IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-000050
[2017] NZHC 22

BETWEEN	QUAKE OUTCASTS Applicants
AND	THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY First Respondent
AND	THE CHIEF EXECUTIVE, CANTERBURY EARTHQUAKE RECOVERY AUTHORITY Second Respondent

Hearing: On the papers

Counsel: F M R Cooke QC & L E Bain for the Applicants
K G Stephen & P H Higbee for the Respondents

Judgment: 19 January 2017

JUDGMENT OF NATION J

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[1] On 18 July 2016, judicial review proceedings were heard in which the applicants sought certain relief relating to the respondents' decisions as to offers the Crown would make to buy uninsured land in the red zone in Christchurch.

[2] In a judgment of 22 August 2016, I declined relief.[1] The applicants filed a notice of appeal with the Court of Appeal on 19 September 2016. At the same time, they applied for leave to bring a civil appeal from the decision of the High Court directly to the Supreme Court. On 13 December 2016, the Supreme Court declined to grant such leave. My judgment in the High Court remains the subject of the appeal to the Court of Appeal.

[1] *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2016] NZHC 1959.

[3] In my judgment, I reserved to the parties the right to file memoranda as to costs if there was any issue over costs. Counsel for the respondents filed a memorandum on 19 October 2016 seeking costs on a 3B basis. On 27 October 2016, counsel for the applicants filed a memorandum in response.

The respondents' position

[4] The respondents seek costs plus disbursements in accordance with the principle that costs should follow the event. The respondents were successful. The Crown (and ultimately the taxpayer) was put to the expense of defending proceedings.

[5] The respondents seek costs on a 3B basis plus disbursements and certification for two counsel. On that basis, they seek costs of $55,605 and disbursements of $2,349.16.[2]

The applicants' position

[6] In opposing an award of costs, counsel argued:

- the proceedings concerned a matter of public interest and the applicants acted reasonably in the conduct of the proceedings.[3] The case was about the exercise of extraordinary powers under emergency legislation in circumstances where it was submitted the applicants had been effectively forced to leave their homes. In that context, it was submitted it was not only reasonable but vital for them to be able to test the exercise of those powers before the courts;

- in challenging the legitimacy of the offers made by the Crown, the applicants were raising issues of significance for the wider public so the proceedings were not just about the applicants' personal entitlements;

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2 There is an apparent contradiction on the face of counsel's memorandum with regard to the amount sought. Counsel's memorandum concludes with a statement that the respondents are seeking costs and disbursements in the sum of $55,605 (as itemised in Annexure B). Annexure B shows the claim is for costs of $55,605 and disbursements of $2,349.16, a total of $57,954.16. I deal with the application on the basis it is for costs and disbursements totalling $57,954.16.

3 Referring to r 14.7(e).

- the terms of the Supreme Court majority judgment, and particularly their statement that the insurance status of the applicants' homes was relevant but should not have been treated as decisive, legitimately raised questions and issues which justified further consideration by the High Court;

- the applicants are of modest financial means. An award of costs would reduce the value of the compensation they have received in accepting the Crown offers. The financial detriment they have suffered has been aggravated by the delays that occurred in their receiving the amounts ultimately offered by the Crown;

- there should be less reason to grant the Crown costs given the decisions being challenged were made as a consequence of the establishment of the red zones in the first place, a step which the courts have already found taken through an unlawful process although ultimately accepted by the courts and not interfered with; and

- in previous decisions in relation to costs, the High Court, Court of Appeal and Supreme Court have recognised the particular plight of the applicants, the difficulties they have faced or will face in attempting to acquire new homes where they have no option but to make a fresh start but have to face a significant shortfall between the amount they will receive from Crown offers against the cost of acquiring a home elsewhere.

Discussion

[7] I am satisfied it is appropriate to fix costs on a category 3B basis. The proceedings did involve complexity because of the constitutional issues raised, the previous decisions of the High Court, Court of Appeal and Supreme Court, and the extensive evidential background to the decisions which were being challenged. It is also appropriate that I certify for two counsel in the High Court. The conclusions I have reached in this regard are consistent with the way the previous proceedings

involving the applicants were categorised. Counsel for the applicants did not argue against either of the respondents' contentions in this regard.

[8] I do not accept the submission made for the respondents that the fact the applicants had accepted the Crown's last offer to purchase their land meant they must have known the new proceedings were unlikely to be successful. Given a number of statements made for the majority in the Supreme Court judgment, there were reasonable arguments and questions raised by the applicant. It was not inevitable that the decisions ultimately made in relation to those questions and issues would be in the respondents' favour.

