IN THE SUPREME COURT OF NEW ZEALAND SC 10/2006

BETWEEN **ALAN JOHN SHIRLEY**

Appellant

AND **WAIRARAPA DISTRICT HEALTH BOARD**

Respondent

Hearing 1 June 2006

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel C J Hodson QC and C James for Appellant
M J Ring QC for Respondent

CIVIL APPEAL

10.01 am

Hodson May it please Your Honours I appear for my learned friend Mr James for the appellant.

Elias CJ Thank you Mr Hodson, Mr James.

Ring May it please Your Honours I appear for the respondent.

Elias CJ Thank you Mr Ring. Yes Mr Hodson.

Hodson It might be thought Your Honours that we are here on an amount which is, on a matter which is in some respects less than the normal level with which this Court might deal considering the quantum involved. On the other hand, in my submission the principle in this case is the important issue, and it is the question of the validity of the Judge's discretion

being exercised at first instance as against the view which the Court of Appeal might take, particularly in respect of matters of fact.

Now in the judgment under appeal the Majority has felt able to differ on the judge at first instance on several matters of fact, not by saying that he was clearly wrong but in some respects merely by taking what I would call a different view. And that is all really why we're here today.

Now if I could start simply by turning to the written submissions on appeal. I will assume unless Your Honours would prefer me to take a different course, that it is not necessary for me to read them to you.

Elias CJ No Mr Hodson.

Hodson No I thought not. May I make a correction please, there's a typographical error in the paragraph numbered 3 on the first page. This was a decision embodying above all other factors the exercise of the Judge's discretion, not decision. So I put the question of jurisdiction aside as that seems to have been common ground throughout and make the point that the Court of Appeal's reasoning is, as I indicated earlier, no more when one examines it than a disagreement with the exercise of discretion. In the one place that Court held that the Tipping J was well placed to make findings of fact and noted the findings of fact which have been made. And then as I've gone on to submit in some detail, has for its own, on its own volition almost, differed from the findings of fact.

Now the history of the case is I think sufficiently plain in the essences of it that matter at this stage. Simply that the couple, the Bensemans, sued the board and the board caused with the plaintiffs or joined with the plaintiffs in adding Mr Shirley and then departing from the case itself. The motivation as I've set out in paragraph 6 of the written submissions is clear. And there's a finding that the plaintiffs would not have taken the step of joining the present appellant of their own volition.

Insofar as funding of the litigation is concerned, clearly with legally aided plaintiffs the receipt of a lump sum of the nature paid by the present respondent would assist their account with the legal services agency. And in turn assist them in assessing the end result or the risk which they faced at the end of the litigation in the matter of costs if they were not successful.

Then at the end of the trial the appellant was successful and in due course appellant received a small award of costs against the present respondent.

So my submissions start at page 8. I've stated that the insurance issue which was found by the Judge not to be relevant was not pursued on

appeal by the respondent but I think my learned friend doesn't quite accept that. I could put it a little bit differently. It's dealt with I think on page 113 and 114 of the case on appeal. That's paragraph 50 of the judgment of I think Justice Baragwanath. There was in the Court of Appeal a fairly lengthy discussion about the importance of the employment contract and of the insurance arrangements which followed from the insurance contract. And the outcome is recorded as my learned friend disavowing any argument that the parties' position is regulated by the contracts. And on that basis, the Court of Appeal agreed with the Judge below that the contracts do not affect the cost discretion.

In every respect in my submission, which I've made twice now, this was a perfectly ordinary case so far as costs were considered of looking at the parties, the conduct of the parties in applying the Rules of Court. The Rules of Court and particularly Rule 476A(2) which is in the appellant's bundle of authorities under tab 1, the last page, were at the heart of the matter. The discontinuance of a proceeding does not affect the determination of costs. Now Justice Baragwanath in particular as he said in paragraph 59 of the reasons for his view in the case, the powerful policy considerations that if the party departs from the case then it should have ended its peril to costs. Well as I have endeavoured to set out as clearly as I can, that simply is not the situation in the light of that Rule. And the only way in which a party departing from a case can protect himself against future liability is by making provision for it. And with a discontinuance, in my experience respectfully I say that the subject of costs is always debated and to some extent or other provided for or later argued.

Tipping J There is of course the rule isn't there that says you can't discontinue against one of several defendants without the consent of all.

Hodson Yes.

Tipping J And when that consent was given.

Hodson Yes.

Tipping J Your client reserved his position in some respects but not in the respect which has materialised.

Hodson That's been discussed at some length and is to be relied on by my friend and I think there are two points in answer. The first is that if you cover yourself in one respect but the position is open in another respect, it remains open. The second is that it has nothing whatever to do with the action of the respondent in obtaining the joinder of the appellant because all that had been done long before the discontinuance. So it really is not of any particular direct relevance. Suppose one had said in any event we're going to claim costs, there's

nothing whatever respondent could have done to change what it had already done.

McGrath J Mr Hodson, under that Rule of course it's open to the Court to give leave despite the refusal of one defendant's consent isn't it.

Hodson It's open to give leave. The Court can do all manner of things. But the point that I'm relying on in respect of that Rule is that it does not shut off the departing party from a risk of liability and that with respect seems to rather weaken what Justice Baragwanath described as powerful policy considerations.

McGrath J Would you say though, say if Baragwanath J had been deciding this at first instance and he thought it was a relevant factor, the breadth of the discretion is such that he would be entitled to treat it as that and to have refused you an order of costs.

Hodson If he decided as a matter of policy in his view he should not because of these powerful policy considerations then with respect he would not be adopting the correct approach. The costs approach is always to exercise discretion in the light of every individual case. And while in one case a party who's departed may very well be justly left to depart, in other cases not. But why there should be a general policy I'm not clear.

McGrath J Your point is that the discretion is a very wide one if there was no principle laid down controlling it.

Hodson Yes.

McGrath J So surely it would have been open to Baragwanath J to have made his ruling on the basis of this factor simply as a discretionary consideration rather than as a point of high policy.

Hodson Certainly.

McGrath J Yes. And you couldn't then have complained because what would be a wide discretion for Justice Miller would also in those circumstances be a wide discretion for Justice Baragwanath.

Hodson Well one would have … the whole of Justice Baragwanath's decision had he been writing Justice Miller's judgment for him.

Tipping J Is it more a matter Mr Hodson perhaps that this would be a material factor but the weight you give to it is very much a matter of judicial discretion in the particular circumstances of the particular case.

Hodson Exactly Your Honour. Exactly.

Elias CJ The terms of Rule 476A sub-clause (2) is relating to the, well provides an exception to the effect in clause (1). And that is about proceedings ending against a defendant.

Hodson Yes.

Elias CJ Yes.

Hodson Yes, yes. The proceedings are ended in that no more pleadings have to be involved, no more hearings taking place but the question of costs remains open.

Elias CJ What was it, do we have a copy of the form of the discontinuance. I haven't looked that up. The notice of discontinuance.

Hodson I don't think so but it was a standard form notice of discontinuance with a consent by the present appellant endorsed. There were no conditions as I recollect it on that document.

Tipping J So the reservation of position was in a collateral document was it.

Hodson It was in a letter.

Tipping J In a letter, yes.

Hodson Then I turn to the **Dymocks** case (**Dymocks Franchise Systems (NSW) Pry Limited v Todd** (No.2) [2005] 1 NZLR 145 PCl), tab 2 of my authorities and the principle insofar as there are principles in this area, which was established in that case. The headnote, the first page, sets out the first principle is that although costs orders against non-parties were to be regarded as exceptional, the ultimate question was whether in all the circumstances it was fair to make the order. And one could hardly have a wider description of the exercise of discretion than that.

Tipping J In view of that Rule you've just referred to, 476A and the discontinuance in not affecting costs, is it appropriate to characterise the Board here as a non-party.

Hodson The way Justice Miller dealt with that was to say that for the purposes of costs, he would treat it as a party.

McGrath J Where did he say that.

Hodson That it remained as a party.

McGrath J Where did he say that.

Hodson He says that at paragraph 30 of his decision on page 91 of the case.

Tipping J Yeah well that's right. Dymock is only relevant in a fragile sense here isn't it because it's talking about true non-parties as I, I may be wrong, but as I recall it. Is that a fair comment or is it more subtle than that Mr Hodson.

Elias CJ Yes it was a funder.

Hodson It's more extreme than this case because the funder had never been a party.

Tipping J Exactly.

Hodson Yes.

Elias CJ But stood to benefit from the litigation.

Hodson So it appeared, yes.

Tipping J But the principles that apply to funders aren't necessarily simply to be carried over to people who have been parties, ceased to be parties for some purposes but remain parties for costs if you like.

Hodson That depends on how far one finds an analogy helpful or finds a related pronouncement of the Committee as helpful. In this particular case the test remains in my submission it's a matter of jurisdiction and justice. And if it can be a matter of jurisdiction and justice where the payer, the non-party has never been a party, then all the more so when it has been.

Elias CJ Well what was the benefit though in the continued litigation to the party that settled.

Hodson The benefit is the benefit which this respondent decided was in its interests in the conduct of the litigation which was to pay some money to the plaintiffs in order to point them at a different target, namely the appellant so as to save the respondent the risk and costs of future participation.

Elias CJ But that benefit had been achieved at the time of the discontinuance.

Hodson It was, it's not the discontinuance with respect that the issue is about. It's the joining.

Elias CJ Yes.

Hodson Which was the essential part of the plan. The motivation and benefit is set out very clearly in the email on page 9 of the case on appeal.

Elias CJ Yes I know that there's that background to this particular case and it may be that marks it off. But I would have thought that the principle

that you're contending for needs to be sound for all cases where there are two defendants and where the first defendant has indicated that a remedy might be sought against a second defendant who is then joined.

Hodson The principle that I'm contending for in the exercise of the discretion is that what's been described in various cases as causation is a necessary element. In other words the funder must have caused something to happen which would no otherwise have happened.

Elias CJ But if it's legitimate for it to happen, if there was a cause of action available against a second defendant, why is that fingering of the second defendant so significant.

Hodson Because when one is causing something to happen which would not otherwise have happened, there may or may not be consequences. For example in this case, suppose in the end result the plaintiffs had been persons of substance and the present appellant had recovered costs in full from them, there would be causation but there would be absolutely no basis whatever to go after the respondent. But to the contrary, if one makes a decision as the respondent did in this case to induce this particular cause of action, and it has economic consequences, it doesn't have to be misconduct. With respect I think my friend is a little over-sensitive on that point. It is simply conduct which has economic consequences for the person involved and for that one is at risk in the Judge's discretion of having to pay.

Elias CJ Is it part, is it material in the case that the liability was company-extensive in this case between the first and second defendants.

Hodson That's I think the point that is being made by Justice Robertson when he makes the point there is absolutely no need to join the present appellant at all. If the action had gone ahead against the respondent and the appellant as a consultant employed by the respondent had been found liable, a claim against him in turn, given that the case had been fully argued, would have been unanswerable, it wouldn't have occasioned litigation. And it's for that reason that we very seldom get into a situation like this because on almost every occasion I can think of there is company-operation between the Board of a hospital and the doctor concerned.

Tipping J Is it not quite significant that the Board chose to achieve its purpose not by joining your client as a third party but by procuring the joinder of your client as a defendant by the plaintiff.

Hodson Well as I think most of the judges below have noticed, that is significant.

Tipping J Well doesn't that simply demonstrate what the tactics were.

Hodson Yes. To get.

Tipping J They weren't seeking indemnity from him in the sense of if they go down, you've got to indemnify us or between insurers. They were trying to put themselves in the position of tactical and economic advantage in the context of the case as a whole, bearing in mind a legally aided plaintiff and so on.

Hodson Yes.

Tipping J So I mean it stands out as plain as a pikestaff.

Hodson Yes.

Tipping J That's what the tactics were.

Hodson Yes.

Tipping J And now the question is, should they in the end, in all the economic reality of the case, is it wrong in principle to hold them responsible in part for the costs. And at the moment I am having difficulty understanding on what basis the Majority of the Court of Appeal took the view that Justice Miller had erred in principle.

Hodson Well as I think the first line of the application for leave to appeal submitted, the decision of Justice Robertson with respect is right. And his analysis is right.

Tipping J But can you articulate for us Mr Hodson where it seems there has been a finding of error of principle but you would rejoin to that. Or are you saying there's really nothing there is the Majority judgments that can even pass muster as a suggested error of principle by the trial Judge.

Hodson I don't with respect believe there is any error of principle by the trial Judge. Or by Justice Robertson. And I'm concerned that the principle that Justice Baragwanath sought to adopt cannot be correct in the context, as a matter or powerful policy to be applied in every case, which is I think what he intended, in the context of the discussion we've had about the Rule.

Tipping J Could you, because I may not have been listening properly or I may have dropped the point. But for my benefit and I apologise, could you just go back to where you say Justice Baragwanath espoused a principle which was contrary to that of the trial Judge but which you say was wrong.

Hodson Paragraph 59 of the Court of Appeal. I accept Mr Ring's argument it would be an unacceptable incentive to settlement if a party were to be subject to a continuing liability for future costs in a proceeding over

which it had no control just because at an earlier stage it had secured the joinder of another party.

Anderson J That's more likely to encourage further litigation than settlement as happened in this case.

Hodson As happened in this case.

Anderson J More parties, more litigation.

Hodson Well it was suggested by someone at some stage that having been joined as a defendant and the Board had got out, we should have got the Board back in and as it was said by Justice Robertson, that would simply pile on the costs further to no good effect.

Anderson J There are a number of considerations that have to be borne in mind and one is the access of a party to all relevant parties. Access to justice against all relevant parties. But in this particular case, as has been noted, the plaintiffs could get no more in damages from two than they could get from one. And there was no question about recovery on the facts of the case because you had a substantial Board and you had an insurer involved.

Hodson Yes.

Anderson J So the direct consequence of joinder was to increase litigation by adding a party.

Hodson Yes. That is what happened. And as a result, what should have been a fairly routine end to a trial has produced this further litigation.

Tipping J What did the Judge mean by the second part of paragraph 59. Any proposed change of settled practice having consequences of such magnitude should be for the Rules Committee. I'm not quite sure what settled practice the Judge was referring to. Does that appear from an earlier part of his judgment.

Hodson It is just possible he had in mind his citation of **King** which he relied on (**King v Foxton Racing Club** [1953] NZLR 852 (CA)).

Tipping J King v Foxton Racing Club.

Hodson King v Foxton Racing Club in paragraph 55.

Tipping J But we now have an express Rule saying that discontinuances are irrelevant to costs.

Hodson Quite, quite.

Tipping J That, if anything, that's the change.

Hodson Quite, yes. Yes, as I said a moment ago, I'm unable really to reconcile those views with that Rule.

Tipping J Because that Rule's quite new isn't it. Or relatively new.

Hodson Yes. I think it came in with all the costs rules when the whole costs regime was amended.

Tipping J And that's what, about 10 years ago.

Hodson Less than that Sir.

Tipping J Less than that is it.

Hodson Yes, yes.

Tipping J Yes.

Hodson And the other case on which Justice Baragwanath relied was his own decision. But that was a case in which he was considering conduct before there was any litigation.

McGrath J What paragraph's that at?

Hodson 56.

McGrath J Jacobi Enterprises, thanks. (**Jacobi Enterprises Limited v Hansells (NZ) Limited** unrep High Court Ak; CP 386-SD01; 27/5/04 Baragwanath J)

Hodson Jacobi, yes the case is under tab 4.

Elias CJ There isn't any specific Rule is there for costs as between defendants.

Hodson There's a Rule that, there is a Rule relating to defendants who defend separately. I think my friend may have put it in his bundle.

Tipping J It's that Lane case isn't it, in part anyway. (**Lane Group Limited v D I & L Paterson Ltd** [2000] 1 NZLR 129.

Hodson Mm. No, I think I mentioned it myself. It's Rule 51.

Elias CJ Which we don't have. Oh yes we do. Oh no that's where they defend separately.

Hodson Yes.

Elias CJ That's only about not allowing more than one set of costs.

Hodson One set of costs, yes.

Elias CJ Is Justice Baragwanath saying that this is a new step because it's unprecedented for a defendant to be ordered to pay the costs ordered against the other defendant post-discontinuance. I'm just trying to work out what he's saying there for it being novel.

Hodson I think he's trying to say that it's unprecedented and quite wrong to retain a liability for costs against a defendant who's out of the case.

Elias CJ Mm.

Hodson And that's why I have difficulty in reconciling it with 476A(2).

Elias CJ Well that's why I wonder though about Rule 476A which is describing simply how a proceeding ends against a defendant.

Hodson Yes.

Elias CJ And the discontinuance doesn't affect the determination of costs. One might read that back against the proceedings ending against a defendant.

Hodson Yes. I don't with respect have any difficulty with that. We are dealing with the defendant.

Elias CJ Yes.

Hodson Up until the moment that it ceased to be a defendant.

Elias CJ Yes, yes.

Hodson And the arrangement about the joining was long before that.

Elias CJ Yes.

Hodson While the defendant was still a party.

Elias CJ Yes.

McGrath J Mr Hodson can I just ask the way in which this joining took place. It was by consent memorandum was it. And consent order to the Court.

Hodson It's described on page 9 in the email. One or other of the plaintiffs or the present respondent prepared an application to which the plaintiffs consented. The Court made an order and the present appellant was served.

