
>
> [15] In these circumstances, the interests of justice and fairness do not require a protective costs order in advance of the hearing. Rather, the Court will be in a better position after the hearing, in reaching its judgment, to consider whether costs should follow the event or whether, if the applicants fail, the public interest nature of the litigation should insulate them from a costs award. The Court will, of course, be sensitive to access to justice issues. I decline the application for a protective costs order in advance.

[5] The plaintiffs now request, under r 7.49 of the High Court Rules 2016, that I vary or rescind that decision on the basis it is wrong, or that I transfer the application to the Court of Appeal. Rule 7.49(5) and (6) provide:

> (5) Unless a Judge otherwise directs, the application must be heard by the Judge who made the order or gave the decision.
>
> (6) The Judge may, –
>
> > (a) if satisfied that the order or decision is wrong, vary or rescind the decision; or
> >
> > (b) on the Judge's own initiative or on the application of a party, transfer the application to the Court of Appeal.

[6] I heard oral submissions from counsel, at the end of the Judge's Chambers List on 10 October 2022.

What has happened since?

[7] Since the decision, the plaintiffs have provided further affidavits:

(a) In an affidavit of 16 September 2022, Associate Professor Newton-Howes says that he cannot bear any award of costs alone, estimated as up to $25,000, which places the proceeding in jeopardy.

(b) In an affidavit of 19 September 2022, Associate Professor Gordon says she does not think it is fair to her family to be funding the proceeding above and beyond the time she is committing as an applicant, and she is not prepared to proceed in circumstances where she is at risk of an undetermined exposure to costs.

[8] In addition, the Human Rights Commission (the Commission) has applied to intervene in the proceedings on the basis that they "raise human rights issues of general principle and wide importance". On 22 September 2022, Grice J granted the application to intervene in relation to human rights principles arising from the substantive issues in the proceedings on the basis:[4]

> The issues raised in this proceeding require consideration of human rights principles contained in the New Zealand Bill of Rights Act and in international human right treaties under which New Zealand is a state party. The proceedings raise human rights issues of general principle and wide importance and the outcome may affect persons not represented in the proceeding.

[9] Those human rights principles are:

(a) The right to refuse medical treatment, as provided for by s 11 of the New Zealand Bill of Rights Act 1990 (Bill of Rights) and art 25 (health) of the International Convention on the Rights of Persons with Disabilities (CRPD).

(b) The right to be free from discrimination, as provided for by s 19 of the Bill of Rights, art 26 of the International Convention on Civil and

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4 *Gordon v Attorney-General* HC Wellington CIV-2022-485-202, 22 September 2022 at [5].

Political Rights (ICCPR), and by art 12 (equal recognition before the law) of the CRPD.

(c) The right not to be arbitrarily arrested or detained, as provided for by s 22 of the Bill of Rights, art 9 of the ICCPR, and art 14 (liberty and security of the person) of the CRPD.

(d) The contemporary human rights implications of *Waitematā Health v Attorney-General* (a decision of a Full Court of Appeal regarding when a mental health patient is fit to be released).[5]

Submissions

[10] Ms Reuvecamp, for the plaintiffs, submits the decision declining the application for a protective costs order should be rescinded and replaced by a decision granting the application or, alternatively, that the application should be transferred to the Court of Appeal, because:

(a) An application under r 7.49 is appropriate as an alternative to appeal. The plaintiffs want the protective costs issue resolved by this mechanism or by appeal before the substantive hearing otherwise there is a real danger it will not be able to proceed.

(b) The intervention of the Commission and the additional evidence about the effect of the decision not to make the order are relevant. The parties were not heard orally before the first decision. It is appropriate that the decision be reconsidered with fuller argument and with the additional evidence and material change in circumstances.

