

[2] In the High Court, Asher J dismissed the misrepresentation claims but allowed, in part, Water Guard’s defects claim.³ Damages were dealt with separately and the proceeding resolved when the parties subsequently consented to the entry of judgment in Water Guard’s favour for about \$67,500. Costs were reserved. Asher J subsequently awarded Midgen costs on a 2B basis for one counsel for a six day hearing on the liability trial plus disbursements (costs order (1)).⁴ The Judge directed that costs incurred after the liability judgment were to lie where they fell (costs order (2)).⁵

[3] This approach reflected Asher J’s view that, overall, Water Guard was largely unsuccessful and Midgen was, for the most part successful.⁶ Further, Asher J considered Water Guard had acted unreasonably in not accepting or not responding to Midgen’s settlement offers.⁷

[4] Water Guard’s appeal to the Court of Appeal on the costs award succeeded in part.⁸ Costs order (1) was set aside with the result that costs were to lie where they fell in the High Court. The Court of Appeal ordered Midgen to pay Water Guard’s costs on the appeal.

[5] In allowing the appeal against costs order (1), the Court of Appeal considered Asher J gave insufficient weight to Water Guard’s success and obtaining of relief in relation to the defects claims.⁹ The Court took the view that the fact Water Guard failed on the other claims could be “properly recognised in other ways, such as reducing costs otherwise payable or ordering costs to lie where they fell”.¹⁰

[6] In submissions in support of the application for leave to appeal, the applicants say, first, that the Court of Appeal did not properly direct itself as to the approach

³ *Water Guard NZ Ltd v Midgen Enterprises Ltd* [2015] NZHC 2227.

⁴ *Water Guard NZ Ltd v Midgen Enterprises Ltd* [2016] NZHC 1546 [HC costs judgment] at [36].

⁵ At [36].

⁶ As the Court of Appeal noted, the Judge worked on the basis about 25 per cent of the trial was directed to Water Guard’s successful claims and the balance spent on its unsuccessful claims: *Water Guard NZ Ltd v Midgen Enterprises Ltd* [2017] NZCA 36 [CA costs judgment] at [5] and [7]. See also HC costs judgment, above n 4, at [10] and [27].

⁷ HC costs judgment, above n 4, at [28].

⁸ CA costs judgment, above n 6.

⁹ CA costs judgment, above n 6, at [12].

¹⁰ At [13].

applicable to an appeal from a decision involving the exercise of a discretion. Secondly, it is said that the Court of Appeal erred in not endorsing the High Court Judge's assessment as to the importance of Midgen's reasonable approach to settlement when contrasted to Water Guard's "obduracy".¹¹ Finally, the applicants say there was no basis for the Court of Appeal to award costs against Mr Midgen in his own right given he was successful in the High Court in the claims against him.

[7] In deciding that there was a basis for interfering with the High Court's decision, the Court of Appeal applied well-settled principles.¹² The Court considered the Judge had erred in the application of the general principle that costs should follow the event.¹³ Nor did the Court ignore the impact of what it described as Water Guard's "unreasonable approach to settlement".¹⁴ That aspect was met by the absence of any award of costs for the part of the defects claim on which Water Guard was successful. No question of general or public importance arises and nor does the proposed appeal involve a matter of general commercial significance.

[8] Nor do we see any appearance of a miscarriage of justice.¹⁵ Water Guard did have some success and the factors militating against an award in its favour were taken into account. Further, as counsel for the respondent submits, the award of costs on the appeal in the Court of Appeal against Mr Midgen was orthodox.

[9] The application for leave to appeal is dismissed. The applicants are to pay costs of \$2,500 to the respondent.

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¹¹ HC costs judgment, above n 4, at [20].

¹² *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [15].

¹³ CA costs judgment, above n 6, at [13].

¹⁴ CA costs judgment, above n 6, at [14].

¹⁵ As noted by this Court in *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369, the miscarriage ground for civil appeals will only enable this Court to review a decision of the Court of Appeal in the rare case of a sufficiently apparent error of "such a substantial character that it would be repugnant to justice to allow it to go uncorrected": at [5].