McGrath J Justice Miller I think referred, rather implies that the consent memorandum included some indication that there would be a cross-

notice. That is that it was not only a question of joinder but also at the same time a cross-notice was to be filed.

Hodson Yes. The Board itself was going to take some step or other. Bear in mind if I may that the appellant knew nothing about any of this and didn't see any of the papers and the first the appellant knew of it apart from the email was being served.

McGrath J I can fully appreciate that. But do we have, we don't have a copy of the actual memorandum consented to by the Board.

Hodson My friend has just handed me the memorandum. It's the defendant, that's the present respondent, seeks to join the appellant as a second defendant to the proceeding and file a cross-claim. Leave is required. The plaintiffs consent to the orders sought. Various rules are cited. And ask for orders by consent joining Alan John Shirley as a second defendant in terms of a second amended statement of claim attached. And granting leave for the defendant to file a cross-claim against Shirley. We really paid no attention to the cross-claim.

McGrath J I think it might be helpful for us to have that memorandum if no-one has any objection. We take it that consent orders just were made on the basis of it.

Hodson Yes.

Elias CJ I had assumed that a cross-claim did eventuate. Did it not.

Hodson I think one may have but really one ignored it.

Elias CJ Well what happened.

McGrath J Well Justice Miller says there was one.

Elias CJ Yes.

Hodson Yes.

Elias CJ Yes, that's right, I knew I'd picked it up from somewhere.

McGrath J Paragraph 5 on page 85.

Hodson I think the departing defendant was making it as clear as it possibly could that in every respect it regarded the present appellant as carrier of the burden from that moment on.

McGrath J Madam Registrar. I just wonder if at some stage, and the morning adjournment would be fine, you could arrange to copy that memorandum that's been handed to you.

Hodson I think I can make a couple of points by way of parenthesis. My learned friend in his written submissions says twice that the appellant consented to the joinder. And that of course is not the case. The other point is that it is.

Tipping J You weren't in at that stage.

Hodson We knew nothing about it.

Elias CJ Yes, yes.

Hodson Until we were leaked the email.

Elias CJ Yes.

Tipping J It's like you were receiving the third party notice.

Hodson Exactly.

Tipping J Bad.

Hodson No, we never consented.

Anderson J The application was the application of the present respondent endorsed with the consent of the plaintiffs.

Elias CJ Yes.

Hodson That's it Sir.

Elias CJ Can I just ask you, in terms of the policy, did the Board have full control over the litigation in the sense that could it, well in terms of the relationship between the Board and the doctor, could the Board in fact settle the litigation despite the reputational damage to the doctor. Was there any impediment to the Board having the whole conduct of the litigation.

Hodson The Board had the whole conduct of the litigation and could have as a matter of law and practice have done that.

Elias CJ Yes.

Hodson What in the event would have happened in terms of employer/employee relationships is another matter entirely.

Elias CJ I see. Well then there may have been some reason why, quite apart from the question of costs, the Board may have thought it necessary to have the doctor in the proceedings.

Hodson The reason was very clear Ma'am. The situation was the Board was not prepared to pay enough to satisfy the plaintiffs. And the plaintiffs were not going to take the money. Then the Board said, well look, we've got a perfectly good insured doctor here, you go after him.

Elias CJ Yes, I'm just trying to think about the thing more generally though.

Tipping J I mean the reputational issue has to be viewed in a sort of pragmatic way. The man's reputation was already going to be tarnished if you like by the Board chipping in whatever, in a sense the Board was saying, although it would have been put on the basis of economics no doubt, but a settlement sum had been paid on account of this man's denied negligence. And I can't quite get to grips Mr Hodson with what either party is trying to make of this reputational thing. I mean it's economics isn't it. There just wasn't enough in the Board's offer to satisfy the plaintiffs. So the plaintiffs couldn't be bought right off so the trick was to get out, bring the doctor in to face the rest of the music.

Hodson That's exactly it. Now my friend says that it was for purely reputational reasons that the case was defended. But it isn't as simple as that. The problem of civil litigation against the medical profession in this country has been largely but not entirely solved by ACC. And as it happens, about the time this case started a number of other civil cases were also starting involving failed sterilisations of one kind or another. And my instructions were that it was in the interests not only of the medical profession generally but also of their employing Boards that cases be taken to trial until we got to the stage where one Judge or another had decided that they were properly covered by ACC. At the end of the substantive judgment Justice Miller notes that he was urged to decide that question. He said that it would be obiter and he declined. As it happened the same question on a female sterilisation came before Justice Baragwanath in Blenheim a few months later and he obligingly decided that these matters are covered by ACC. So that we were going to keep plugging until we got there one way or another.

There was also, for what it was worth, the point that I made to my learned friend in the correspondence which was referred to somewhere, that while the reputation is an issue, on my instructions the allegations were simply not correct and ought to be defended on that basis. And moreover, the Board itself had some degree of responsibility for not providing a form of consent which would have made it so clear what the patient was consenting to that the litigation couldn't have got off the ground. So there were all those factors in it.

Elias CJ And the Board may will have been liable to the doctor if it had settled on a basis that didn't entail vindication of the doctor.

Hodson When one says liable to the doctor, one with respect Ma'am is embarking on questions of employment law in which I am not expert.

Elias CJ Yes.

Hodson But that would be the general theme. But there was also the possibility.

Tipping J It wouldn't have been contractually liable if it had the, was there a QC clause in or anything like that, to deal with the question of whether settlement was appropriate.

Hodson No.

Elias CJ No, it's employment law that's been indicated.

Hodson No, no.

McGrath J You're really saying it could only be under some employment law principle.

Hodson Yes.

McGrath J Because the general Rule is the doctor's liable to the Board.

Hodson Yes.

McGrath J For his negligence is it not.

Hodson Yes indeed. That's why I say if we had lost, if the Board had stayed in the case and we had run it on the Board's behalf, which was what we usually do, and there was a judgment against the Board, the doctor would have to fund it.

McGrath J Well yes.

Tipping J The insurers of the doctor.

McGrath J The insurance company would fund it, yes.

Hodson They're not all insured.

Tipping J I thought it was a contractual term that they be. Anyway, we're getting a bit removed aren't we.

Hodson Yes. Now I think that we have got past Dymocks. Past paragraph 12 of my submissions. And to the four factors set out by Justice Heath in paragraph 104 which is page 124 of the case. And in my paragraph 14 I've set out what I see of each of those factors to be and endeavoured to respond to them.

Now the first one, point A is the one we've already discussed, the fact of the existence of Rule 476A(2). The second one is the point of the

terms of the reservation, we've already discussed that. And I reiterate that it made no difference, the reservation and its terms made no difference whatever to the conduct which had already happened.

And the clause C, now if we're talking about the exercise of discretion and what view the Court of Appeal should take of a finding of fact, that paragraph C in no way suggests that Justice Miller was clearly wrong. It is simply that Justice Heath took a different view of the matter.

Tipping J Well I don't think with respect that the Judge, this is Justice Heath, has thought this thing through fully enough. If he had been joined only as a third party the whole issue would not have arisen.

Hodson Exactly.

Tipping J That's expressly why he wasn't joined as a third party.

Hodson Yes, yes, yes. And the last reason is number D. He distinguishes Dymocks. And I cite Dymocks only really in the context that it is a more extreme case in that the party concerned was never a party to the litigation. And I've quoted my paragraph 17 that in my respectful submission is the essence of what the Privy Council had to say in that case that relates to this case, the words of Lord Browne in that paragraph. If you wish to see them in context, they're under tab 2 at page 156 of the reported decision.

Tipping J I'm inclined to think with respect that Dymocks doesn't really apply but not for the reasons that Justice Heath espoused. I think it's only tangential.

Hodson Yes, absolutely. And I brought it in only in the context that there is some expression of view on a differing but vaguely similar position.

Tipping J Yes.

Hodson Here we have Rule 476A(2) and we have the fact that the payee was a party at the time that this discussion is about.

Tipping J Just remind me please, what did the trial Judge make out of Dymocks. Is there any room for an argument that he misdirected himself as to the relevance if you like or applicability of dymocks.

Hodson He discussed dymocks. And that discussion is at paragraph 31 on page 91. 30 and 31. And said in paragraph 30 essentially much more elegantly what I've been trying to say, that the Board, the respondent in this case, wasn't a non-party in the dymocks sense. And that Rule 476A(2) makes provision for the case.

Blanchard J What was the position before we had Rule 476A.

Hodson Your Honour.

Blanchard J How did one go about discontinuing and how were costs dealt with.

Hodson One discontinued as of right. One didn't have to have the consent of the other defendants. And if you didn't settle costs you were at risk is my recollection of the position.

Blanchard J So there's nothing really new about Rule 476A(2) then.

Hodson It makes explicit what may have been tacit.

Blanchard J Yes.

McGrath J Mr Hodson coming bck to Justice Tipping's earlier question, would it be fair to say that the only relevance that Justice Miller appears to place on dymock is to take up the Privy Council's assumption that causation had to be shown.

Hodson Yes.

McGrath J Before there could be if you like any qualification for costs.

Hodson Yes.

McGrath J On the part of a discontinuing defendant.

Hodson Yes.

McGrath J And he picked up that assumption and applied it and said there was causation here.

Hodson Yes.

Anderson J There must be many cases where a defendant arranges for a new party to be added as a defendant on the basis that the new party is a more appropriate defendant. And in this case it might be said the more appropriate defendant is Mr Shirley, the Board's liability being only vicarious.

Hodson Well again, this case is unusual that the plaintiffs chose to sue the Board alone. Usually the doctor is the first defendant and the Board is the second defendant.

Anderson J The point that is really troubling me is why a defendant who says to a plaintiff, this is a more appropriate party than me, you should join them as well, should be liable for costs if that fails. In the days of personal injuries you had lots of people manoeuvring to get other parties, often in a vicarious situation.

Hodson Yes, if one, I think that, and I'm trying to think of examples, but I suspect that it's accurate to observe that such conduct doesn't usually accompany an escape from the case. At the end of the day all the defendants are sitting in front of the Judge and each bears a share of the responsibility.

Anderson J I'm not sure whether that's so. The whole idea of getting another defendant is to improve your position by a plaintiff.

Hodson Yes.

Anderson J Which might be at trial or it might be by settlement. And many cases settled against some parties and proceeded against others.

Hodson Yes Sir. And in many cases.

Anderson J Without this type of order being made to my recollection.

Hodson Without the element of causation.

Anderson J But that's always causative. Every time a defendant is the one who applies, as happened here, that's causative.

Hodson Well the principle is that there must be causation for a costs application to get off the ground. With that, there must be some conduct having consequences which in the discretion of the Judge makes it just that an order be made.

Anderson J Suppose in this case the respondent wasn't able to settle and it went to trial.

Hodson Yes.

Anderson J And the plaintiffs failed spectacularly against both defendants. Would you still be saying that Mr Shirley's underwriters should have a contribution to costs from the other successful defendant. Because usually it's an unsuccessful defendant who's ordered to pay a successful one.

Hodson I quote, whether in all the circumstances it is just to make the order. One would have to see how and why the situation that actually arose did arise.

Anderson J Why is it just here.

Hodson It's just here because the step was taken which had economic consequences and were known to be likely to have economic consequences which was unnecessary and which exposed the doctor to his own costs which would not otherwise have been incurred.

Anderson J But that's what always happens when someone's joined as another defendant. There's always an economic consequence.

Hodson Yes but this is an employer/employee situation where the employer is the one being sued and would normally be expected to pick up the costs.

Anderson J Well only because employer's generally speaking are more likely to have the money to pay. And that's often why they're sued. Like the Romford Ice Cold Storage Company (**Lister v Romford Ice Company Limited** [1957] 1 All ER 125).

Hodson Well then on Your Honour's reasoning we are without doubt in an unusual and exceptional circumstance.

Anderson J Only because of the employment dimension. If you remove that as irrelevant to the costs issue, you get a perfectly ordinary situation of parties being added, often at the behest of another one in the firing line.

Hodson Yes. But it's only because of the employment situation that this appellant is liable at all to the employer.

Anderson J Well that's because if there was a fault it was his fault.

Hodson Yes it was. Yes it was.

Blanchard J It was the **Bensemans** who made the application for joinder.

Hodson No, no Sir with respect. It was the defendant to which the Bensemans consented.

Blanchard J Oh, so Justice Miller's statement in paragraph 1 of his judgment's wrong.

Hodson I don't know that he had seen the document that my friend has just produced for Your Honours.

Anderson J Mm, it is wrong.

McGrath J Perhaps the Registrar might go and copy that document now. Because that's.

Blanchard J Does he make that mis-statement again elsewhere in the judgment.

Hodson I think, without doubt it was at the instigation of the Board that Mr Shirley was joined. The Bensemans may well be shorthand, having consented to his being joined, then pursued him.

McGrath J But presumably the plaintiff would in the normal course, and perhaps may be the only person who can apply to add a defendant. A defendant would be applying to add a third party or submitting a cross-notice against a defendant normally wouldn't they.

Hodson Well I think that'll be plain when Your Honours see the document.

McGrath J Yes.

Anderson J It was not unusual in my experience, albeit some decades ago now, for applications for joinder of a defendant to be made by a defendant.

Hodson Yes.

Tipping J You had to get leave didn't you. I think.

Hodson There's reference to the need to get leave to issue the statement of claim against, or the cross-notice, whatever the document was.

Tipping J Mm.

Anderson J Yes I remember, plaintiffs resisting these applications on the basis that why should they be obliged to sue two people instead of one. And the defendants saying, ah but they're a more appropriate defendant or they should share the liability.

Tipping J It's very unusual though to have that situation where there is an unequivocally concurrent liability.

Hodson Yes.

Tipping J I.e. one is vicariously responsible for the other. The liability is then single in a sense.

Hodson Yes.

Tipping J It's joint rather than several.

Hodson Yes.

Tipping J And that's the dimension of it which seems to me to distinguish it at least prima facie from some of these cases where you would join someone else as a more appropriate defendant. I can understand that your target might want to be tactically the very man whose hand slipped so to speak. But I think that is a material factor.

Hodson I think the famous Porirua Lift Slab case is a one in point. From memory there was only one insured defendant in that case and every person who had any responsibility for the design and construction of

the building found themselves in the firing line at someone's instigation.

Elias CJ Can you just, I'm struggling a little with relevance of causation. I can understand that in Dymocks it was necessary to consider that because it was a non-party. But why is it relevant here. If there's a discretion to make costs orders against all parties, you don't really need to have any additional causation do you.

Hodson If the plaintiffs in this case had thought of it themselves, and sued the appellant as first defendant and the Board as second defendant and the Board had settled and gone away, the present appellant, the doctor, would be in a much weaker position if indeed he had any case at all for costs. Because what he could not say, and what he now says, it's because of what you did that my name appeared on the papers and I had to defend the proceedings in my name.

Elias CJ But the plaintiff might have come to the view that there should be a second defendant anyway.

Hodson The finding of fact is that he wouldn't have.

Anderson J I would seem to recall some reference in the papers to the possibility of the respondent being sued for systemic failures. Now that would be a consideration. The plaintiffs might have thought we'll sue the Board for its vicarious liability and we'll add in a claim for its systemic negligence which wouldn't have involved Mr Shirley, the latter one.

Hodson If the plaintiff had thought of the apparent deficiency in the consent form, it might have. But it was hardly for either my friend or I to encourage the plaintiff in any direction like that. We took the plaintiff's case as we found it.

Anderson J I'm just having difficulty really with seeing why this case is different in principle from what was a commonplace in the days of personal injury litigation. Or any other civil litigation … co-defendants.

Hodson I can't answer that with any first-hand knowledge of the practice in those days.

Anderson J It may not, I should have qualified it by saying that it may not go directly to the question of whether there's been an error of principle by Justice Miller.

Hodson Sorry Sir, I simply can't answer that from what happened in those days. I have to say I always instructed.

McGrath J J Mr Hodson, can I just ask you about another point. Am I right in saying that the cover that is provided to Boards does not extend to wrongful acts by consultants. That the Boards rather deal with that

matter by requiring the consultants to belong to an appropriate or the appropriate medical company-operative insurance society.

Hodson Not quite, that was a question which concerned Justice Miller and he deals with that early on in his judgment when he considers the question of whether or not the insurance arrangements are relevant. And that's at pages 87 and 88. And in paragraph 18 on page 88 he notes that the Board has insurance cover in respect of its own liability for the negligence of its consultants. And it meets consultants costs of procuring insurance from the Medical Protection Society of a person. It's interests there are that the possibility of civil litigation is a very low order in the risks covered. The consultants face all manner of personal liabilities for which the Board does not want to have any responsibility at all and, most expensively of course, disciplinary proceedings.

McGrath J Yes. Well if, however, in this case the Board had gone to trial and had a substantial award of damages against it, is there some regular procedure by which it would be approaching the insurer of your client.

Hodson Not a regular procedure because in my time that situation of an approach after judgment has never happened. But as a matter of law, it would be fully entitled to say, if you Mr Shirley don't write us a cheque, we will be entitled to summary judgment in very short order under the terms of your responsibilities to us.

McGrath J But it would be a perfectly reasonable thing for us to do in employment terms because we have made it part of our contract with you.

Hodson Just so.

McGrath J That you have cover for this particular risk.

