

IN THE SUPREME COURT OF NEW ZEALAND

SC 28/2015
[2016] NZSC 23

BETWEEN

BRUCE BRENDON VAN ESSEN
First Applicant

JASON JAMES PATTERSON
Second Applicant

AND

THE ATTORNEY-GENERAL
First Respondent

PETER JAMES GIBBONS
Second Respondent

GRAEME JOHN SCOTT
Third Respondent

Court: Elias CJ, William Young and Glazebrook JJ

Counsel: A Shaw for Applicants
No appearance for First Respondent
D P Robinson for Second and Third Respondents

Judgment: 15 March 2016

JUDGMENT OF THE COURT

We certify that, were it not for s 45(2) of the Legal Services Act 2011, the applicants would have been ordered to pay the second and third respondents jointly costs of \$2,500.

REASONS

[1] The applicants unsuccessfully sought leave to appeal.¹ They were legally aided and thus have qualified protection against costs under s 45 of the Legal Services Act 2011. It is not suggested that an order against them would be

¹ *Van Essen v Attorney-General* [2015] NZSC 166.

appropriate under s 45(2) but the respondents seek a certificate under s 45(5) which provides:

If, because of this section, no order for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.

[2] The applicants by their counsel initially suggested that a certificate under s 45(5) cannot be given unless the s 45(3) criteria for an award of costs have been satisfied.² That, however, is not the scheme of the section, as counsel in effect acknowledged in a supplementary submission. In this submission, counsel argued that an order under s 45(5) requires the exercise of a discretion and that no adequate basis has been advanced for the discretion to be exercised in favour of the respondents.

[3] If it were not for s 45(2), an order for costs in the sum of \$2,500 would have been made against the applicants.³ That this is so provides a logical basis for the making of the order which is sought by the respondents and we see no reason why such an order should not be made.

Solicitors:
Ord Legal, Wellington for Applicants
Gallaway Cook Allan, Dunedin for Second and Third Respondents

² There is authority for this view, see *S v I* HC Hamilton CIV-2009-419-139, 21 August 2009. There is also authority going the other way, which we prefer, see *X v Y* [2000] 2 NZLR 748 (HC); and *ND v GGH* FC Queenstown FAM-2007-002-138, 4 December 2009 at [10]–[14].

³ And indeed such an order was initially made, the Court not being aware at time of the legal aid position.