(c) The primary purpose of the proceedings is to effect a human rights consistent interpretation of legislation *pending* law reform. While declarations of inconsistency are sought as alternative relief, the proceedings first and foremost seek declarations regarding the

5 *Waitematā Health v Attorney-General* [2001] NZFLR 1122 (CA).

interpretation of the Act. Declarations are sought about the interpretation of specific provisions and that relevant guidelines currently used to interpret those provisions incorrectly state the law. Evidence has been filed as to what that would mean for the day-to-day practice of mental health professionals. That does not undermine the current law reform process but is consistent with what the Minister and Ministry of Health say is the aim of the process.[6] A new Act is months if not years away. A human rights consistent interpretation of the current legislation would be in the public interest and of public importance in the meantime.

(d) The effect of the judgment is that the criteria for a protective costs order require evidence that the applicant would definitely not pursue the proceedings otherwise. This places the plaintiffs in an invidious position. They will not proceed if they have to bear the risk of funding the costs themselves. They would have to try to find external funding from somewhere, which is very difficult. Many of those with psycho-social disabilities who are affected by the Act are not in a position to bring proceedings. This is the very sort of case where a protective costs order ought to be available as it is, in the interest of access to justice. Justice is best served by the removal of significant barriers for applicants wishing to bring human rights related proceedings of public importance that are in the public interest and where the applicants have no personal interest.

[11] Mr La Hood, for the Attorney-General, submits:

(a) One aspect of the criteria for protective costs orders in *Environmental Defence Society v New Zealand King Salmon* is not just that the case raises issues of public importance but that those issues would be

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6 Ministry of Health *Human Rights and the Mental Health (Compulsory Assessment and Treatment Act 1992* (HP 7453, September 2020) at vii; and (6 April 2021) 751 NZPD (Mental Health (Compulsory Assessment and Treatment) Amendment Bill – First Reading).

resolved through the proceedings.[7] The Human Rights Commission was granted leave to intervene on the former ground. But the latter has yet to be decided. Whether the Court can appropriately deal with the declarations sought is the fundamental issue in the substantive proceedings. The declarations sought are hypothetical relief bearing no relation to any actual dispute. Cases where the Court can see that the issues are capable of resolution by the courts and are in the public interest before seeing the evidence and submissions are rare and exceptional. If the Court considers the resolution of the issues by the Court is not in the public interest because the Court is not the appropriate forum, the taxpayer should not bear the burden of the plaintiffs' failure, despite their best intentions.

(b) There is no clear statement of the plaintiffs' impecuniosity. So the fact they are not willing to apply their own funds to the case cuts against the idea it is so compelling that it must be heard. If it is so compelling, why are they not prepared to put their money where their mouth is?

[12] The Human Rights Commission abides the decision of the Court, given that the terms on which it has been granted to leave to intervene do not extend to this issue.

Was the decision wrong?

[13] The threshold for invoking r 7.49 is that I must be satisfied that my original decision declining the plaintiffs' application for a protective costs order is wrong. It is not likely to be a frequent occurrence that a Judge will find their decision was wrong so soon after it being issued. But I am satisfied of that in this case.

[14] There is new information available to me since I made the original decision. First, the plaintiffs have made clearer their positions about whether they are willing to bear the risk of a costs award themselves. They are not. It was important to the

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7 *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 167, (2014) 25 PRNZ 637.

original decision that "it is not clear that the proceedings will not be pursued without a protective costs order".[8]

[15] Second, the Human Rights Commission has lent their weight to the importance of the domestic and international human rights issues at stake in the proceedings. The right to refuse medical treatment, to be free from discrimination, not to be arbitrarily detained, and when a mental health patient is fit to be released are important rights. The greater intensity with which a Court scrutinises decisions in relation to those rights, compared with other interests, weighs in favour of the application. Perhaps that could be said to have been the case originally. But the intervention by the Human Rights Commission provides an additional level of assurance that these are serious human rights proceedings.

[16] Third, it is also clearer to me now that the plaintiffs are seeking clarification of the law pending the outcome of the current law reform exercise. Such exercises can be lengthy, despite optimistic government objectives as to timing. The rights at issue here remain important in the meantime. And the point that those directly affected by mental health law are unlikely to be in positions to take proceedings is well made.