Hodson Just so.

McGrath J Mm thanks.

Elias CJ We don't have the application for costs I think in the documents do we. I just would like to know what Rule it's made under. I suppose it's, thank you.

Hodson My friend has it.

Elias CJ Perhaps I can just have a look at it, we don't need to have it copied.

Ring I have got other copies of that one Ma'am.

Elias CJ Thank you. (Document handed up). Yes thanks.

Hodson I've moved on in the written submissions from paragraph 19 and onwards reviewing the more recent cases in which the Court of Appeal has considered the extent to which it can amend a finding of fact and the issue of discretion. I've mentioned in paragraph 20 the Bryson v Three Foot Six case (**Bryson v Three Foot Six Limited** [2005] 3 NZLR 721 SC) where this Court simply touched on the issue. And in paragraph 21 I've endeavoured to summarise the various points that the Court of Appeal hadn't taken into account or has taken a different view in respect of factual findings.

And my submission is that this is a case where the Judge was entitled to exercise his discretion as he did and that the Court of Appeal in reversing him has not actually met the standard which it articulated in **Harris v McIntosh** ([2001] 3 NZLR 721 CA).

Now I can take Your Honours through those cases but they all with respect say very much the same thing, that findings of fact are not to be reversed unless they are clearly wrong, in various ways in various situations.

Paragraph 23 I mention Dymocks and I mention also the careful way in which His Honour exercised the discretion at the end of the day by awarding only 30 percent. And then I ask for the judgment at first instance to be restored and for costs in the three Courts. And I've mentioned on an indemnity basis. My friend asks why do I do that. If I could simply say that in the High Court there was no order for costs. And one didn't take exception with that. The point had been made why spend more money arguing over costs. We went to the Court of Appeal and there was a costs order. And we've come to this Court and by now of course if the appellant is successful it's a pyrrhic victory in economic terms indeed. And I simply say on an indemnity basis to perhaps highlight that if the appellant is to receive costs then it should be on a particularly generous basis to make some financial sense out of the exercise.

Elias CJ But there's no financial sense in the particular exercise, as I think you've acknowledged.

Hodson I think I've said that, yes.

Elias CJ Yes.

Hodson So I don't think my friend should get unduly upset about that. After all, he appealed first.

I did want to add two comments in relation to my friend's argument. And I have a further written page which perhaps the Registrar could be circulated. (Document handed up)

Tipping J Could I just ask for some help on paragraph 31 of the trial Judge's judgment, page 91 of the case. It's probably quite simply answered Mr Hodson but I just couldn't work it out immediately for myself. In that paragraph Justice Miller says the Board was entitled to settle independently of Mr Shirley. It did so for the understandable reasons and so on. Settlement is to be encouraged. In such circumstances there could be no justification for an award of costs subsequently incurred in the absence of either a right to indemnity or some conduct on the Board's part that caused Mr Shirley to incur costs that he would otherwise not have incurred. What's the significance of the phrase subsequently incurred.

Hodson He's making the point that he has noted in paragraph 29 above that all the costs claimed were incurred after the discontinuance.

McGrath J But the Rules would address costs previously concerned anyway wouldn't they.

Hodson Yes, yes.

McGrath J The Rules actually.

Hodson The Rules in my submission preserves the position.

McGrath J Confines itself to costs previously concerned.

Hodson Yes, yes.

McGrath J So there's a principle stated in the Rules at that stage.

Hodson Yes.

Elias CJ Which Rule.

Hodson 476A(2).

Elias CJ Oh, (2).

Hodson Mm.

Tipping J But the subsequently incurred is subsequent to what.

Hodson After the conduct of joining the appellant and then having the plaintiff file this discontinuance. Then the costs went on. That's what it's subsequent to.

Tipping J No justification for an award of costs subsequently incurred.

Hodson Yes.

Tipping J Am I being obtuse Mr Hodson.

Hodson No, costs incurred after.

Elias CJ Some conduct on the Board's part.

Hodson After on the face of it you've got out of the case, subsequent to your getting out of the case to the extent that you do, costs are incurred.

McGrath J Subsequent to discontinuance does it mean.

Hodson Yes.

McGrath J Yes.

Tipping J Oh I see, yes, he's talking about the Board.

Hodson Yes.

Tipping J Yes, sorry.

Elias CJ But I thought it, well, doesn't paragraph, I must be being obtuse, but paragraph 29 indicates that your costs are all post-discontinuance.

Hodson Yes exactly.

Elias CJ But the point that the Judge is making is that you wouldn't be entitled to those normally unless there was some conduct on the Board's part.

Hodson That is the point Ma'am that I wanted to highlight on the page that I've just distributed.

Tipping J Yes, I wasn't too far removed.

Hodson The paragraph 1 we've dealt with already, that Mr Shirley didn't consent to being joined. Presumably it's a typo on my friend's behalf. But the second point, I've looked at and I have difficulty with and I thought it would be helpful to highlight it at this stage. My friend's written submissions, his paragraph 2.1 sub-paragraph 3(a) which is at the bottom of page 3 of his written submissions. In particular my friend says the Judge erred in holding that causation alone is not a sufficient basis for an award of costs. It's for my friend to explain, but the difficulty I have with that is that I thought that his argument depended on that very proposition, that causation alone isn't a sufficient basis.

But perhaps more importantly the paragraph 31 that we've just looked at, what the Judge actually said was that causation is necessary, not that it's the sole element of liability. It's simply a necessary element and

then he goes on in most of the rest of the judgment to discuss the other factors which led him to make the order that he did.

But my friend then in his argument seems to feel that conduct equals misconduct. And notes quite correctly that Justice Miller found that the Board hadn't misconducted itself. My point there is the one that has been already made in the course of argument, that it's not misconduct, it's conduct having economic consequences.

Elias CJ Well it's really just, causation on your argument is simply instigating the joinder.

Hodson Instigating something that would not otherwise have happened.

Elias CJ So doesn't apply if there is some independent claim against the defendant.

Hodson If the plaintiff had made the claim against Mr Shirley himself, we can hardly blame the Board or say the Board should pay for it.

Elias CJ No but if there was some independent claim, then surely it would have been appropriate, or not causative in this sense, for the first defendant to have pointed out that there's a more appropriate defendant. It's a fact that there is no independent claim that is significant, coupled with the instigation.

Hodson Yes, we're not in the situation of trying to sort out which of various subcontractors or tradesmen have caused the building to collapse.

Elias CJ Yes, yes. I see.

Tipping J They had joint rather than concurrent liability I would he thought.

Hodson Liability, yes. That really Your Honours is all that I have to say unless there is any further aspect.

Elias CJ Can I be tedious about, and I should have looked at this before I came in. But again, in terms of the application for costs, all the Rules are relied on. But am I right in thinking that the only Rule that provides the authority for costs as between the two defendants in this case is Rule 46, the wide provision. Because Rule 47 doesn't help at all does it. Because it's about the party who, the principle that the party who fails pays costs to the party who succeeds and that's not the situation we have here.

Hodson No, that's not the situation Your Honour.

Elias CJ So is there any other Rule that you can really rely on for this.

Hodson Well it was necessary to cite 476A(2) and it was necessary to cite the Rule giving a general jurisdiction, a general discretion. And the particular prayer is in the further grounds, that it is just that the defendant receive his costs.

Elias CJ Yes. Is there any case that's exactly on all fours with this.

Hodson Not to my knowledge ever.

Elias CJ No. I'm just feeling for why Justice Baragwanath thought that this was a novel case. And that it would require amendment to the Rules.

Tipping J Settled practice, I find that very difficult. And maybe Mr Ring can enlighten us with his vast experience of these matters.

Elias CJ Yes, yes.

Tipping J But I don't see this as being contrary to settled practice because it's very unusual in itself.

Hodson I don't remember any part of the argument before Justice Baragwanath being conducted on that basis.

Elias CJ Well it may not be settled practice but it may be novel and it may be that's what he should have said. And what I'm trying to ascertain is, has it, is there a case in which the wide power in Rule 46(1) has been applied to enable a defendant to obtain costs against a party who's settled. No alright, thank you.

Hodson Neither of us are able to take that one further. May it please Your Honours.

Elias CJ Thank you Mr Hodson.

Ring Your Honours can I just start by ending up with what in my submission should be the principles that we end up with. I had hoped and still do that this will be the ratio of the judgment that the Court issues. I did start off this morning hoping that it would be unanimous and I still do harbour that hope. But.

Elias CJ You can't read anything into this Court.

Ring No, I certainly don't Ma'am. The principle that I've dealt with here is unashamedly borrowed heavily from Your Honour Justice Tipping's judgment in Lane.

Tipping J Oh dear. I might be the kiss of death Mr Ring.

Ring Well that's.

Tipping J Justice Thomas wasn't very impressed with that effort.

Ring No, hence my earlier comment. But can I just come back to this in a moment. But can I just refer you to something first that just may be a little bit helpful. If Your Honours have a look at the authorities for the respondent, tab 2 which is the Rules. You've been referred to 476A(2) and as Your Honours have already appreciated, the purpose of subs(2) is to preserve the proceeding for the purposes of costs because otherwise under subs(1) it would be all over. And this does not make a change to the original Rules. It simply makes express what was the previous position.

As does 476B which is setting aside the discontinuance, there was a common law rule to that effect. But what you haven't been referred to is 476C which must be read in my submission in conjunction with 476A(2). And that makes it explicitly clear that the contemplated costs are not costs ongoing endlessly in the action but the contemplated reserved costs that are open to be dealt with notwithstanding the proceeding has been brought to an end are those costs up until the day the proceeding has been brought to an end.

Tipping J Doesn't that make explicit what was implicit before. But I'm not sure you're right Mr Ring to say that 476A(2), the general makes explicit what was implicit before. Previously, as between plaintiff and defendant discontinued again, there was a residual liability for costs wasn't there.

Ring Mm hm.

Tipping J But 476A(2) speaks in much more general terms than 476C. And I think that's new but you're quite right, 476C simply codifies the previous practice, or rule or whatever it was. I don't know how significant this is.

Ring Well what would be the need Sir for 476C if 476A(2) was just the be all and end all of costs. Costs are still open to be determined, full stop.

Tipping J No but this gives the mandatory obligation. It doesn't just hold it open, it states the prima facie, if you like, position. 476A(2) is a general holding open with no weight either way. That I think is new. Whereas the prima facie liability to pay costs to a defendant against whom you discontinue is quite conventional.

Ring Well I would put it on this basis Your Honour, that while 476A(2) is expressed in general terms, the only costs specifically referred to in this area of the Rules is expressly limited to costs up until the discontinuance is effective.

McGrath J Mr Ring, I'm sorry, can I just ask you, is it significant that whereas in 476A(3) that Rule is expressed to be subject to 476B, there's no such qualification in respect of 476C.

Tipping J I think that might with respect be included in "or the Court otherwise orders".

Ring I would have thought.

Tipping J The spirit of it I think.

Ring I would have thought so. There's no doubt that this is an unusual application. I detect that it's beyond the specific experience of anyone in this courtroom that such an application has been made. I could find no authority in New Zealand or in Australia or in the United Kingdom for that matter for this particular type of situation. And so in that sense, in my submission we're at a stage of making principle here. Either making it or defining what it is.

Anderson J What's the usual situation in relation to costs where there is a defendant and a third party and the plaintiff fails.

Ring The position very clearly is that the defendant pays the third party's costs. That is the general rule. It may be subject to specific provisos.

Anderson J But it may recover from the plaintiff in respect of those.

Ring Correct.

Anderson J By saying, in the circumstances facing the plaintiff's claim it was appropriate for us to join the person for whom we are vicariously liable.

Ring There is in fact a United Kingdom case on the basic point that Your Honour is raising, without delving into the vicarious types of situation, I can give you that citation if you're interested.

Anderson J Yes, it says I recall the defendant pays third party costs but might get something back from the plaintiff in respect of them.

Ring The name of the judgment is **Johnson v Ribbins & Ors** [1977] 1 All ER at 806. A decision of the Court of Appeal, judgment delivered by Lord Justice Goff. And he says, talking about the discretion, in the exercise of that discretion however, in our judgment the Court should be guided by the principle that normally costs follow the event as expressly provided in the English Rule and should therefore normally order the defendant, although successful in the action, to pay the costs of the third party if he also be successful.

So it's an example of costs following the event. And that's a major theme or will be a major theme of my submissions.

Elias CJ Do you have, I'm sorry I'm just thinking of something. Do you have the Rules there. I didn't come into Court with them.

Ring Not all of them.

Elias CJ Oh, that's alright. I just wanted the definition of proceeding. That's alright.

Ring I'm sorry Ma'am, I don't have that.

Anderson J Anything that's not an interlocutory matter.

Elias CJ Is that all it is.

Anderson J It's to that effect.

Ring Just before I go into this principles. Can I make a confession which may colour some of the things that I'm saying, but probably not. I hadn't appreciated actually until I looked carefully at the document that you've now been provided with, and that is the consent memorandum, that the first line was that the defendant had sought to join Mr Shirley.

Anderson J And costs should follow the event in that case.

Ring Well I think we can get around that okay.

Blanchard J None of the judges below seem to have appreciated that either.

Elias CJ No.

Ring No.

Blanchard J They all say the wrong thing.

Ring But can I just make a couple of points which I hope then gets my submissions back on track. And they are these. First of all, we need with respect to look at the substance of what happened and not the form of it. And the substance of what happened is that the Bensemans ended up making a claim against Mr Shirley direct. Although it may say that the defendant seeks to join Mr Shirley, the statement of claim that is attached, as of course it must be, the draft statement of claim, is not a claim by the Board against Mr Shirley. It's a claim by the Bensemans against Mr Shirley.

Tipping J But it is patent from this what the reality was.

Ring Well the reality is encouragement and that's where I think with respect that's where the principled analysis ought to focus. Without being too bound up with who actually made the application at the end of the day because, and again this is my second point, although it says the defendant seeks to join Mr Shirley, when you then move on to number 4, the parties rely on the Rules and request the following orders to be made by consent. So I think at worst for the Board you'd have to say it was a joint application. But the reality is that because the claim that is being made is being made by the Bensemans against Mr Shirley, that that's the costs following the event Rule aspect of it. And that what we're talking about here is encouragement which is what Justice Miller dealt with on the basis of which Justice Miller dealt with it in the High Court and the basis on which it was dealt with in the Court of Appeal.

Tipping J Would the word instigate be acceptable to you Mr Ring.

Ring Any of those words.

Anderson J Procured.

Ring Procured. Yeah, I don't have a problem with, in all seriousness I don't have a problem with any of those words.

Anderson J Procured the joinder of Mr Shirley as a defendant.

Ring Yes, yes.

Tipping J And could one reasonably read into this the principal reason for that joinder from the Board's point of view was the cross-notice.

Ring The principal reason, there's two-fold reasons. One's the short term reason and one's the long term reason. The long term reason is if we're all there at the end of the day, then Mr Shirley needs to be the ultimate recipient of liability because it's his conduct that is at issue.

Anderson J So you could do that by a third party notice.

Ring And yes, it could have been done by a third party notice. But the short term reason is that it was considered that this would be the most conducive way to achieving a settlement short of a trial.

Anderson J Well I can see that because Mr Shirley's indemnifiers would be faced with the prospect of the economic choice of settling being cheaper than succeeding against a plaintiff who would never have to pay them costs.

Ring And I think it's important, you're quite right Sir, but I think it's important to also see the chronological context here. The application or the start of that process was November 2002. The settlement didn't in fact take place until July 2003. So there was that period of time

when there were co-defendants in this action. And there was ample time if Mr Shirley wanted to contribute to a settlement for him to do so. So it wasn't a situation where there was a pre-conceived plan, we'll join him one day and you can discontinue against us the next.

Anderson J What was the date in 2003 again, sorry.

Ring July 2003.

Anderson J July. And the joinder was September 2002.

Ring I think November.

Blanchard J November the 6th.

Anderson J Thank you.

Elias CJ Are co-defendants in the absence of a cross-notice parties to the same proceedings. I suppose they are.

Ring Yes they are.

Elias CJ I've always assumed they are.

Ring And the Judge can make an award between co-defendants.

Elias CJ Yes.

Ring Without even requiring a cross-notice.

Elias CJ Yes, yes.

Tipping J Equally the Judge can adjust costs as between co-defendants on the same basis can't he Mr Ring. If it comes to it. It's not always a Bullock Sanderson situation, it can be direct between the defendants.

Ring Provided there's a principle basis for it.

Tipping J Oh yes, you can't just do it because you don't like the look of one of the defendants.

Ring Well, or because it's just a totally unfettered discretion which in my submission is along the lines of what we're dealing with here. And the purpose of my submissions is to actually try and find the four corners of that discretion. And to put some principles on it that can be used and if applied, would not have justified the costs order in this case.

Elias CJ Mr Ring should we take the morning adjournment now.

Ring I'd be delighted Ma'am.

Elias CJ Thank you.

Court adjourns 11.30 am
Court resumes 11.51 am

Elias CJ Thank you Mr Ring.

