

IN THE SUPREME COURT OF NEW ZEALAND

SC 35/2016
[2016] NZSC 148

BETWEEN MICHAEL MARINO
Appellant

AND THE CHIEF EXECUTIVE OF THE
DEPARTMENT OF CORRECTIONS
Respondent

Hearing: 6 and 26 July 2016

Court: Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ

Counsel: D A Ewen and G K Edgeler for Appellant
B J Horsley, D J Perkins and T P Westaway for Respondent

Judgment: 8 November 2016

JUDGMENT OF THE COURT

- A Costs to a maximum of \$33,400 plus usual disbursements are awarded to the appellant. We certify for second counsel.**
- B Costs in the courts below should be set by those courts in the light of this judgment (if not agreed).**
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REASONS

[1] On 22 September 2016 this Court allowed Mr Marino's appeal. Costs were reserved.¹

[2] Mr Marino seeks costs on the appeal to this Court and in the courts below. The level of costs sought in this Court effectively equates to costs at Court of Appeal rates.²

¹ *Booth v R* [2016] NZSC 127 (Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ).

² As provided for in the Court of Appeal (Civil) Rules 2005, r 53C and sch 2. The rates are calculated on the basis of being two-thirds of actual daily rates: r 53C(3).

[3] The Chief Executive accepts that costs should follow the event in this Court but submits that costs should be at the usual rate for this Court. Counsel suggests a reduction of \$1,600 to reflect the fact that the Chief Executive prepared the case on appeal.

[4] There is nothing to suggest that this appeal is different from other appeals heard by the Court. We therefore consider it appropriate to use the costs measure in this Court³ and to apply the deduction suggested by the Chief Executive for the preparation of the case on appeal. The normal costs award for two hearing days would be \$35,000. With a deduction of \$1,600 this means costs of \$33,400.

[5] The Chief Executive submits further that, as Mr Marino was legally aided and because under ss 99(2)(a) and 105 of the Legal Services Act 2011 the Legal Services Commissioner has to approve any payment to counsel, any costs awarded should be no more than the amount approved by the Commissioner up to a maximum of the costs award. This is because any costs awarded should not exceed the amount incurred. We accept this submission.

[6] Costs in the courts below should be set in light of our judgment if they are not able to be agreed.

Solicitors:
Kerry Burroughs, Hamilton for Appellant
Crown Law Office, Wellington for Respondent

³ These rates are to be designed to be a reasonable contribution to costs and not full or indemnification costs: *Prebble v Awatere Huata (No 2)* [2005] NZSC 18, [2005] 2 NZLR 467 at [10].