[17] Fourth, it is also clearer to me that the plaintiffs do not have a material private personal interest in the outcome of the proceedings but are acting in the interest of the public and to vindicate the human rights of those subject to current mental health law. As the Court of Appeal of England and Wales held in *Austin v Miller Argent (South Wales) Ltd*, the absence of a material private interest need not be fatal to an application for a protective costs order.[9] But I consider it is a significant factor which goes to the bona fides of the plaintiffs acting in the public interest. A Court is likely to be more sceptical of an application for a protective costs order for litigation in which a plaintiff stands to benefit personally, particularly financially.

[18] Access to justice is a foundational right in our system of justice. In *R (on the application of UNISON) v Lord Chancellor*, the United Kingdom Supreme Court

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8 *Gordon v Attorney-General (No 1)* at [13].

9 *Austin v Miller Argent (South Wales) Limited* [2014] EWCA Civ 1012 at [44], cited in *Gordon v Attorney-General (No 1)* at [11](a)]

observed that access to justice has long been embedded in their constitutional law, citing the Magna Carta of 1215 (and 1297), and is inherent in the rule of law.[10] The same is true in New Zealand. As the Court of Appeal said in *Saunders v Houghton*, "[a]ccess to justice is a fundamental principle of the rule of law."[11]

[19] Measures that deter frivolous and vexatious cases increase overall access to justice.[12] The costs regime attempts to face litigants with the effects of taking losing positions in litigation. But the outcome of litigation is often uncertain. The ability of a plaintiff to bring proceedings that are in the public interest, about serious human rights issues, with competent counsel, for no personal benefit, should not be determined by their ability to pay costs.

[20] I conclude that the factors identified in the first judgment, on the basis of Supreme Court and overseas authorities, for making a protective costs order, are satisfied here. The first judgment was wrong. I rescind that decision.

[21] As the Supreme Court observed in *Environmental Defence Society Inc v New Zealand King Salmon*:[13]

> … the Court in *Corner House* considered that, as a matter of fairness to the defendant, it might be appropriate to impose, as a condition, a limitation on costs, should the claimant prove to be successful:[14]
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> > … The purpose of the PCO [protective costs order] will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest.

[22] In the United Kingdom, cost caps have been viewed as a means to give "appropriate reciprocal protection" to the defendant in proceedings where the court

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10 *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 at [64] and [74]; and see *R v Secretary of State for the Home Department, Ex p Saleem* [2001] 1 WLR 443.

11 *Saunders v Houghton* [2010] NZCA 610, [2010] 3 NZLR 331 at [28].

12 At [86]

13 *Environmental Defence Society v New Zealand King Salmon,* above n 7, at [19].

14 *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 WLR 2600 [*Corner House*] at [76].

made a protective cost order.[15] The principles relevant to cost-capping orders there were helpfully summarised in *R (on the application of the Plantagenet Alliance Ltd) v Secretary of State for Justice*.[16]

[23] In *Corner House*, the Court of Appeal of England and Wales observed that cost-capping orders were not required in cases like *R (on the application of the Refugee Legal Centre) v Secretary of State for The Home Department* where the claimant's lawyers are acting pro bono and had made clear they would not be seeking costs if successful.[17]

[24] The plaintiffs' statement of claim here does not seek costs so I proceed on the basis that they will not seek costs if they are successful. If that is incorrect, counsel for the plaintiffs should advise me by memorandum within 10 working days so I can consider whether costs should be capped and at what amount. On the basis that they will not seek costs, and counsel is acting pro bono, I consider a full protective costs order is appropriate.

Result

[25] The decision in the judgment of 26 August 2022 is rescinded. If the plaintiffs indicate they will not seek costs if they are successful, it is replaced with an order that no award of costs will be made against the plaintiffs if they are unsuccessful.

Palmer J

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15 *R (on the application of the Plantagenet Alliance Ltd) v Secretary of State for Justice and others* [2013] EWHC 3164 (Admin) at [58].

16 At [59].

17 *Corner House,* above n 14, at [75]–[76],