Ring Thank you Your Honour. If I could now focus on the guiding principle which in my submission is the correct one to deal with this case. It is in encouraging a party to a proceeding to join another party to a proceeding who is ultimately successful is generally of itself not sufficient to justify an award of costs and in any event it must be set against any other relevant factors in favour of the respondent to the costs application. These may include first that the respondent was not unsuccessful or at fault on the merits. Second there was a reasonable and proper basis for the joinder. Third, the respondent was not an actual or an effective, and by that I mean a real party to the proceeding when the costs were incurred. And fourth the respondent was not guilty of any impropriety or misconduct in causing the costs to be incurred.

And if I can then colloquially paraphrase that, it is simply this: if you play by the rules you will generally have no costs liability unless you lose. But if you don't play by the rules, you will generally have a costs liability regardless of the result. In my submission those principles permeate all of the costs decisions and they are a rational, cohesive and coherent set of guidelines which can be applied in any costs case as the four corners of the discretion.

And I'll be expanding on that if I may just further on in the submissions. I would emphasise that all of the factual aspects of this case are incorporated, all of the relevant ones, are incorporated into these principles and in particular the one at paragraph 1. And by that I mean on the undisputed facts. So there is no factual dispute which would prevent these principles from being operative in this case.

And the theme of my submissions Your Honours is that if the Court accepts this formulation of principle, then it follows that the High Court judgment was wrong and that the Court of Appeal was entitled to interfere.

Elias CJ Well the problem that you face though is that this isn't what the Rules provide for. They provide for a very wide discretion. So where do these principles arise.

Ring They arise from the Rules number 1. From the authorities number 2. And from the proposition Your Honour that just because there is a wide discretion doesn't mean there are no principles within which it has to be exercised. And that I think with respect is the difference between

His Honour Justice Robertson's judgment in the Court of Appeal and the judgment of the Majority. Justice Robertson's judgment is premised on the basis that the discretion is completely open ended. And the Judge having exercised it, it wasn't for that Court to interfere. But a discretion doesn't just mean, as it's been colloquially put already in this Court, you can do what you like. There still have to be principles. And there have to be principles for all manner of reasons of course, so that costs are predictable. And there is of course a specific Rule in relation to that, Rule 48A(g) I think it is. Sorry 47G. So far as possible the determination of costs should be predictable and expeditious.

But for the purposes of appeal or review, there have to be principles so that that function can be properly exercised.

Anderson J Can I discuss this with you Mr Ring. Because the issue is whether the High Court acted on a wrong principle, it's necessary to examine the principle that emerges from the High Court decision. And the principle that emerges from the High Court decision is this. A successful defendant may be ordered to contribute the costs of another successful defendant when the first successful defendant has procured the joinder of the second successful defendant and where the second successful defendant is unable to recover or adequately recover costs from the unsuccessful plaintiff. That is the principle that emerges from it in a model situation. And so the question must be, what's wrong with that.

Ring Well I'm not altogether sure that that is an accurate rendition of the principle. Just assume that it is for a moment.

Anderson J Well it's the ratio.

Ring Well what's wrong with it? A number of things. First of all it infringes the basic rule of costs that costs follow the event.

Anderson J Take a note of these please.

Ring And these are the things that I will be developing in my submissions anyway. But the answers that immediately spring to mind are those. First it infringes the principle that costs follow the event.

Blanchard J What event.

Ring The result of the Court case.

Blanchard J In this case what was that.

Ring That was that the Bensemanns failed.

Blanchard J Yes, well what's that got to do with it.

Ring Well that's the result of the Court case.

Blanchard J I just don't see how that really impacts. Here we've got two defendants trying to sort out the position amongst themselves.

Ring But one of those people who you're describing as the defendant wasn't even there at the Court case.

Blanchard J But they were the instigator.

Ring They procured or encouraged the joinder of the ultimately successful party, yes.

Anderson J Mr Ring, that principle of costs follow the event is really encapsulated in 47A in a way.

Ring Correct.

Anderson J That isn't expressed to cover the situation is it. It contemplates there will be a party who fails and a party who succeeds. In the present instance that is not the case and I suggest that we just have to face the fact that 47A is irrelevant. It can't be sort of encapsulated in the costs follow the event principle when it's not stated in those terms.

Ring Well in my submission that is actually the point. That unless, the principle that I'm articulating is the two-fold one that I've colloquially put there. If you follow the rules, and by that I mean you don't engage in misconduct, I don't just mean that you follow the High Court Rules per sé but it's encapsulated in all of that, if you follow the rules, i.e. you're not guilty of misconduct, then if you are a loser in the proceeding, if you lose the case, then you pay costs. But if you are not a loser in the case then unless you've been guilty of misconduct in some way, then you ought not to be exposed to costs.

Anderson J I understand the principle and I can understand an argument it's a good principle. But the way the Rules are constructed, there is a general discretion given to a Judge as to costs with certain principles stipulated in the Rules that basically are to be applied. I mean the discretion is not open ended in that sense. Now isn't really the real place for your argument before the Rules Committee. If they think that this is a good principle, they can apply it. And we really have to get into a situation in which there is no, nothing you can really point to that supports this principle. You are inviting the Court in effect to make Rules to deal with it and we are really looking to rather try and find out why a discretion that's not controlled by any express principle at the moment has been wrongly exercised.

Ring Well there are some controls in the discretion by the principles in Rule 47.

Anderson J Indeed.

Ring And the only one that the Rules Committee saw fit to put in there was that a party who fails pays the costs of a party who succeeds. The corollary of that is if you're not a party who fails, you should be able, you should be in a position where you're not paying costs. Where the principle is that you are not exposed to costs.

Anderson J Well I have trouble with the last step Mr Ring. It seems to me that if you're not within the principle, prima facie there's nothing to control discretion in relation to 47A. There's nothing you can draw on. You actually need a different expression of 47A or perhaps more logically a 47H expressed in the eminently reasonable terms that you've expounded in your note.

Ring Well what I was hoping to persuade Your Honours is that there is a rational cohesive set of principles within which the discretion can be exercised. They are articulated partly in the Rules, partly in the decided cases and that the proposition that somebody who encourages a party to join someone who is ultimately successful will not of itself justify the exercise of the discretion to award costs.

Anderson J If you can show there is a principle, and it seems to me it's perfectly legitimate to build on it as to saying it's half expressed in the Rules and you get the rest from cases, I think that you're well on the way with that proposition.

Ring Well thank you Your Honour. If I can then just move on perhaps to the next stage in my submissions which is just to talk for a little bit about what the nature of the rationale is for the principles that I'm expounding. The starting point in my submission is that the jurisdiction to award costs is ancillary. It's not a cause of action in itself. It's the aftermath of a concluded process and it must be in itself a summary process. And again I refer to Rule 47G in support of that, that so far as possible the determination of costs should be predictable and expeditious. And I submit to Your Honours that any principle under which costs are awarded has to reflect that the necessary process to determine a costs liability is not suited for potentially disputed facts.

We've seen this already in Harley and McDonald. And the English cases which deal with wasted costs orders themselves have expressed the concern that if you allow for a process which may necessarily involve disputed facts, it has the potential to become a form of costly satellite litigation. And I've given Your Honours in my materials or my authorities the House of Lords decision in Medcalf (**Medcalf v Mardell** [2002] 3 All ER 721 and I've referred to this proposition at paragraph 6.26 of my main submissions.

The second point is that this is what has been described in at least one United Kingdom Court of Appeal case as a cost shifting process. That was that Arkin judgment that I hope Your Honours received the day before yesterday (**Arkin v Borchard Lines Limited and ors** [2005] All ER 613 (CA)) .

Neither is it a punishment for the loser of the case. It's a balancing of rights. And at its most fundamental it balances the right of ready access to the Courts with the right to recover costs if the Court has vindicated the successful person's stance.

The third point is that legal should be irrelevant. And again that is reflected in Medcalf and I've referred to that at paragraph 6.13 of my submissions.

Tipping J How irrelevant is irrelevant Mr Ring if I can be slightly facetious. You mean one should simply pretend that the plaintiffs were perfectly solvent and capable. Because I mean if that were so we wouldn't be here.

Ring Section 115 of the Legal Services Act 2000 says any rights or liabilities of an aided person under this Act do not affect (a) the rights or liabilities of other parties to the proceeding or (b) the principles on which the discretion of any Court or Tribunal is normally exercised. So in the exercise of the Court's discretion in relation to costs, the rights or liabilities of the legally aided person have to be ignored. And one of those rights of course is the right to be immune from costs themselves. So the fact that.

Elias CJ But you wouldn't ignore impecuniosity of a plaintiff would you. So you've got statutory impecuniosity here.

Ring I accept Your Honour that it may be legitimate to take into account that the plaintiff is unable to pay. But in a way that effectively circumvents what the statute says. Because the statute says you can't take into account the fact you can't get an order for costs against the legally aided person in exercising the discretion, for example for costs against somebody else. But if you could then just taken into account that the plaintiff is impecunious you're actually defeating the spirit of what the Act is saying.

Tipping J Different types of impecuniosity result in different responses. Literal impecuniosity you can take into account but statutory impecuniosity you can't.

Ring Well in my submission, to be consistent you'd have to say that the fact the plaintiff was on legal aid or was impecunious ought not to be a discretionary factor, in principle ought not to be a discretionary factor in foisting costs on somebody else in the proceeding. And that comes back.

Anderson J What about when that factor has been utilised by one of the parties to bring economic pressure on another party.

Ring Well Your Honour, then you start to get into that whole question of how is all this going to be established. How's the plaintiff's, and at what sort of stage.

Anderson J Well we know it's established here.

Ring We do but we're legislating here.

Anderson J Are we?

Ring Well.

Anderson J We're trying to see if the High Court acted on a wrong principle.

Ring We're trying to see if there is a coherent principle that can apply in all cases and not just this one.

Anderson J Anyway, you say that the legally aided person has a right not to be liable for costs where what the aided person actually has is an immunity.

Ring Well.

Anderson J And the Act doesn't preclude consideration of immunity. It doesn't say rights, liabilities, privileges or immunities. It just says rights or liabilities.

Ring I would have said with respect Your Honour that that intent there, by expressing it as the rights or liabilities and relating it to affecting the principles on which the Court exercises its discretions and talks in terms of broad discretions that it must be contemplating this sort of thing as well.

Anderson J Well maybe.

Ring But I do emphasise that the summary nature of the costs jurisdiction, and yes we might have got away with things by affidavits here, but it won't necessarily be the case.

Anderson J Well I certainly sympathise with the idea of keeping it summary because nothing is more tedious to a first instance Judge than returning after a long trial to a long argument over costs.

Ring Indeed. And once you start getting into questions of what, and I'll be developing this a little bit later, what was the extent of the procurement for example. What was the degree or nature of the procurement. How

was it implemented. You run the risk, the very clear risk, that there has to be a case to decide those facts. The impecuniosity point, you then have to deal with questions of, does the party who's been foisted with the costs have to know about the impecuniosity of the plaintiff for example. And how would you ever know that. And what's the extent of impecuniosity that would be required. Because we're not talking here just about whether they're on legal aid or not. If the principle is that it's impecuniosity, then how would the party whose liability then becomes dependent at least in part on whether the plaintiff's impecunious or not, ever know whether it was exposed or not.

Anderson J Well it's likely that in this case, if the plaintiffs had not been legally aided the order that was made would not have been made. That's likely to be so. I don't say that as an argument against your position but if anything it's for it.

Ring Well indeed.

Anderson J Because then that focuses on the relevance of the impecuniosity as affecting what would otherwise be the situation.

Ring Well thank you Sir, because that is indeed part of the submission that I wanted to make, which is, it's not really the impecuniosity that is the factor in Your Honour's articulation of the judgment, it's actually the legal aid. And that was what I would say is the impermissible matter to take into account.

Anderson J By reason of s.115?

Ring I would submit not only by reason of s.115 but also just by reason of general principle. That the financial position of the plaintiff shouldn't change the principle of whether you're liable for costs or not.

Anderson J Yes.

Ring Just as the financial position of the party applying for costs shouldn't be taken into account either.

Elias CJ There is provision of course, I mean are you mounting any sort of argument based on the principle, the policy in the Legal Aid Act or whatever Act it is.

Ring Legal Services.

Elias CJ You're not? Legal Services Act.

Ring No.

Elias CJ Because there is an ability to seek contribution.

Ring Yes but you need a certificate from the Judge and you have to have effectively misconduct by the applicant and then your second tier is to apply to the Legal Aid Committee or whatever, the Legal Aid Services Board, for an award of costs from them. And they take into account the means of the applicant for the costs as well. And certainly in my experience, acting for insurance companies, we were never poor enough to qualify.

Tipping J I'm glad to hear it Mr Ring, very glad to hear it.

McGrath J But is that right, I mean I certainly accept what you say about the relevance of the means of the plaintiff. But did you say misconduct has to be part of it. I didn't understand that to be part of the legal aid scheme. I think it's section 40 isn't it.

Ring Well my understanding, and I know it's been through a lot of changes, the legislation, but my understanding of where it was last, and I think this is still the position, is that stage one, the plaintiff let's say is immune from an order for costs because they're on legal aid.

McGrath J Yes.

Ring Stage two is, however, you can go to the Judge and say, because their conduct has been so outrageous in the case, that these are special circumstances or extraordinary circumstances. Please give us a certificate which overrides the immunity.

McGrath J Yes.

Ring And then you have a right to pursue the legally aided person not just for their contribution which is their statutory limit.

McGrath J Yes.

Ring But endlessly.

McGrath J Yes but.

Ring And then there's a third stage.

McGrath J Yes.

Ring Which is, notwithstanding your rights to chase the legally aided person, you have a right to go to the Legal Services Board itself and ask effectively for public funds.

McGrath J Well you ask for public funds because you can't pursue the legally aided person because of the limits of doing that. But in that area of public funds there's no element of misconduct is it. It is however

subject to a means of the plaintiff test which doesn't help your situation.

Ring Well my recollection of the criteria is that one of them, and it may even be the first one, is the way the legally aided person has conducted the case. And another one is the way that you, the applicant for costs, has conducted the case. And a third one is your means. So I think the conduct of the case is very much at the forefront of whether you get public funds or not.

McGrath J Thank you.

Anderson J Conduct of the parties, 41 subs (2), considering an application the Agency must have regard to the following: the conduct of the parties, whether the costs were unnecessarily increased by the conduct of the applicant. And then it goes onto the means situation.

Ring Thank you Sir.

Anderson J Hardship. Hardship to the insurer.

Ring Yes, well that's the one we never quite managed to overcome. But we keep trying.

The fourth point that I wanted to make, and it's just for completeness but I've mentioned it before, is that we're talking about the nature of the discretion and the rationale for it. The discretion doesn't mean that the Judge can do what he or she likes. It's fundamental in our submission that costs are based on a cohesive and consistent regime which is dictated by principle and which reflects both policy and predictability. And the principles then applied, and the factors then taken into account must fit within this proper template.

And the template that I'm submitting is the one that applies such that everything is then within the four corners of the discretion reflects those two colloquial principles. And the first one, if you play by the rules, the loser pays the winner. And I just want to expand on that in two respects.

First, that loser in this context includes not only a direct loser but an indirect loser. And i.e. that is somebody who is on the same side as the direct loser is also liable to pay the winner but only if they've funded, controlled, directed the losing case and are beneficially interested in the outcome. And that's the Dymocks example which I will come back to. So we're talking here about a non-party but we're not talking a pure funder. And that's the distinction that is drawn in Dymock between somebody who simply provides the means by which the plaintiff can advance the action but takes no controlling interest and has no benefit out of the outcome.

Tipping J Is there a difference between a non-party and a former party?

Ring Is there a difference Sir?

Tipping J No, should there be, conceptually.

Ring Well from my submission Your Honour, it all comes back to whether you're a loser or not. If you weren't there when the judgment was pronounced, and you're not mentioned in the result, you certainly can't have lost. No Judge has said you were wrong. And the second point that I wanted to make under that heading of the loser pays the winner is, it's implicit, well explicit in that, that one winner does not pay another winner and that one loser does not pay another loser.

Elias CJ Unless there's the controlling interest aspect.

Ring That, well, my submission is, and again I'm going to just touch on the cases because they're already in my submissions.

Elias CJ Yes.

Ring But I'm just trying to put it into a framework that is consistent.

Elias CJ Yes.

Tipping J Are you putting out these as absolutes or as prima facie.

Ring I'm reluctant to say they're absolutes because that immediately invites an effort to find exceptions of one sort or another. I would prefer to put it on the basis that these are the rules generally but the costs jurisdiction inevitably is going to recognise utterly special cases. And again I just want to be careful not to use words like exceptional because then you get into an argument about what's exceptional.

Tipping J Well utterly special sounds pretty exceptional.

Ring Yes. Well I picked that formulation because I'm not aware that any Judge has articulated what it means yet.

Anderson J Well you just have to look to family protection proceedings where very often the technical loser, the trustees pay, the technical winner might be trustees pay an unsuccessful applicant. It's certainly not absolute.

Ring No.

Anderson J The type of process, the type of proceeding might be relevant.

Ring Well again at the risk of creating exceptions which undermine my principles, you might find in those sorts of special cases that they are

… generous because of the nature of the relationships between the parties.

Anderson J Yes.

