IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 57/2021
[2023] NZSC 20

BETWEEN	MALCOLM BRUCE MONCRIEF-SPITTLE First Appellant
	DAVID CUMIN Second Appellant
AND	REGIONAL FACILITIES AUCKLAND LIMITED First Respondent
	AUCKLAND COUNCIL Second Respondent

Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	J E Hodder KC and P A Joseph for Appellants K Anderson, K E F Morrison and K W Kemp for Respondents
Judgment:	14 March 2023

JUDGMENT OF THE COURT

The appellants must pay the respondents costs of $10,000.

REASONS
(Given by Ellen France J)

Introduction

[1] In a judgment delivered on 5 December 2022, the Court dismissed an appeal brought by Malcolm Moncrief-Spittle and David Cumin.[1] The judgment addressed

[1] *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138.

issues arising from the decision of the first respondent, Regional Facilities Auckland Ltd, to cancel a contract for the hire of a publicly owned venue for a speaking event. We reserved costs and sought submissions from the parties if agreement could not be reached. Submissions for the parties have now been received.

Background

[2] Before addressing those submissions, it is helpful to say a little about the decisions in the Courts below and in particular to explain the approach taken to costs in those Courts.

[3] The present appellants were unsuccessful in the High Court on the basis that the decision to cancel the venue hire contract which they sought to challenge was not amenable to judicial review.[2] The High Court ordered Mr Moncrief-Spittle and Dr Cumin to pay costs on a 2B basis, rejecting their argument that the case raised matters of public interest.[3]

[4] Mr Moncrief-Spittle and Dr Cumin were also unsuccessful in their substantive appeal to the Court of Appeal although the Court accepted the decision to cancel was amenable to judicial review.[4] The Court found that the New Zealand Bill of Rights Act 1990 (the Bill of Rights) applied but that the decision to cancel was reasonable both in administrative law terms and under the Bill of Rights. In the course of the judgment, the Court also determined Mr Moncrief-Spittle had standing on the basis he was a plaintiff with "a bona fide interest in having a matter of public interest considered".[5]

[5] The appeal by Mr Moncrief-Spittle and Dr Cumin against the High Court costs award was successful. The appellants had argued that, on the basis that the proceeding did raise matters of genuine public interest, either costs should lie where they fall or be significantly discounted. The Court of Appeal reduced the High Court costs award

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2 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2019] NZHC 2399, [2019] 3 NZLR 433 (Jagose J).
3 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2019] NZHC 2828 (Jagose J).
4 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142, [2021] 2 NZLR 795 (Kós P, Cooper and Courtney JJ).
5 At [130].

by 70 per cent. By consent, the same discount level was applied to the costs awarded to the respondents in the Court of Appeal.

The approach of the parties

[6] The appellants submit that costs should lie where they fall on the basis that this was public interest litigation and because they had a measure of partial success. Alternatively, they say that any costs award should be heavily discounted. The respondents argue that there is no reason to depart from the principle that costs follow the event and that if there were to be any discount, it should be minimal. The respondents also note they do not seek disbursements.

Our assessment

[7] We accept the respondents' submission that the appellants should have indicated at the hearing of the appeal that they considered costs should lie where they fall.[6] That said, nothing raised by either of the parties provides a good reason for us to depart from the approach that has been adopted to costs to date. As we have noted, the parties accepted costs on the appeal to the Court of Appeal should be determined on the basis there was a 70 per cent reduction. The approach taken to date appropriately reflects the particular circumstances of this case including the fact that the litigation had features of genuine public interest and the appellants had some success.[7] That success was, however, relevantly limited to the rejection of the respondents' challenge to the Court of Appeal finding that the decision to cancel was amenable to review and captured by s 3 of the Bill of Rights.

[8] We add that, although the precise arrangements are unknown, the respondents place some emphasis on the reference made to a funding entity by the appellants in their unsuccessful attempt to be excused from payment of security for costs in the Court of Appeal. They say this means there is a potential benefit to the funding entity

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

7 This case accordingly bears similarities to *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 133 where the Court decided not to make an award of costs.

from a decision that costs lie where they fall.[8] We do not see this matter as a reason for altering our position on costs.

[9] For this appeal, which was heard over a period of a day and a half, we would have otherwise have made an award of $30,000. With a reduction in the order of 70 per cent, the respondents are entitled to $10,000 costs. As there was no challenge to the orders made in the Courts below those orders stand.

Result

[10] The appellants must pay the respondents costs of $10,000.

Solicitors:
Franks Ogilvie, Wellington for Appellants
Anthony Harper, Auckland for Respondents

[8] The appellants respond that both senior counsel appeared on a pro bono basis in this Court and that Mr Hodder KC also appeared on a pro bono basis in the Court of Appeal.