IN THE SUPREME COURT OF NEW ZEALAND

SC 75/2012
[2013] NZSC 133

BETWEEN	WEST COAST ENT INCORPORATED Appellant
AND	BULLER COAL LIMITED First Respondent
	SOLID ENERGY NEW ZEALAND LIMITED Second Respondent
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Third Respondent
	WEST COAST REGIONAL COUNCIL AND BULLER DISTRICT COUNCIL Interveners

Court:	Elias CJ, McGrath, William Young and Glazebrook JJ
Counsel:	D M Salmon and D E J Currie for Appellant J E Hodder QC, J M Appleyard and B G Williams for First Respondent A C Limmer for Second Respondent P D Anderson for Third Respondent J M van der Wal for Interveners
Judgment:	2 December 2013

JUDGMENT OF THE COURT AS TO COSTS

The applications for costs are declined.

REASONS

[1] Buller Coal, Solid Energy and the two Councils have applied for costs. Although the submissions raised a number of issues[1], the primary question for us is whether awards of costs are appropriate.

[2] Costs were reserved in the Environment Court[2] and no order was made in the High Court.[3] The possibility that orders for costs might be made was adverted to in emails between the parties before we granted leave to appeal to this Court. No order for security for costs was made, apparently because the respondents waived provision of security.

[3] There are many authorities which could be regarded as relevant to whether we should award costs, but it is necessary to refer to only two. The first is *New Zealand Maori Council v Attorney General* where the issue of costs was dealt with by the Privy Council in this way:[4]

> There remains the question of costs. Although the appeal is to be dismissed, the appellants were not bringing the proceedings out of any motive of personal gain. They were pursuing the proceedings in the interest of taonga which is an important part of the heritage of New Zealand. Because of the different views expressed by the members of the Court of Appeal on the issues raised on this appeal, an undesirable lack of clarity inevitably existed in an important area of the law which it was important that Their Lordships examine and in the circumstances Their Lordships regard it as just that there should be no order as to the costs on this appeal.

The other case of significance is *Prebble v Awatere Huata (No 2)* where this Court said:[5]

> [3] The general rule that a successful party to an appeal will be entitled to costs was adopted as the practice of the English Court of Appeal in 1875. It has been the invariable practice of the Court of Appeal in New Zealand. It is a presumption legislatively provided for in the High Court Rules. It is consistent with the practice of the Privy Council. It is not suggested that any other approach should be applied by the Supreme Court. In those circumstances, if a party to an appeal wishes to raise a contention that costs

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1 Some of which – whether Buller Coal and the interveners should be awarded costs against Forest and Bird – have now been resolved by agreement.

2 *Re Buller Coal Ltd* [2012] NZRMA 401 at [56].

3 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd* [2012] NZHC 2156, [2012] NZRMA 552.

4 *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 (PC) at 525.

5 *Prebble v Awatere Huata (No 2)* [2005] NZSC 18, [2005] 2 NZLR 467 (footnotes omitted).

> should not follow the event, that submission should be raised at the hearing of the appeal. Without an application, an order that the unsuccessful party is to pay costs to be fixed if necessary by the Court is likely to be made, in application of the usual practice. Such order was made in the present case. We are not persuaded that it should be changed.
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> [4] Counsel for the respondent submits that her private interest in the litigation is outweighed by "the overwhelming public interest" in the interpretation and application of the legislation in issue. It is suggested that it is relevant that the appeal was not brought by the respondent and that she acted reasonably in supporting the majority decision of the Court of Appeal in her favour. It is submitted that Mrs Awatere Huata had a duty to those who elected her to "uphold her seat by all lawful and proper means including participating in a legal process to determine her entitlement to do so". It is said that her participation, responsibly and in the public interest, provided the Court with opposing argument in a complex case involving constitutional issues.
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> [5] The Court's obligation under R 44 is to make such orders as are just. Requiring a successful party to bear the full costs of its case will seldom be just. That is the reason for the general rule that costs follow the event. In public law cases as well as in other civil litigation the rule that costs follow result will generally be just between the parties. Although unreasonable conduct in litigation or giving rise to it may affect the availability or the amount of costs, departure from the usual practice is not justified merely because an unsuccessful party has acted responsibly or is the respondent on an appeal. The criteria for leave to appeal under s 13 of the Supreme Court Act 2003 will usually mean that in the cases heard by the Court wider public interests will be engaged than the interests of the individual litigants. The present case, in which the respondent initiated litigation in part to protect interests of benefit to her against a private organisation, is far removed from the circumstances of *New Zealand Maori Council v Attorney-General*. We consider that it is just that the respondent pay costs as ordered in the judgment of 18 November 2004.

[4] Neither case is precisely on point although the present circumstances are perhaps nearer to those involved in *New Zealand Maori Council*. There are other considerations which also point against the making of an order for costs. The issue before us was very much a subset of the Environment Court proceedings which were plainly closely balanced. The challenge to Whata J's judgment was dealt with by this Court (rather than by the Court of Appeal) primarily because of the stance taken by Buller Coal. As well, the underlying issue of law was difficult and its resolution had a significance which went well beyond the present case.

[5] For these reasons, we have decided not to award costs.

Solicitors:
Lee Salmon Long, Auckland for Appellant
Chapman Tripp, Christchurch for First Respondent
Lane Neave, Christchurch for Second Respondent
P D Anderson, Christchurch for Third Respondent
Duncan Cotterill, Christchurch for Interveners