Ring And the proposition that I will be advancing which, again it's all in the submissions but I just want to put the framework on it, is this doesn't mean that a winner can never recover costs against another winner or a loser can never end up paying costs of another loser. What it means is you can't do it by means of an application for costs. You can't use the summary process for this purpose because it's not within the coherent structure of the Rules or of the principles. But if there are relationships between those parties which provide for duties and their breach and the causative consequences of that breach are that they have incurred these costs, then there's an action available to them. There's a civil action available to them and the costs may be one head of loss, there may be lots of others. There may be reputational damages, the field is wide open for what is recoverable. But all I'm saying is that in the summary jurisdiction that we're dealing with, where the loser pays the winner, you can't have winners paying winners as well and losers paying losers.

So that's the first half of the proposition. The second half of the proposition is that if you don't play by the rules, i.e. you are guilty of misconduct, then first a winner can be deprived of costs and in the exercise of the Court's discretion you simply don't get awarded them. And second a loser's legal advisers for example can be ordered to pay costs personally.

And these are reflections of the overriding policy considerations that there is a duty on litigants and legal advisers to act properly.

The question then becomes where on the template do you put a claim by a winner against somebody who at best for the appellant in this case cannot be characterised as either a winner or a loser. Someone who's played by the rules as the Judge found. Somebody not guilty of any misconduct. Somebody who was not a loser and has not been found liable for anything in the main action.

And my submission is that this is where you come to causation. And causation is fundamental in the sense that it is hard to envisage a situation where you can become liable for costs without having some connection to the proceeding. I think that would be a generally accepted proposition. And the extent of necessary connection in my submission is recognised in the general rule that costs follow the event. Which again also underscores the ancillary nature of the costs jurisdiction. The unsuccessful party pays the costs of the successful party because the loser has caused the winner to incur those costs.

It's often been said that the purpose of costs is to deter the plaintiff from bringing and the defendant from defending an action which they are likely to lose. But that the principle or underlying rationale is that unjustified and/or unreasonable conduct of a party ordered to pay costs, i.e. the loser in my scenario, has caused costs to be incurred by the applicant for costs, i.e. the winner.

Now that reference to unjustified and/or unreasonable conduct in my submission is important. And it's reflected in two authorities. The first authority is the Court of Appeal in the Commerce Commission case which is at tab 3 of my submissions (**Commerce Commission v Southern Cross Medical Care** [2004] 1 NZLR 491), I'm sorry, of my authorities. And is referred to at paragraph 6.5 of my submissions.

And at line 35 on page 494, it's paragraph 13, the rationale for the presumption, this is that costs will follow the event in the absence of some particular reasons to the contrary, is that successful parties should not have to bear the costs of having its rights vindicated in circumstances where the litigation stance taken by the opposing party is shown to have been unjustified.

And the second authority that I would take Your Honours to in relation to that unreasonably, is the Arkin v Borchard Lines judgment that I sent through the other day. And at p.619 paragraph 23 Your Honours will see the reference to cost shifting under which costs usually follow the event and it not being a universal rule in common law jurisdictions. And then.

Elias CJ Sorry, what paragraph is that.

Ring Paragraph 23.

Elias CJ Yes thank you.

Ring And just a couple of lines down, the main principle that underlies the rule is that if one party causes another unreasonably to incur legal costs, he ought as a matter of justice to indemnify that party for the costs incurred.

And what I'm emphasising here is they're not saying causation alone is enough. They're saying unreasonable. Causation which is unreasonable or causation which is unjustified. That is enough.

Blanchard J The rule that's being spoken of is the general rule that the unsuccessful party pays the successful party's costs.

Ring Mm.

Blanchard J Is that correct.

Ring Yes Sir. But the essential element of this rule is that the party ordered to pay has been unsuccessful.

Blanchard J Yes but that's as between unsuccessful and successful.

Ring Mm. Which is the general principle in 47A.

Blanchard J Yes. So we're coming back to that point again.

Ring We are but it also permeates through these authorities. And.

Blanchard J But none of these authorities deal with a case that's remotely similar to the one before us.

Ring Well with that Sir I self-evidently absolutely agree. But it is sometimes helpful to see how other situations have been dealt with to try and derive the principle that might apply where you just change one or two elements. And so what I'm looking for, what I'm trying to articulate, is rationales and principles that we can then say, well if that's what happens in these cases, then this is what also should happen in ours.

Elias CJ I've just seen in this case the reference in paragraph 19 to the Aiden Shipping Co case (**Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira** [1986] 2 All ER 409, [1986] AC 965).

Ring Yes.

Elias CJ Which suggests that either the rule making authority must control the exercise or appellate Courts can establish principles.

Ring Well indeed.

Elias CJ You're really inviting us aren't you to establish principles.

Ring Well I would like to think I'm inviting you to recognise the principle and.

Elias CJ Inherent in the Rules.

Ring Inherent in the Rules. And then when you apply it to my circumstances, it produces the result I'm submitting for.

But I'm only doing that because I detect that it's easier to ask Your Honours to identify a principle that already exists and apply it than it may be to, if Your Honours think that you're actually legislating.

Elias CJ Well it's just that it may be supportive of the thrust of your submissions that the House of Lords, if this is accurately quoted, indicates that despite the breadth of the discretion, it's not a question of just simply saying if the Judge can be shown to have acted against

established principle there is a role for an appellate Court in establishing the principles for exercise of a discretion.

Ring Well indeed and thank you Your Honour. Because that is what I am submitting ought to be the case here.

My proposition here is that this essential element that the unsuccessful party is the one that's, and the only one that can be ordered to pay costs, is supported in my submission by most of the authorities, well there's none to the contrary, but the authorities that I've dealt with in my submissions. And there's been some discussion in the judgments and also this morning about whether the Board can be truly characterised as a party or a non-party for these purposes. But in my submission, the label itself is potentially misleading and is unnecessary that you have to go back to the substance of what is being alleged. You have to go back to the substance of the principle, the underlying rationale of the principle and then it doesn't matter how you label the particular person you're dealing with.

And so for example to take the most simple case. An unsuccessful plaintiff or a defendant may be ordered to pay the costs of the successful defendant or plaintiff as the case may be. That's just a straight application of the explicit words of r.47A and of the common garden variety everyday occurrence. It also applies in effect or in substance in relation to, for example, culderbank(?) letters or offers to settle under the Rules, under what is now Rule 48G. The effect of failing to beat the offer is that you in effect, for costs purposes, become the unsuccessful party. You have lost even though at the bottom of the judgment there is an award in your favour, overall circumstances in substance, you are the loser. And the person who made that offer is the winner.

So that is an example in my submission of why we should keep away from labels like parties and non-parties. And we should be looking at the substance of what has happened.

Elias CJ And so a party who controlled the litigation of another party, on the Dymocks principle you'd accept is liable for costs.

Ring Your Honour that's my next point. But exactly correct.

Elias CJ Yes.

Ring The unsuccessful real plaintiff may be ordered to pay the costs of the successful real defendant. And that's the Dymocks example exactly. But not just full stop. You have to be behind the unsuccessful plaintiff, you have to be controlling or directing, managing the litigation, funding it, and you have to be financially interested in the outcome. So even there where that is an example of costs following the event in its most simplistic sense, just the mere fact of being behind somebody is

not enough. There's got to be those additional factors. So mere causation or to put it another way, to qualify for causation, it's not just enough to be standing there encouraging. You've actually got to be actively, proactively involved to the extent that you are the real party before the Court in all but name. And indeed that's one of the expressions that's used in Dymocks.

And for completeness in this area, the same applies the other way between successful plaintiffs against unsuccessful defendants. And an example of that is a case referred to in Arkin, TGA Chapman v Christopher which is referred to at Arkin at paragraph 28. (**TGA Chapman Ltd v Christopher** [1998] 2 All ER 873, [1998] WLR 12). Again this is that situation, fortunately it doesn't arise very often, where a liability insurer is behind the unsuccessful defendant. And the question arose in that case whether the liability for costs in favour of the successful plaintiff ought to be the problem of the unsuccessful defendant alone or whether the liability insurer ought to be directly liable. And on the same principles and underlying rationale to Dymock, the answer was, the liability insurer has the same exposure. The defence was run for its benefit, albeit with a contractual limit of liability under the policy. It controlled the litigation. It caused the costs to be incurred as a result. It could have settled but chose not to. It couldn't just hide behind the policy limit and say, that's all I'm up for. You the plaintiff just have to find your costs somewhere else wherever you can.

So that's the flip side of Dymock but again it's an example in my submission, or it shows that the principle that I'm putting forward is a coherent one that applies in these mirror situations.

The third proposition is an unsuccessful defendant may be ordered to pay the successful defendant's costs directly. And that's the Sanderson order situation and that's Your Honour Justice Tipping's judgment in Lane which is at tab 4.

And in that case which I've referred to at 6.9 in the submissions but Your Honour's judgment at paragraph 84 for instance, while it may have been reasonable for the plaintiff to join both defendants, that does not of itself entitle a plaintiff for an order the unsuccessful defendant should pay successful defendants' costs. If it was unreasonable the plaintiff can't seek to pass them on. Even if it's reasonable at the outset the position must be looked at from the point of view of the unsuccessful defendant. If that party has done nothing to cause or contribute to the joinder of the successful defendant, that will be a point in its favour.

Now of course in this case, what was being discussed was the, this was a claim by a purchaser against a vendor for misrepresentation in the sale of a business. And in the course of the litigation the vendor defendant swore an affidavit saying it was basically the agent's fault, at

least in part. And that caused the plaintiff then to join the agent as a second defendant. But in the course of the trial, the plaintiff discontinued against the agent and there was a question of whether the costs that the plaintiff had to pay the agent on the discontinuance, who should bear the incidence of those costs.

But then at page 155 at paragraph 91, and this is where you might see that I've borrowed the most heavily for my principle from Your Honour's judgment, down to about line.

Elias CJ I would have thought that paragraph 84 was totally against you isn't it, or am I misreading it.

Ring No, no, I'm using it as an example of the successful defendant being entitled, or the unsuccessful defendant being required to pay costs.

Elias CJ Yes, yes.

Ring It's not a question of how much costs because in the end there was an apportionment.

Elias CJ Yes, yes sorry. I missed out on the unsuccessful part.

Ring Yes.

Elias CJ Yes.

Ring But it was the, paragraph 91 at 155 where Your Honour disavowed an absolute principle that if the joinder was proper and reasonable then that ought to dictate where the incidence of costs fell to the proposition that it will be a relevant and sometimes decisive consideration but against the original reasonable and proper joinder must be set any relevant factors in favour of the unsuccessful defendant. And they can include change of position, how much was recovered, whether the unsuccessful defendant caused or contributed to the joinder and in the end the overall justice.

The point I'm making is that causation alone here is not enough.

Tipping J And in the end the overall justice of the matter as between the three parties concerned.

Ring Yes.

Tipping J That was the punchline Mr Ring.

Ring Well I'm sure Your Honour wasn't saying that that was the overriding consideration but it was just one of a number of factors that had to be taken into account.

Tipping J Well it could be read as saying that these are the factors you should take into account in making that ultimate assessment.

Ring I'm not disputing that the overall justice of the case has got to be a relevant factor. Every time you allow for the exercise of a discretion in my submission you're really allowing for that implicitly in it.

Tipping J And also the next passage which may have some relevance to the present case in view of the Judge's order of only 30 percent, analogously relevant to the next passage. It doesn't have to be an all or nothing.

Ring No.

Tipping J The discretion can be exercised on an apportioned basis.

Ring Yes. But of course we are saying here that you don't actually get to that.

Tipping J I appreciate that.

Ring And the fourth factor that I say is, or the fourth example that lines up with this principle is the unsuccessful party's legal advisers may be ordered to contribute to a successful party's costs, directly or through the unsuccessful party. And that's the Harley and McDonald or the Baxter example which I've given Your Honours in the judgment. (**Baxter v RMC Group plc** (High Court, Akld; CP 262/01; 9/9/03; O'Regan J).

Blanchard J It wasn't being suggested here.

Ring No. Not yet.

Blanchard J You can ignore that.

Ring I'd be grateful if Your Honours didn't mention it in the judgment either. But that's a situation where you have causation but causation again alone is not enough. There has to be a misconduct element as well. But it's an example of somebody who's lined up on the losing side who is being ordered to pay the costs of the winning side. You wouldn't get to that position unless you're on the losing side to start with. Unless the misconduct was in some discrete area that added to the costs that were being caused.

The misconduct, if I now turn to effectively the second limb of my proposition that if you don't play by the rules, i.e. you're guilty of misconduct, then we're no longer in the costs follow the event scenario.

This is, in one sense it can be seen as an exception to the general rule. But in another sense it's just the other half of the equation. It operates to disentitle the successful party to the beneficial exercise of the discretion. And I've referred Your Honours at 6.15 in my submissions to the Oshlack judgment which is at tab 7 (**Oshlack v Richmond River Council** (1998) 193 CLR 72). And as you'll appreciate, there's a lot of material in there that was unnecessary. So I've just given you the costs aspect of it.

And if Your Honours turn to page 97 of that judgment there is reference to costs just between lines 67 and 68, the usual order is to indemnify the successful party by the unsuccessful party, not to punish the unsuccessful party. And then at 69, traditional exceptions. And the reference there to guilty of some sort of misconduct. And then describing what is meant by misconduct and this is what I mean by misconduct, and when I talk about not playing by the rules.

And these are the things that are all or almost all reflected in Rules 48C and 48D anyway. And again, emphasising the coherent nature of what I'm submitting as being complementary to the principles in the Rules. Lacks conduct inviting the litigation. Unnecessarily protracting the proceedings. Succeeding on a point not argued in the lower Court. Prosecuting solely for the purpose of increasing costs and so on.

And again, that is, once you're in this area you are really talking about punishment for misconduct whereas in the first area punishment as a rationale or factor or principle just does not figure.

And so in my submission, unless there is misconduct, the consistent theme or the them of a consistent regime at least, requires that the costs exposure is the price of losing or being on the losing side. It reflects that the stance taken in the litigation which has been proved to be unreasonable or unjustified. But moreover, if you're not the direct loser, i.e. in a Dymocks or a TGA Chapman situation, you still need additional elements beyond just being on the losing side. Even being a pure funder isn't enough. To establish the requisite causation you have to have those additional elements of management, control of the litigation and also that it's for your ultimate financial benefit.

If you're not the loser, then in my submission in this coherent regime that I'm promoting, or identifying, the liabilities are dictated by the existence or otherwise of a cause of action.

So you need to look in a separate context at questions of duty breach, causation and loss analysis. And the difference between what I'm advancing and what happened in the High Court is in my submission properly analysed. The High Court judgment is that causation alone is enough. Although at paragraph 31 that Your Honours were taken to.

Elias CJ Causation in the sense of procurement.

Ring In 31, yes that's right, His Honour said, in the absence of either the right to indemnity or some conduct on the Board's part that caused Mr Shirley to incur costs that he would not otherwise have incurred, that is actually shorthand for just saying causation. And indeed it can't be anything else because all through the judgment when His Honour articulated this, it was all on the basis that there was no finding adversely on the merits. The Board was entitled to do what it did. The joinder was proper. There's been no misconduct by the Board. And so when my friend says that the judgment is based on causation plus other factors, it actually in my submission isn't. It is based on causation.

Tipping J And you say that's not enough. There has to be something else.

Ring Something more.

Elias CJ What about legal aid.

Tipping J Yeah, what about, is it confined to misconduct is it, this something more.

Ring Well not necessarily. The something more in Dymocks is that you're the funder and the manager and the ultimate beneficiary of the litigation. So it might not be just impropriety or misconduct. It might be some of those factors, or it might be those factors. But it can't just be that you've availed yourself of rights that you're entitled to avail yourself of and then settled so that you're no longer a party to the proceeding when the costs that have been claimed against you have been incurred. It's like standing round at the funeral and having the hand reach up through the grave to grab you. We were in the clear on this proceeding.

Tipping J You thought you were in the clear.

Ring We thought we were in the clear on this proceeding in July 2003. No costs application, and a reservation that if we lose, we might come looking for you depending on the basis on which we lose. And then 15 months later when the files are closed and this is history, suddenly it comes back. Now Your Honours if that's not the classic antithesis costs being predictable and expeditious, it would be hard to know what is.

The whole point of my submission in one sense just boils down to that basic proposition. How can this principle.

Elias CJ But that's nothing to do with the predictability of the costs. It's about the predictability of an application for costs.

Ring Well it doesn't say predictability of an application. It doesn't say predictability of the quantum of costs.

Elias CJ Mm.

Ring It just says predictability.

Elias CJ Of liability for costs.

Ring Predictable and expeditious. And these costs are neither. But even just not even focusing on predictable.

Tipping J Well if something happens for the first time, it can't really be said to be predictable can it.

Ring Well that might be right. But let's just talk about expeditious for a moment. There is just no time limit by which our liability if we have one can ever be controlled by us here.

Anderson J But then you shouldn't sic it onto someone who's going to be exposed to costs as long as that person remains in the litigation.

Ring Well except that we didn't make the claim against them. Somebody else did who had a valid cause of action.

Anderson J Thought they had.

Tipping J Surely in the light of that rule which says that costs are always on in spite of discontinuance Mr Ring, your clients if they were wanting to buy off this horrible hand from the grave, should have got it as an express term of the consent to the discontinuance.

Ring Well we got a discontinuance which had one reservation.

Tipping J I know but it was left open in other respects. You're not saying there's an implied, that's never been argued.

Ring Well that's actually not quite right Sir.

