IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 84/2023
[2023] NZSC 167

BETWEEN	DERMOT GREGORY NOTTINGHAM First Applicant
	ROBERT EARLE MCKINNEY Second Applicant
AND	ATTORNEY-GENERAL Respondent

Court: Glazebrook, Williams and Kós JJ

Counsel: Applicants in person
S L K Shaw and H T Reid for Respondent

Judgment: 18 December 2023

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay the respondent costs of $2,500.

REASONS

[1] The applicants, Mr Nottingham and Mr McKinney, commenced three proceedings in the High Court (one being an application for habeas corpus) challenging the Government's response to the COVID-19 pandemic. Woolford J struck these proceedings out.[1] He later awarded costs against the applicants.[2] What follows concerns only the costs judgment.

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1 *Nottingham v Attorney-General* [2022] NZHC 405.
2 *Nottingham v Attorney-General* [2022] NZHC 1060 [HC costs decision].

[2] The applicants filed a notice of appeal in the Court of Appeal against the costs decision. After an unsuccessful application to dispense with security for costs on that appeal, the applicants failed to pay security, apply for a fixture or file the case on appeal. The appeal was accordingly deemed abandoned, pursuant to r 43(1) of the Court of Appeal (Civil) Rules 2005. The applicants then applied for review of the Deputy Registrar's decision on security for costs, along with a necessary application for extension of time under r 43(2).

[3] Two Judges of the Court of Appeal dismissed this latter application on the papers.[3] The proposed appeal, they said, lacked public interest or merit.[4] The applicants had sufficient time to comply with r 43 or apply for an extension and failed to do so, had not satisfactorily explained why they did not comply with r 43, and were well-familiar with the applicable appellate processes, Mr Nottingham having run a similar argument unsuccessfully before.[5]

[4] It is from that judgment that the applicants seek leave to appeal. Their submissions address the alleged merits of their substantive claims, and then pose as a question of law:

> When should the discretion to award costs (and significant costs) in a matter that addresses the "great writ" [i.e. habeas corpus] be given, and was this such a case, and should the court go further and address these pertinent interrelated questions due to the possibility that this type of conduct could become prevalent by Governments?

Our assessment

[5] The criteria for leave to appeal are not met.[6] The substantive merits of the underlying proceedings (or the lack thereof) are not in issue: the applicants did not appeal against Woolford J's substantive judgment. The award of costs following the event was orthodox. While a proportion of those costs is attributable to the habeas

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3 *Nottingham v Attorney-General* [2023] NZCA 122 (Brown and Clifford JJ).
4 At [15].
5 At [13]; see *Nottingham v Maltese Cat Ltd* [2018] NZCA 387.
6 Senior Courts Act 2016, s 74.

corpus proceeding, there is no absolute bar on that course.[7] Relevantly, Woolford J noted:[8]

> [5] The plaintiffs had already unsuccessfully applied for habeas corpus. On appeal from that decision the Court of Appeal found they were not detained in the sense intended by the Habeas Corpus Act 2001. I found I was bound by that decision. I also noted it appeared the plaintiffs were using the habeas corpus procedure as a means of obtaining a priority fixture for their other proceedings.

[6] We do not consider the question of an award of costs against the applicants in these circumstances raises a matter of general or public importance which the interests of justice necessitate be considered by this Court.[9] This is not an appropriate case to revisit generally the approach to be taken to costs on an unsuccessful application for habeas corpus. Nor do we consider a substantial miscarriage of justice is likely if the appeal is not heard.[10]

Result

[7] The application for leave to appeal is dismissed.

[8] The applicants must pay the respondent costs of $2,500.

Solicitors:
Meredith Connell, Wellington for Respondent

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7 See *AN v Counties Manukau District Health Board* [2016] NZCA 226, [2016] NZFLR 468.
8 HC costs decision, above n 2 (footnotes omitted), referencing *Nottingham v Ardern* [2020] NZCA 144, [2020] 2 NZLR 207 at [25].
9 Senior Courts Act, s 74(2)(a).
10 Section 74(2)(b); see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].