[9] It should be rare that, in proceedings such as these which are brought with the benefit of competent legal advice, the ultimate outcome will be seen as inevitable, having regard to what all parties knew when they embarked on and then continued with the proceedings. I nevertheless accept the submission made for the respondents that costs are a mechanism by which the practical consequences of pursuing litigation where success is uncertain are brought home to applicants. That is a matter of real practical significance to the many people and businesses who have had to involve themselves in civil litigation in the High Court following extensive losses or damage they suffered as a result of the Canterbury earthquakes, and reflects the difficult legal or evidential issues associated with such litigation. I do not consider that, with regard to costs in these proceedings, the applicants should be treated differently to other litigants to whom the normal principles apply.

[10] I do not accept the submission made for the applicants that these proceedings were brought and continued because of the public interest in testing the legitimacy of the way in which the Minister had exercised the emergency powers available to him under the relevant legislation. While it is possible that a judgment in the applicants' favour may have ultimately benefitted others in the red zone who had already accepted Crown offers, that is a matter of conjecture only. The proceedings were brought by the applicants in an attempt to obtain an increased payment from the Crown for their properties. In that sense, they were seeking to pursue civil proceedings for their financial benefit in the same way as numerous litigants who have had to resort to Court proceedings arising out of the Canterbury earthquakes.

[11] I note that in *New Health New Zealand Inc v South Taranaki District Council*, Heath J summarised the case law regarding reduced/refused costs where an unsuccessful litigant had brought a proceeding in the public interest.[4] These proceedings involved the legality of fluoridation of public water supplies. Heath J noted that, for the public interest exception to apply, the Court must be satisfied that a private interest had not been dressed-up as a public one. He also noted that the public interest exception rarely applies to appeals or to attempts to re-litigate the same issue in other proceedings.[5]

[12] These applicants had the benefit of receiving an increased offer from the Crown for their properties, against the background of a new recovery plan and the Minister's reconsideration of what offer should be made in light of previous Court judgments which included the opinions expressed by the majority of the Supreme Court. They received the benefit of the increased offers by accepting those offers and agreeing to sell their properties to the Crown on that basis. However, they then initiated and pursued further judicial review proceedings in an attempt to obtain an increased financial benefit. They must have known that there was no certainty that the Court's judgment would ultimately be in their favour. In accordance with the principles that normally apply, they should have recognised that they might have to bear the burden of a costs order against them if they were ultimately unsuccessful.

[13] I recognise the way in which the applicants' financial position has been affected by the delay that occurred between the creation of the red zone and the making of the final offers which they accepted. However, the issue I must consider is whether it would be unjust for the Court to make a costs order against them in relation to the new proceedings which they issued and pursued after they had accepted and benefitted from the Crown offer which was ultimately made.

[14] I also acknowledge the difficult circumstances the applicants face in having to re-establish themselves in new homes. That is now, however, a circumstance particular to them in the context of the way a significant number of property owners

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4 *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 993, [2014] 21 PRNZ 766 at [10]; *Taylor v District Court at North Shore* HC Auckland CIV-2009-404-2350, 13 October 2010 at [9].

5 At [16].

in Canterbury have been affected by the Canterbury earthquakes. The applicants were not legally aided. They also received capital payments from the Crown. The burden of any costs order will be shared by the now 14 property owners who chose to be party to the further proceedings.

[15] I acknowledge the way in which previous courts have dealt with costs issues involving these parties in earlier proceedings. I note that, in refusing the applicants' leave to appeal directly to the Supreme Court, that Court ordered the applicants' to pay costs of $1,000.

[16] An award of costs in this Court does not preclude costs from being revisited at the discretion of the Court of Appeal.[6]

Conclusion

[17] Against that background and given the context of these particular proceedings, I consider that the applicants' particular circumstances do not require the Court to depart from the general principle that a party who fails with respect to a proceeding should pay costs to the party who succeeds. I accordingly order the applicants' to pay costs in the sum of $55,605 and disbursements as fixed by the registrar but to be for the items specified in Appendix B of counsel's memorandum. The amount due for disbursements should be exclusive of GST.[7] If there is any dispute over the amount due for disbursements, that amount is to be as fixed by the registrar.

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GCA Lawyers, Christchurch
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6 Court of Appeal (Civil) Rules 2005, rr 48(4) and 53J.

7 I have assumed the respondents' are entitled to claim GST credits for the GST portion of the disbursements they have had to pay. On that basis, consistent with the Court of Appeal judgments in *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282, (2016) 27 NZTC 22-058, reimbursement for disbursements should be on a GST-exclusive basis.