Tipping J Isn't it. But it's not before us.

Ring It's worse than that. The High Court judgment shows me conceding it.

Tipping J Well.

Ring And that was something that I mentioned in the submissions.

Tipping J Alright.

Ring But I don't know that we need to delve into that issue.

Tipping J I know but surely the problem from your client is that it took the view that that consent let it completely off the hook. Whereas in terms of that Rule it didn't.

Ring Well have Your Honours seen the letter that actually sets out this reservation.

Elias CJ Yes it's before us.

Ring Yes.

Tipping J I've seen it but frankly haven't looked at it closely. Where is it.

Ring Page 12.

Tipping J Page 12.

Ring I don't want to elevate this to an estoppel. I just prefer to look at it at a practical discretionary factor level. But if you look at that letter, it says, what's prompted it is, we want you to consent to the discontinuance. And the answer comes back, yeah okay. But two things: only two things; tell us how much and we'd just have to warn you that we may come looking for you if we get an adverse judgment at the end of the day. Confirm that and you have your discontinuance. Now anybody reading that would hardly think that there was a harboured reservation there that in the looked for event of a judgment in our favour, we're going to come looking for you anyway.

Tipping J Well are you saying, and you put it no higher than this, that this is a factor in the exercise of the discretion.

Ring Well if we're talking, yes I am. And if we're talking about a principled basis, in an analogous situation where some authorities have said if you're going to apply for indemnity costs you ought to warn people in advance, it we're talking about proper principles here, one principle that I would submit is appropriate is if you're going to apply for costs in this situation, if there is a discretion, a principled basis for awarding costs in this situation, at the very least it ought to be conditional on it being heralded by some sort of notice. Whereas what we got here was exactly the opposite.

So what we ended up with in my submission, if you're just following those cases through and those principles through, that it's not logical or rational that somebody in the Board's position should be liable for costs where it's not a loser, i.e. it's not unsuccessful, it's done nothing wrong on the merits, it's not even there and if anything it would have been rooting for Mr Shirley in the case and not rooting for the Bensemanns, plus there's no misconduct on its part, that it was a reasonable and proper to join, it was entitled to act as it did and that includes the settlement.

I also wanted to talk in a little more detail about the encouragement factor.

Elias CJ Well then should we take the adjournment at this stage and.

Ring Yes I would be obliged thank you.

Elias CJ Yes thank you. And you were saying, the encouragement factor and?

Ring Oh, I just want to talk about the encouragement factor in terms of time, maybe another half an hour, 45 minutes max.

Elias CJ Thank you, alright, we'll take the adjournment.

Court adjourns 1.00 pm
Court resumes 2.15 pm

Elias CJ Thank you. Yes Mr Ring.

Ring Thank you Your Honour. I just wanted to make a further comment about the encouragement factor. This was recognised in the concept of the Sanderson order and in particular in Your Honour Justice Tipping's judgment in Lane in the passages that I read out before which I've referred to at 6.9. And they're paragraphs 84 and paragraph 91. But I wanted to draw the distinction between the factual situation there and what we're talking about here.

The issue there was that a factor relevant to the exercise of the discretion was if the party being sought to pay costs had caused or contributed to the joinder. And then balanced against that on the other side is whether there was a reasonable and proper basis for the joinder as well. In that case of course it was a factual issue because the party that was being asked to pay the costs had advanced a factual scenario which was effectively either not me, him, or if it's me, it's him as well. It doesn't much matter which but it was a new factual scenario not being alleged by the plaintiff that suggested that the party to be joined was liable.

And I want to draw the distinction between that and what we have here. Which is that all that was being said to the Bensemanns was, on exactly the same pleading as you're currently advancing, on exactly the same factual scenario that you're currently advancing, there is another party which also has a legal liability. So it was a discussion if you like about the law and not about the facts.

And in my submission this comes back down to those references in the authorities to conduct that was unjustified or unreasonable as being the underlying basis or rationale for the joinder.

What was being said in this case was, if you the Bensemanns prove the factual scenario that you're advancing, which we don't accept, but if you prove it, then Mr Shirley is also liable. That's not an unjustified position for the Board to have taken because on the law that's absolutely correct, because the judgment in Lister for example. And it's not an unreasonable position for them to take.

And then it comes down potentially to a question of timing. What would have happened for example if the Board had joined Mr Shirley as a third party and then as is absolutely common, the plaintiff sees that and says, okay, I'm going to join you now as a second defendant. There doesn't have to be a discussion that even takes place. It can be the pleading itself. Would that be regarded as encouragement in terms of the principle? If the High Court judgment is right, absolutely that in my submission that can't be the principle that a coherent system of costs is based on.

And I'd like to consider a couple of other factual scenarios as well. Your Honour Justice Anderson has already pre-empted me on one of them. And that was the question, let's say we had the same encouragement evidential position here. But both had been at the trial and both had succeeded. Both would be winners in accordance with the rules and the principles. The rights of both would have been vindicated by the judgment. In my submission on a coherent principled basis Mr Shirley would not have been entitled to costs against the Board and vice versa.

Elias CJ But on the trial Judge's position, he would have, or the trial Judge would have been entitled to.

Ring Correct.

Elias CJ Yes.

Ring A winner would have got costs against another winner. And it would have been purely on the basis of causation and nothing more. And in my submission that just can't be right. That cannot be the correct principled legal position. And again I'm not saying it could never be. All I'm saying is, if there was a right to costs, then it should be founded not in the discretion but in a cause of action.

Anderson J It's easy to see an exception which doesn't apply here. For example there's one winner which may by its conduct have increased the length of the trial.

Ring Ah.

Anderson J And would therefore have to contribute to it.

Ring And we can find a principled basis for that, it's in the Rules.

Anderson J Mm.

Ring Indeed. Indeed. But on that purely level playing field basis, it cannot be right that a winner could get costs against another winner. And what about the alternative scenario. Let's say they both lost. Both would be losers. Could one loser get costs against another loser.

Anderson J In some circumstances.

Ring Well again, there is authority for this proposition and that's the judgment of His Honour Justice Hardie Boys in Morton (**Morton v Douglas Homes Limited (No.2)** [1984] 2 NZLR 620) which I've given you at 6.16 and is at tab 8 and was supported by two other earlier decisions, one of them is Schollum (**Schollum v Barripp (No.2)** [1917] NZLR 448) which I've given you at tab 9. And that is direct authority for the proposition, all of those cases, that an unsuccessful defendant is not entitled to costs under the costs regime from another unsuccessful defendant. If there is a right to costs, then it should be pursued by way of a cause of action which explores the duties, breaches and relationship between them.

Tipping J Do you mean that it would be confined then to some contractual or quasi contractual inquiry.

Ring Yes.

Anderson J Is that Morton are you saying.

Ring Yes, Morton is tab 8 in my casebook. And the relevant section is page 634 about line 23.

Anderson J Yes.

Tipping J Why did His Honour not take the view or reject the view that the general discretion as to costs allowed that to be done. Did he regard the general discretion as some way limited by the absence of any specific, of course we didn't have the specifics then did we.

Ring But the only rationale, the only way to rationalise that judgment is that the basic rule is that costs follow the event. And that if you have two unsuccessful parties then any costs liability between them ought to be determined by an analysis of their relationship to each other and not under some general discretion.

I mean otherwise where you end up is once you step out of costs follow the event doesn't apply any more, you have no rules. And it can't be that once you're not in that ballpark of costs following the event that the discretion is utterly untrammelled. There must be principles and

what I'm endeavouring to articulate is that those, what I'm attempting to articulate are those principles.

And there's a symmetry.

Tipping J His Honour in Morton regarded that point as a jurisdictional one. Because he said at line 33, Neither Mr Gallagher nor Mr Dawson argued this jurisdictional question. Here we haven't got a jurisdictional issue.

Ring Well we had a long argument in the Court of Appeal about jurisdiction. To the extent that the Rules say there is a total discretion in relation to costs, you have to, I have accepted and I have accepted it in the written submissions, that there is a power to award costs in this broad type of situation.

Elias CJ That's a distinction that was made in the Aiden Shipping case where the statute in the UK expressed the wide power. And that was equivalent to our Rule 46, and that was said to be the conferral of jurisdiction. And then there was an issue of the principles under which the jurisdiction could be exercised.

Ring Indeed. And there is a difference but to a certain extent it's semantic when you talk about there being no jurisdiction because the factual circumstances justifying the exercise of the discretion don't exist and saying there's no jurisdiction. I'm accepting, as I endeavoured to do in the Court of Appeal, that because of the general rule, there is actually a power to award costs against anybody at all. But that power, that discretion then has to be delineated in some ways.

Tipping J Well that's what the House of Lords were talking about in the case that the Chief Justice has just mentioned. There's a difference between the people who are susceptible to an order and whether or not an order should go against a susceptible person. And I don't want to make too much out of this Mr Ring but it's I think, that is a factor.

Ring Yes well I'm accepting that everybody is susceptible to an order for costs.

Elias CJ Oh, everybody with some connection to the proceedings because that is what the Aiden case says.

Ring Oh that's what Aiden says, correct.

Elias CJ Yes.

Ring But if you just look at the Rules, everybody is susceptible.

Elias CJ Yes.

Ring To an award of costs.

Elias CJ Yes.

Ring Aiden is an overlay which starts to define the four corners of it, just in the same way as these other principles that I'm articulating.

Tipping J Well I would have thought that all parties are susceptible, ex hypothesi, but the question of non-parties are to be brought in is the question of what you might call jurisdictional principle or power.

Ring One of the beauties of the common law is its incremental approach to things that when you get to a certain point you can look back and see what the springboard was that got you there. What the step before was that took you to that place. And you can say, that is logical, that is principled, that makes sense to me. In a very simplistic way, what I'm querying here is, what's the springboard that gets you to the position that the Board, that someone in the Board's position is liable for costs. Because it certainly isn't the costs follow the event.

And when you look at a situation like Dymock where there is somebody who actually fits within the costs follow the event principle you can see how the common law went from costs follow the event and an unsuccessful plaintiff pays the costs of a successful defendant. You can see how the next logical step is, well if somebody who is behind that unsuccessful plaintiff ought to be in the same position. But when the Privy Council enunciated that springboard step, when they defined that principle, they didn't just say, if you're behind the loser you pay the costs. They said if you are a funder, and you are a controller, and you are the ultimate beneficiary of the outcome, then you are in the position, the same position as the loser.

So even somebody for example who was a funder and stood to gain the benefit of the outcome would not be susceptible to costs on the Privy Council judgment in Dymocks. And let me give you an example of that.

Let's say the Bensemanns were living, were in arrears to their landlord because they'd had to move into a bigger house to accommodate the extra children they weren't contemplating. And the landlord said to them, you should be suing Mr Shirley and then you'll be able to pay me the rent that's outstanding. And I'll help you. I'll fund it for you. You go off and do it, I don't want to have anything to do with it. I'll fund it for you, you go off. Now the Privy Council would have said, sorry, you don't qualify as a non-party liable to costs. But there's an example of somebody who actively encouraged, financed and stood to gain and in a real sense was the real party, would have been the real party behind the plaintiffs. No liability.

And so if there's no liability in that case, and that's a common law incremental step from costs follow the event, again, what's the springboard that justifies costs against the Board when we didn't lose and we weren't even there. And we didn't stand to gain by the result in any way.

Elias CJ Well you may have gained from the result.

Ring Well once we'd settled.

Elias CJ Yes. Yes I understand that.

Ring We couldn't care what happened after that.

Elias CJ Yes.

Ring We didn't gain by the outcome of the judgment at all. In fact, if anything, we thought we were better off on this result because on the other result, we were still hooked back into that reservation on the discontinuance. So this was actually our desired result that we're being foisted on.

Tipping J Do you say that the particular relationship between these parties, that is to say employer and employee, is irrelevant to the issues that arise.

Ring Well no I don't say that it is irrelevant. What we've said is, and I just need to correct the factual situation just a little bit from previous discussions, the Board was insured for its own liability if it was sued. For a whole host of things including if it was sued in this situation because of the conduct of the doctor. However, it was a term of the doctor's employment that he also be insured for his liability for being negligent in the course of medical duties. And the Board paid for that insurance. They paid the premium for that insurance. So there were complementary insurance schemes in place. We were insured for our liability. If we got sued he was insured for his liabilty.

Tipping J But say he'd been, the Board had been sued alone and that the doctor had never come into it. But it was his actions for which you were being sued. You'd have been covered by your policy would you.

Ring Correct. But then.

Tipping J So there was a kind of concurrent dual cover for the same conduct.

Ring Well only dual cover in the sense that two parties had parallel cover in respect of the same conduct. But then at the end of that process, if the Board was found liable because of Mr Shirley's conduct, in terms of Lister it would have been entitled to a complete indemnity from him. It provided the.

McGrath J Would the insurer have been liable for that. I thought that as a consultant, he was not one of the insured under your policy.

Ring No he's not insured under our policy. But he's got his own policy that we pay for.

Tipping J But you're insured for his conduct.

Ring Correct.

Tipping J So you are actually, there's no question of averaging here is there.

Ring No, no, no. Not at all.

Tipping J No. But you are covered, both policies cover the same negligent hand.

Ring Yes but they're insuring different people for it. Different defendants.

Tipping J But it has to be concurrent doesn't it. I mean you're always vicariously, you may be able to push it back, but you're always, this is a dimension of it I found curious Mr Ring.

Ring Well I found it difficult, as you might have detected, to persuade any of the lower Courts the insurance had anything to do with it. Everybody wanted to take the traditional view that we ignore the insurance and it doesn't matter. Well the submissions that I was making was that the insurance has some great relevance here because we paid for the cover to enable Mr Shirley to vindicate his rights if he wanted to. We set him up with an insurance scheme which paid for his defence costs, which paid for his liability.

Elias CJ Which we are you at the moment.

Ring Oh, we the Board.

Elias CJ Yes.

Ring Oh sorry, I'm always we the Board.

Elias CJ Yes. So that is not looking at the insurance position.

Ring Well Your Honours probably remember the Marlborough Properties case. It was a question of whether the tenant is liable for negligently damaging the landlord's property and the question was, had the parties agreed because of the insurance arrangements that there would be no liability. Well it was a bit like saying in Marlborough Properties, the insurance position was irrelevant. That's how I felt the argument was going in the lower Courts. And the insurance arrangements are quite pertinent. Because we all contemplated this situation and we set up an insurance scheme to deal with it. Having paid for his insurance so that

he could defend himself and vindicate his reputation in these sorts of circumstances, and having done that, he now wants us to pay twice effectively by sharing in the costs of that the second time.

McGrath J Mr Ring can I just ask you to look at page 87 of the case, paragraph 16 of Justice Miller's judgment. What I want to know is whether what he says there, including the citations from this QBE policy is correct with respect to talking of specifically excluding cover for medical practitioners who carry separate professional indemnity cover in respect of their professional roles.

Ring Yes, yes the named insureds did not include the doctors. But that's quite different from the Board being insured because of its own liability caused by the doctors.

McGrath J Well is Justice Miller correct in the second sentence, the policy specifically excludes cover for medical practitioners and other health practitioners who carry out separate professional indemnity cover in respect of their professional roles. I had assumed that specifically excludes cover for the Board.

Ring No, no. No what it does is says the Board is insured for its liability if the doctors are negligent but the doctors will not be insured under this policy. We're going to pay for another policy for them to have their own insurance.

Tipping J So in effect.

Blanchard J Beginning of paragraph 18.

Tipping J The Board is the insured and there's no extension to cover individual practitioners.

Ring Correct.

Tipping J Yes.

Ring And we pay for it separately for them.

Tipping J You get the extension via the separate cover.

Ring Well it's not an extension.

Tipping J Well it's not an extension. But in effect.

Ring It's a different insurer.

Tipping J Different insurer yes.

Ring Wish it wasn't but different insurer. Yes.

Tipping J Because if it was the same insurers, this whole hassle wouldn't arise.

Ring I think people have identified that already. And there's been a lot of discussion about it.

Anderson J But there are clear reasons why the doctors' insurer is different. I mean it covers disciplinary matters, it's a funding source for more refinance and all that sort of thing.

Ring Yes. And also the interests of each may be different. The Board may interested in economic resolution, quick economic resolution and the doctor is interested in vindicating his rights. But this is the irony of this whole case. Because the real complaint is we joined him to the proceeding so that he had to vindicate his rights and incur the costs of it. Whereas what we could have just as easily done is settled with the plaintiffs and his rights would never have been vindicated or we could have joined him as a third party, then settled with the plaintiffs and his rights would never have been vindicated.

So he wants to vindicate his rights. We've given him the only avenue, this is the only way that he could have achieved that. We've paid for him to do it with the insurance so it never costs him anything. And now we're being asked to pay again when he's successful in achieving that result.

Tipping J The cover which you paid for on his behalf, the cover that attaches to him personally, includes both liability and costs of defending.

Ring Correct.

Tipping J So you've paid for the costs to defend him and he's now saying, or his insurers are saying, we want that back from you.

Ring Pay me again, that's what, when it all boils down. We've paid for the fund to start with and now they want to be paid again.

Blanchard J Just like Marlborough Properties.

Ring Beg your pardon Sir.

Blanchard J Just like Marlborough Properties.

Ring Oh, just like Marlborough Properties. And.

Tipping J Should we be taking some notice of Marlborough Properties vis a vis

Blanchard J It's a different field but it interests me because one of the Property Law Act recommendations from the Law Commission was to try and reverse that. I understand the insurance industry may be opposed.

Ring Well most of the, it depends on whether it's a landlords' market or a tenants' market as you know. But mostly these days the leases all come out with a tenants' indemnity except the extent the landlord's not insured. So effectively the insurance market is wearing it at the moment.

Tipping J But that case didn't have any discussion about costs in the same, no.

Ring No, but the principle's exactly the same, it's an exactly analogous, you pay for the fund and having paid for the fund, then you can't go then suing as well. So.

Tipping J Has it ever been argued that because of this arrangement there was some sort of implied term in the contract between doctor and Board that there would be no recourse.

Ring No. No.

Tipping J Because that would seem to me to be close to what you're effectively arguing Mr Ring.

Ring Well we never got to put it on a duty breach causation basis because this whole costs jurisdiction has been advanced just on a pure discretionary basis.

Tipping J Well I don't personally at the moment as at present advice think that the insurance dimension is irrelevant. I think it is a feature of the whole background if you like which inter partes, or inter the insurers if you like, does have some relevance. Now are you saying that everyone below has tended to say it's got nothing to do with it.

Ring I've submitted to every Court to date that the insurance arrangements should be taken into account.

Tipping J Well that's a major point of principle in the costs discussion isn't it.

Ring Well.

Tipping J That's sort of emerging from left field fairly late in the day.

Ring Well I've always thought so. But I'm heartened, I think Your Honour might be the first ever to have actually expressed even the slightest positive view on that.

Anderson J To my mind the only relevance of the insurance arrangements is that it allows you to say we didn't throw him to the wolves.

Ring Well it's a little more than not throwing him to the wolves. We built a cage around him at of our own cost. And we provided him with the ammunition to fight them off.

Anderson J Well it was part of his employment package. But you paint the picture of a Board joining him for wholly altruistic reasons for his benefit.

Ring Oh no, no, no. I'm sorry Sir. I'm not for a moment suggesting that we did him a favour in that sense. And that was our sole motivation was to do him a favour.

Anderson J I thought your sole motivation was to put economic pressure on his insurer to contribute to a settlement and get the thing off the table.

Ring In the short term. In the long term our motivation was, if we're all going to be there at the end, well if we're going to be there at the end, then he needs to be there as well.

Anderson J Not necessarily. Your client could have defended at trial and won. And that would have vindicated him vicariously.

Ring Well that would have, yes. But if we lost then we would have been facing a second action in order to recover from him. And I know my friend said oh, everybody would have sorted it out. But you know, that has never been a good basis not to join somebody who is ultimately legally liable.

Anderson J The reason why I don't at present see the insurance position as relevant is that there's nothing your client can be criticised for for seeking to share the economic risk with someone who is an appropriate party.

Ring But can I add to that, an appropriate party whom it has funded so that it can fight that dispute, or fight that claim, at no cost to itself.

Elias CJ Is that just though saying that if procurement is a relevant basis with causation for liability for costs in these circumstances, then the procurement has to be seen in the context of the insurance arrangements.

Ring Certainly that's another way of looking at it Your Honour, absolutely.

Blanchard J Mr Ring, you rightly or wrongly are relying heavily upon general rules in relation to costs, well established rules. Are there any of those rules which take into account insurance arrangements.

Ring Not that I can think of specifically, no. But.

Blanchard J So it's not something that would normally enter into a question of assessment of costs.

Ring Well no but in the same way as the insurance behind the parties wouldn't normally enter into the rights and wrongs of their legal position but it does in Marlborough Properties for example.

Blanchard J Mm.

Ring You can't say, in no case can you take the insurance into account when the very existence of the insurance may be a factor, at the very least a factor which is relevant.

Tipping J Well it's highly relevant here in that we are told that there are two insurers and this is the very reason why we've got this dispute. A normal inference might be, but for knowing of the background in this particular profession that you'd have a single insurer that would be covering both the employer and the employee. And that's the normal. It's just abnormal in these facts. So that's why I think it is at least relevant to how this dispute has arisen.

Ring Mm. Well I'm sorry that was a very long answer to your question of what the relevance of the insurance was.

Tipping J Well I actually started this by the relevance of the relationship between the parties. It's moved into the insurance aspect of that relationship and I found it very interesting and helpful.

Ring I'm obliged Sir. The point though that I wanted to emphasise and I'm not quite sure whether I finished it before, is in a Dymocks situation, even with that close relationship between the loser, the actual losing party, and the party foisted with the costs, there was in addition to the causation those extra elements of, in particular standing to benefit from the outcome which can in no way be causative. You might be able to say that the funding and the control and management of the litigation were causative factors. But the right to the benefit of the proceeds is not. So there was that additional element to causation required there.

And I come back to the question, well so that's a logical springboard of requiring those extra elements if you're moving one step back from the party that's involved. But there is no principled springboard basis for awarding costs in this sort of case other than to call back and say, there is no rule, there is no principle, it's just within the discretion. And in my respectful submission that's actually not setting any principles, that's just saying there aren't any. And that cannot be right.

Tipping J Sorry to ask you yet another question Mr Ring, but am I right in understanding that say you had been sued alone, you had been found liable. The different insurance interests would have meant that you would have inevitably sought to pass that over to the doctor.

Ring Yes Sir but not by applying for costs against him.

Tipping J No, no I appreciate that. Passing on the liability that you'd been found liable for against the Bensemanns. Because that's presumably a necessary ingredient of the duality of the insurance arrangements.

Ring Well indeed. But just imagine this situation. Suppose we'd alone been sued and we won, I'm sorry, and we'd lost.

Tipping J And you'd lost, you'd lost yes.

Ring And we'd lost. But the damages were, well say there was only liability in contract, the damages were a dollar for some reason. So the big loss for us, or the big cost for us was costs. The costs of the action. We wouldn't have been able to just make an application like Mr Shirley did against him for costs. We would have had to sue him in a separate action. We'd have had to prove a duty, that's breach, causation and the damages would be the costs liability that we had incurred.

And again what I'm trying to highlight is that it just doesn't necessarily follow that the minute there's a result, costs are at large to everybody who's anywhere near the place. In some circumstances the appropriate way of pursuing costs, if there are any, is through the avenue of whether there is a duty, a breach, whether there is a cause of action for those costs.

Tipping J The cause of action would have been he owed you a duty in contract and in tort to perform the act properly.

Ring In a very real way the justice of us being entitled to costs against him in that situation must be more stark than his potential entitlement to costs against us in the current situation. I mean in the example I've just postulated, we have been found legally liable because of his conduct. Only because of his conduct. Because we are vicariously liable for his conduct. So every dollar that we have spent on that case is purely because of him. And because he's acted unlawfully. Now if there was a costs jurisdiction, surely it would exist in that situation.

Tipping J You're speaking on the hypothesis that you had been found liable.

Ring Yes.

Tipping J On account of his, yes I can see the puzzlement on the faces of your learned friends.

Elias CJ Well I think it might have been the unlawfulness.

Tipping J Yes.

Elias CJ This is a rather odd concept to use. In breach of duty.

Ring Well we, because of Lister.

Elias CJ Yes.

Ring We would have a right of indemnity from him.

Tipping J Yes.

Ring For every loss that we'd suffered as a result of that. But I'm postulating that the claim, all we've got really is the cost of defending the action unsuccessfully because the damages for some fortuitous reason were a dollar. We wouldn't be going making an application for costs to His Honour in the High Court and expecting to get them in a summary process.

Now if we can't get costs in a summary process when he's been found to act unlawfully and cause us to be legally liable for those costs, how could it be fair, how could there be a rational cohesive system of costs which gives him costs against us when neither of us have been found liable. And when we haven't done anything wrong.

Tipping J And you've paid for him to.

Ring And we've paid for it. I mean the fact we've paid for him just makes it just so much worse.

Anderson J It's not the money, it's the principle …

Ring Lawyers love principles, as Your Honour knows. So there was just, I think one other type of scenario that I would just like to explore if I'm not trying Your Honours' patience too much on these. And where does this encouragement factor lead. If encouragement in itself is enough, which is the High Court rationale, where does it lead.

And let me give you the example which is a pretty real one at the moment of the leaky building litigation. Existing proceedings. A discussion between the lawyer for the subsequent purchaser plaintiff of a leaky building talking to the defendant architect. And the defendant architect says it's not me who did this, it's all these other people. And they're all joined in to the action. The architect is settled out. And all those defendants succeed, let's say because the damage was pre-existing and so the plaintiff couldn't recover against anybody. So you've got a potential multi-unit piece of litigation that's run for two, three, four years before the judgment is out. There are 20, 30 defendants at the trial. It takes six months and then somebody comes along to the architect, 20 or 30 defendants come along to the architect and say, you told the plaintiff that it was us. Please pay everybody's costs.

Imagine that, and that's not an unrealistic scenario. You could imagine the same discussion on a less formal basis even still between the clients

direct. What about the third and fourth party claims as well. They've only been joined because of that idle comment or whatever. It could have been a discussion even before the proceedings were issued between the intended plaintiff and the prospective architect defendant and he may never have been joined. May never have been sued in the first place. But three or four years down the track he has, on an indistinguishable factual scenario, encouraged or procured the suit against all of these other parties.

Now I pose the same question again. Would that be a cohesive rational system of costs which then foisted that architect with the whole of the costs of that action. Years after the event. And he may never have even been a party to it.

McGrath J I don't think anyone is contemplating that Justice Miller's judgment, if the appeal is allowed, would be created into a binding statement of principle that would then be up for application in totally different factual situations.

Ring Well, but it has to have the core of a principle attached to it. And the core principle, as I understand.

McGrath J It's got to be, he's got to be other than wrong.

Ring Well the ratio of that judgment is that encouraging a party to join another party who is ultimately successful exposes the encourager to costs. And that, stripped away from everything else, is the essential principle that is being enunciated and that is just simply saying causation alone is enough.

Blanchard J Went beyond encouragement, you actually made the application.

Ring Well again, that was what I said from the outset Your Honour. In substance it was the plaintiffs' joinder in the sense that the plaintiff made the claim, it's the plaintiffs' statement of claim and I don't think it can make a difference to the principle whose letterhead the memorandum, the consent memorandum goes under. It's the plaintiff that has made a claim against the second defendant, prosecuted that through to trial.

Tipping J But if you had a right to pass on any judgment that was entered against you to the doctor, there was no possible basis for criticising you for bringing the doctor in. The only possible argument might be that you brought him in as a defendant rather than as a third party.

Ring Mm.

Tipping J I mean it was perfectly conventional to bring him in somehow so that you could have the issues between you resolved.

Ring Well that's why I gave Your Honours that Mainzeal case (**Mainzeal Corp Ltd v Contractors Bonding Ltd** (1989) 2 PRNZ 47) because the Mainzeal judgment of Justice Barker's was a very similar factual situation or an analogous factual situation. That was a claim by a principal against the person who'd issued the performance bond and the person who issued the performance bond sought to bring in the contractor as a second defendant over the plaintiff's objection. So different in that sense but effectively a similar sort of contractual type of situation or a liability chain type of situation.

And His Honour, it's at tab, it's the last tab in the authorities. He says about three paragraphs down in page 49, it's quite clear at the very least the defendant is entitled to have Monadelphous joined as a third party on the basis that, if the defendant were liable under its bond to the plaintiff, then that liability was caused by Monadelphous' poor performance of its contract with the plaintiff; that, therefore, Monadelphous should indemnify the defendant. However, Mr Robertson for the plaintiff goes further and submits that, in terms of r.97 the plaintiff should join, and that should be Mr Robertson for the defendant, goes further and submits that in terms of r.97 the plaintiff should join Monadelphous as a defendant. He points out defendant cannot adequately present its defence without having Monadelphous as a party. I think that must be so.

Anderson J Am I correct in my recollection that counsels' researches have not turned up a single other case where a non-loser has been ordered to pay costs to a non-loser.

Ring Correct. And the closest, and it's a long way off, the closest is that there isn't even an ability to award costs between two losers. And that just underscores the point, the real point that I'm making which is at the very least you have to be a loser.

Anderson J I see. The case really could come down to this couldn't it, that here we have an extraordinary situation of a non-loser being ordered to pay the costs of a non-loser. On what principle basis could that be done. Is it sufficient in principle that they have procured the joinder of a proper party to be joined. Is it a proper basis that a person who would normally be liable for costs is not in a position to pay costs. Then you would say neither is a sufficient cumulative thing. And therefore, although you can't point to any particular principle that's been applied that's wrong, you could point and say, yes a wrong exercise of the discretion because it seems to have no justification.

Ring Your Honour I'm more than happy to put it on that alternative basis. That is effectively the basis I'm putting it on except that I've branched it out into a wider, to try and see whether there is a coherent scheme that this can fit into.

Anderson J Yes.

Ring And I come to the same conclusion. It doesn't fit into a coherent scheme. Therefore, it falls outside the four corners of the discretion.

Well unless I can help Your Honours with anything further, those are my submissions.

Elias CJ Yes thank you Mr Ring.

Elias CJ Yes Mr Hodson. Do you want to be heard in reply.

Hodson Yes there are a few points Your Honours. I'm confident Your Honours will get to afternoon tea.

In the order in which these points arose, one could have no difficulty with the principles and as set out in this document of my learned friends, given the generality of them, in fact Justice Miller did consider each of the four factors which these principles set out. The point is of course that he considered other factors. And unless in some way this Court is going to decide that as a matter of absolute law these are the only factors, which with respect I'm not sure that you can, then the principles really don't take us much further forward.

Nor do I have any difficulty with the proposition that if you play by the rules you will generally have no costs liability and if you don't you'll generally have a liability. But that doesn't take us any further in a situation which is not a general or routine situation.

The leave to appeal was granted on the issue of the Court's, whether the Court of Appeal should have differed from the High Court's discretionary decision. Justice Anderson put to my learned friend the ratio of the High Court's discretionary decision and asked my learned friend to say where it was wrong. With respect I have not actually heard any part of the argument directed to what the High Court said in reaching its decision.

Tipping J Well shall I put one point that's troubling me Mr Hodson.

Hodson Certainly.

Tipping J It's the absolute exclusion of the relevance of the insurance arrangements, paragraph 24.

Hodson That's not only the High Court. At paragraph 24 Your Honour will see also what happened in the Court of Appeal on that topic. Page 113, paragraph 50.

Tipping J I don't see how you could properly understand and adjudge this situation without taking some account of the insurance position. Where it might lead is another matter. But I don't want to hide it from

you that I am now more attracted than I was to the proposition that the insurance dimension is possibly quite significant. But it's the absoluteness of the judges in the other that seems to me to be debatable.

Hodson Well we heard a lot about the significance, which to my friend is great significance, that it was part of the conditions of contract as it is of every hospital doctor in the country that the employer pay the subscription to the Medical Protection Society. To that, with respect, I say, so what. If that wasn't in the terms of employment then one would presume that the salary would be about $1,000.00 a year higher. I, with respect, cannot see what that has got to do with it. So far as the fact that the.

Tipping J Well wait a moment. Wait a moment. Can you cavil at the proposition that if the Board's found liable it's got almost necessarily a good cause of action against the doctor.

Hodson No, I said that this morning.

Tipping J Yes. Well with the doctor then being separately insured for that liability, and the ability of the Board to pass it on, and the payment by the Board for that separate cover, I take your point they could have arranged it differently, they could have increased his salary by $1,000.00 or whatever. But isn't that relevant when it really comes down to a row between two insurers. As Justice Miller said, I think somewhere, he said this is really a row between two insurers. And then he says that you shouldn't take the insurance dimension into account.

Hodson Well almost all litigation was a row between insurers in the old personal accident days.

Tipping J Well maybe so, but.

Hodson And in vehicle accidents, it's constantly the case. This is the rule, not the exception. But it doesn't mean to say that the Court says, oh well, it's just one insurer against another.

Tipping J No, no I know it doesn't. But this is a very unusual state of affairs here.

Hodson Exactly, it is.

Tipping J And I'm not trying to drive a wedge through the general proposition that you don't normally take into account that parties are insured, but this seems to me to be a situation where it's very difficult to say on the one hand this is really a row between insurers but we'll forget that.

Hodson I could put it the other way round. I've listened to my friend on, this is the third occasion now, saying why it's important. And I confess that I have been unable to follow why it is important.

Tipping J Oh well, if that's your position, that's fine Mr Hodson.

Hodson Well I'm sorry, but it's.

Tipping J I can't ask you to say something if you don't think it's so.

Hodson If I could contribute something more useful I would. But.

Tipping J Well I admire your candour.

McGrath J It is important, would you acknowledge it's important to understanding the facts of the situation and the realities of what has happened in this case and so it has a place in the background in that respect for the Court.

Hodson Let's suppose the unfortunate Mr Shirley had, as some of them are, not got his insurance, his MPS cover in order, he would have been asking Justice Miller for a vastly greater contribution and hoping that he gets something out of the wreckage.

McGrath J Well he did ask for a greater contribution didn't he.

Hodson Well one can imagine.

McGrath J 50 percent plus I think was the.

Hodson The urgency of this appeal if there was no insurer behind him. But again I'm not quite sure where that takes us.

Anderson J It just seems to me rather odd that the person whose conduct makes another vicariously liable is entitled to be indemnified by the one whose been made vicarious liable. Other way round I can understand.

Hodson In every other case, I think every other case, there has been a co-operation. In a letter which I'll come to in a moment, I invited some co-operation in one respect which wasn't forthcoming. Again, we're in exceptional and unusual circumstances.

Elias CJ Mr Hodson one of the things that's bothering me is that the Judge at paragraph 12 refers to the affidavit in support of the application for costs by Mr Shirley which says that he feels that the Board has let him down. Because in order to save some costs it was prepared to compromise this claim and it had inevitable damage to his professional repute and good standing and he'd had no alternative but to go on. I mean that's very close to demonstrating an independent perspective

which doesn't coincide with the interests of the Board. An acknowledgement.

Hodson The dichotomy, and that's a very subjective paragraph, the dichotomy, as my friend pointed out and I think it's been pointed out elsewhere.

Elias CJ You mean the Judge is being subjective.

Hodson No the deponent in that paragraph is giving a subjective account of his own personal motivation in the case.

Elias CJ In seeking costs. It's the affidavit apparently in support of the application for costs.

Hodson He's explaining there why he defended the matter rather than asking his insurers to settle it.

Tipping J But if he does that.

Hodson And the costs, he refers to in the next paragraph. What he has done is he's saying, I've defended my reputation, I've been successful, I've been landed in this to some extent by my employer and or it's insurer and I'm asking for some help.

Elias CJ Because they settled the action against them. He controlled the action against him.

Hodson Yes, my friend has argued on the basis that he's being penalised for misconduct. And I don't say it's misconduct at all. I say it's simply conduct having an economic consequence.

McGrath J Mr Hodson is it fair to say that the Judge thought that Mr Shirley's very strong desire to be vindicated was a factor that discounted the percentage of costs he would get by way of award.

Hodson That may well be so.

McGrath J I'm just looking at paragraph 37 of Justice Miller's decision.

Hodson Yes, that may well be so. If he's going to take this attitude, he's got to bear some of his own costs.

McGrath J What Justice Miller says is that I accept what I take to be Mr Ring's submission that the desire for vindication justifies a reduction in any award of costs in this case.

Hodson But that is the Judge exercising his discretion in finding a balance between the desire for vindication and the economic effect of defending.

Anderson J Can we take it that Mr Shirley would have been just as aggrieved if he hadn't been joined and the Board had settled.

Hodson As we discussed earlier, the consequences of that, it didn't happen but if that were to happen, one could expect some consequences to follow.

Anderson J Would he have been as aggrieved if he hadn't been joined and the Board had nevertheless settled. Because his complaint is that settlement by the Board has damaged my reputation. So it would be irrespective of whether he was a party or not. He's complaining that they settled instead of fighting it.

Hodson Yes. That they're prepared to pay some money.

Anderson J Their exposure for vicarious and they would be looking at the cost benefits of settlement rather than fighting.

Hodson There was a certain amount of reputation for the hospital itself of course.

Anderson J Vicariously I suppose.

Hodson Well hardly. Many people look on a hospital as responsible for the doctors it employs.

Anderson J Yes I take the point. Thank you. It's just, I just wonder whether though the whole case has been skewed by these personal aspects of it and by feelings of employers letting me down and all this sort of thing rather than by proper cost principles.

Hodson Well with respect while Mr Shirley has put that forward, in my submission Justice Miller has unexceptionably discounted those factors and looked on it as an economic exercise for his discretion. If he had said, look this is a terrible thing to do to Mr Shirley, they've got to pay, that would be another matter. But he said the exact opposite.

Anderson J Yes.

Hodson The next point I noted was the raising of the section in the Legal Services Act. I have to say.

Elias CJ I'm sorry, just while we're dealing with some of these factual matters. You said that, I think you said something to the effect that the Judge had taken a lot of other factors into consideration. But really isn't the nub of his decision simply in paragraph 40. Is there anything more than that.

Hodson Well he puts it that the dominant consideration, and it's 40 paragraphs into his judgment, so that he has had everything else in his mind up to

that point, but when he comes to focus on the single major factor, he says that is the major, the single major factor that I brought to account. If that was the only factor I doubt that it would have been reduced to 30 percent.

Elias CJ Well it's, I mean his decision on the exercise of his discretion is only from paragraphs 32 to 40. So what other factors do you identify.

Hodson That the Board was entitled to join Mr Shirley. In fact all the four factors that my friend sets out in his principles. He's considered all of those.

Elias CJ Yes, yes.

Hodson In favour of the Board.

Elias CJ But then in favour of the award of costs he may say it's the dominant consideration but what else is there in favour of the award of costs.

Hodson In paragraph 34 the manner in which it acted to have him joined, that is having him joined as a defendant instead of a third party notice.

McGrath J That's the pressure factor there is it.

Hodson That's the pressure factor.

Elias CJ Yes that's the pressure factor.

Tipping J I have difficulty and am a bit puzzled at paragraph 34 of the Judge's where he seems to put it all, or a lot, on the tactic of joining as a defendant rather than a third party. That seems to be the fulcrum of that point.

Hodson It is the fulcrum of that particular point. But it is only one point in the whole judgment.

Tipping J But it's a bit like saying, well they were going to bring him in anyway. Because they brought him in as a second defendant as opposed to a third party, that's why costs should be awarded against them.

Hodson I'm not sure that it's saying why costs should be, it's saying that because they did it that way, the exposure is there. In other words, jurisdiction. I feel that I can do it if I think at the end of the day that I should do it.

Anderson J You see the fallacy there is that if they'd joined him as a third party they wouldn't necessarily have settled. They might have gone to trial so that they could get an indemnity from him. They mightn't have involved themselves very much in the trial. They may have seen it as

directly a fight between the plaintiff ultimately and Mr Shirley and put up a pro forma defence and let him carry the can for it.

Hodson This is what generally does happen.

Anderson J Yes so the fact that they settled when he was in the position of a co-defendant doesn't really have much significance.

Hodson It's very hard to.

Anderson J They mightn't have if he wasn't it.

Hodson It's very hard to speculate on the possibilities which didn't occur. For example it would not have been difficult to say to Mr Shirley, look we're prepared to put $20,000.00 in. You can be assured of that if you have to pay it out. In the meantime go ahead and defend it.

Anderson J Mm.

Hodson There are all manner of different courses of action could have been taken. But in the events which happened, the Judge has thought that at the end of the day he's reached the just result.

Tipping J But the impression I get from this judgment is if he had been joined as a third party, the Judge would not have ordered costs against the Board. But because he was joined as a defendant, the Judge will order costs against the Board.

Hodson I don't think that that's the point. What he says at paragraph 35, had the Board gone to trial he would have been entitled as a successful third party to costs against the Board. In other words he most certainly would have got them.

Tipping J Yes indeed. But he would have also been entitled, but it's paragraph 34 that I'm. As Mr Ring argued, there is nothing wrong with that, but having behaved in that way.

Hodson Yes.

Tipping J That is to say, the distinction between the third party and the defendant, the Board can't complain.

Hodson Well you have to go back to the point that unless the Board had behaved as it did, Mr Shirley would not have been a party. Now all kinds of consequences might have happened if for example the Board had settled. But in the events which did happen he was a party, he was joined in a particular way which left the Board open to the possibility of an award of costs. And all he says is, the Board can't complain when Mr Shirley exploits that possibility.

McGrath J Mr Hodson I suggest that in paragraph 40 is where, is the paragraph the Chief Justice pointed to as the summary, you get some of that oration, that the Judge was concerned at the pressure exertion element.

Hodson Yes.

McGrath J Of, as he see it anyway, of joining him in the way it did. And it joined him as a third party. That would have been more beneficial for costs, certainly if the matter had gone to trial. And on those two accounts he reaches his conclusion that those elements were sufficient to carry weight in his balancing of the factors as to whether to make an order for costs.

Hodson Your Honour has anticipated the point that I was about to make in summarising all of this. You have heard today various explanations from my friend and we're told that it was really the plaintiff's application and so on and so forth. If you look at the contemporary explanation given at the time, which is always a good place to look, which is page 9 of the case, the insurer's solicitors set out very plainly what the idea was. It was to put pressure on the doctor to make him settle. It wasn't to give him a chance to vindicate himself.

Tipping J Our strategy is to bring Alan in.

Hodson And that's the insurer's strategy.

Tipping J Mm. And then to explore settlement directly with the Bensemanns.

Hodson Mm.

Tipping J This would leave the case to continue against Alan without the hospital's involvement.

Hodson And as you know from the other documents, my friend had already advised his client that in his view this action would force the doctor to settle. It was unashamedly a pressure tactic.

Elias CJ Well most litigation is.

Hodson Yes. Yes.

Elias CJ I must say I just don't understand the, in 40, had he been joined as a third party very likely would avoid the costs. If there had been the settlement, he would have avoided the costs but so too would the hospital.

Hodson If he had been joined as a third party, and there had been a settlement.

Elias CJ Yes.

Hodson That would leave him in a position as part of the terms of settlement to recover costs as a third party.

Elias CJ Up to the time of settlement.

Hodson Yes.

Elias CJ But what we're talking about here is his conduct of the litigation from that time forward.

Hodson Yes. For which he has lost 70 percent of his claim.

Elias CJ But both parties, both parties would have been saved those costs if he'd been joined as a third party and if the matter had settled.

Hodson Yes. I'm not quite sure with respect that takes us any further.

Tipping J But this paragraph 40 Mr Hodson continues it seems to me the theme of this real distinction between third party and a second defendant as being that they've in effect done something a bit sly by joining him as a second defendant as opposed to a third party because that was going to sort of put the arm on him.

Hodson I think that was the, I think that that was exactly what did happen. They did do it in order to put the arm on him to force him to settle.

Anderson J I think it wasn't so much to put the arm on him but to improve their position.

Hodson It improved their position as well.

Anderson J Because they would say to the Bensemanns, look, let us out. You've still got someone to sue. In fact someone who on your proposition is the one really responsible.

Hodson Yes.

Anderson J So that's an inducement to let us go as you've got someone else there. Whereas if there wasn't someone else there they wouldn't.

Hodson And if you do it, and he's a defendant and in the back of their minds not a third party, he knows he is going to, if he is going to defend it at all and not settle, he's got a legally aided plaintiff against him.

Anderson J So then if he'd been joined as a third party, I mean obviously he might end up with no, with a contribution to his costs from the Board obviously, but I find it difficult to accept that if he'd been joined as a third party he wouldn't have required the Board to fight it to the bitter end.

Hodson Well there is some rationality.

Anderson J And would have resisted any attempt by the Board to settle.

Hodson Some rationality would have crept into the thing. Again we really can't speculate on what could have happened if the case had been done differently.

Anderson J Well you can see though that even if he was joined as a third party, his indemnifier was in for costs.

Hodson Yes.

Blanchard J Do we know what the Bensemanns' motivation was for settling with the Board. Was it to get their hands on the $20,000.00 so as to use that to carry on with the litigation or was that all taken care of by legal aid anyway.

Hodson No my understanding, their problem was they owned a house which was going to be subject to a mortgage and my understanding is that the $20,000.00 was a very powerful contribution to the reduction of the mortgage to enable them to contemplate carrying on.

Tipping J I'm sorry to harp on about this third party business. But if he'd been joined as a third party, and Mr Ring had managed to do a deal with the plaintiffs, they would have simply applied to join the third party as a defendant. And this position would have been exactly the same. I mean it just doesn't seem to me to make forensic sense that all this great distinction is being made between third parties and defendants.

Hodson I don't think it was, it features in His Honour's decision. But it is one of the factors.

Tipping J Well could we put it this way, that because they brought him in at all, never mind in what capacity, because they brought him in at all, they were trying to put pressure on him and that's what gave title for the order for costs.

Hodson No. The causation is because the Board got them to do something they would not otherwise have done. Now that is the essential. That's the causation.

Tipping J Got who to do something.

Hodson Got the plaintiffs.

Tipping J They didn't. It was the Board's application.

Hodson To which the plaintiffs consented and went on with it. That's the finding of fact, that Mr Shirley would not have been a party unless the Board had procured these events to happen.

Tipping J It happened at the instigation of the Board.

Hodson Yes.

Tipping J No question about that.

Hodson Yes.

Tipping J Mr Ring doesn't deny that. But what I'm puzzled about is this seeming relevant distinction between third party and defendant. Because the Judge seems to have thought this was quite significant for whatever reason.

Hodson The significance is probably the economic consequences. Defendant alone leaves Mr Shirley against a legally aided plaintiff. Third party leaves him with some recourse. And the economic consequences are different. That's all the significance that with respect I can attach to it.

McGrath J I think what's being put to you Mr Hodson if you look at paragraph 37, is the query as to whether the Judge's finding is correct, in paragraph 37 the second last sentence. Had matters proceeded as he wished he would not have been joined at all.

Hodson Yes.

Anderson J Once Mr Shirley was in as a third party, as Justice Tipping indicates, the probabilities were that any settlement with the Board results in a concurrent application to convert him into a defendant. That's what one would expect.

Hodson Well as I've been saying for a little while, one can speculate in all directions.

Anderson J Mr Ring would certainly have done that.

Hodson Justice Miller was dealing with the circumstance.

Tipping J That's primer 1.

Elias CJ The speculation is here in the judgment. Had matters proceeded as he wished he would not have been joined at all. That's speculative.

Hodson No that's a finding, there's a finding of fact earlier on.

Elias CJ It's a finding of fact.

Hodson Yes, earlier on that that is the case.

Elias CJ Oh at the earlier stage.

Hodson In the judgment.

Elias CJ Yes, I see, it's not being directed at the.

Hodson No, no, no.

Elias CJ Yes of course. Yes, yes.

McGrath J Paragraph 40 he says had he been joined as a third party, it's likely he would have avoided the costs he now claims since he would have benefited from any settlement between plaintiff and defendant.

Tipping J I don't understand that.

Anderson J That doesn't follow to my mind.

Hodson Well as I've endeavoured to explain that, that he, as part of a settlement, he's got a defendant against whom he can claim costs up to that point.

Elias CJ But that's well short of the actual costs being claimed here.

Hodson Well he wouldn't have, if there was a settlement, it wouldn't have gone to trial and they wouldn't have been incurred.

Elias CJ Yes, yes.

Hodson So we'd be talking about a totally different amount.

Elias CJ Yes.

Tipping J You were going to say something about the Legal Services Act I think.

Hodson Simply to say that the oral reference to the Legal Services Act was the first time that's been mentioned at any stage in this litigation. I cannot think that Parliament intended that as between defendants, yet bankrupt plaintiffs should expose a defendant to liability whereas a legally aided plaintiff doesn't. That just doesn't seem to follow and I would respectfully adopt the point about immunity.

The only other thing I wanted to say about the causation issue is simply to invite the Court to adopt the succinct and in my submission accurate summary of Justice Robertson, paragraphs 32, 33, pages 105, 106.

Elias CJ Well I have difficulty with that because that is a clear indication that the fact of causation on its own is sufficient.

Hodson With respect no, the second sentence of paragraph 33, once causation is established, there has to be a causation, then you can exercise your discretion or the Judge can I should say, in weighing up the fact specific considerations.

Tipping J Well I understand the argument against you to be that causation is a necessary but not a sufficient precondition. Justice Robertson there seems to be saying that it is a sufficient precondition because once you've got it your into the discretion.

Hodson Yes. Yes, you're into the discretion but that does not mean to say it's going to be exercised in your favour. If you haven't got causation you're nowhere near discretion.

Tipping J Yes but the argument against you is that before you can exercise the discretion at all there must be something more than causation.

Hodson Yes. And I don't have a difficulty with that. It is for the Judge to weigh up the various factors, Mr Ring's put forward four of them but in my submission there are many others, and come to a decision as a result. Causation alone for example would certainly not be enough if you had recovered your costs from a solvent plaintiff.

Tipping J I think the Judge's ratio, that's Justice Robertson's, is at the very foot of page 105 isn't it in essence, the last sentence on that page.

Hodson Yes. Making him a party was driven by economic advantage and can have economic consequences. And that's a view that I have been urging.

Tipping J It's a fairly succinct statement of the Judge's there.

Hodson That is the view I've been urging.

Tipping J Yes. It's essentially your submission isn't it.

Hodson Yes. Yes I did start I think by saying that I thought Justice Robertson was quite right.

I don't know if Your Honours want to hear any more at all about the point of the letter of reservation if I can put it that way. I could say something about it if you thought it was a factor. I remain of the view that all the events which gave rise to the order had happened before that letter was written. But if Your Honours thought there was anything to it at all I would say (a) the letter says nothing at all about costs. It raises the possibility of some recourse to the Board in the unlikely event of a loss. And it should be seen in the context of the earlier letter in which it was said that the Board might bear a share of responsibility for its consent forms.

My friend said today that much was said about jurisdiction. I'm not quite sure of what he thought was much being said about it. There are three references to jurisdiction in three of the judgments. The Judge at first instance, Justice Robertson and Justice Baragwanath, all of them note that one way or another, jurisdiction was conceded.

And those are all the points that I have noted.

Elias CJ Thank you Mr Hodson. Thank you Counsel for your assistance. And we'll take time to consider our decision in the matter.

Ring As Your Honours please.

Hodson May it please Your Honours.

Court adjourns 3.38 pm