IN THE SUPREME COURT OF NEW ZEALAND

SC 82/2013
[2014] NZSC 167

BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED Appellant
AND	THE NEW ZEALAND KING SALMON COMPANY LIMITED First Respondent
	SUSTAIN OUR SOUNDS INCORPORATED Second Respondent
	MARLBOROUGH DISTRICT COUNCIL Third Respondent
	MINISTER OF CONSERVATION AND DIRECTOR-GENERAL OF MINISTRY FOR PRIMARY INDUSTRIES Fourth Respondents

SC 84/2013

BETWEEN	SUSTAIN OUR SOUNDS INCORPORATED Appellant
AND	THE NEW ZEALAND KING SALMON COMPANY LIMITED First Respondent
	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED Second Respondent
	MARLBOROUGH DISTRICT COUNCIL Third Respondent

MINISTER OF CONSERVATION AND
DIRECTOR-GENERAL OF MINISTRY
FOR PRIMARY INDUSTRIES
Fourth Respondents

Court: Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ

Counsel: R B Enright and N M de Wit for Appellant SC 82/2013
M S R Palmer and K R M Littlejohn for Appellant SC 84/2013
D A Nolan and J D K Gardner-Hopkins for New Zealand King Salmon Company Ltd
S J Ritchie for Fourth Respondents

Judgment: 19 November 2014

JUDGMENT OF THE COURT AS TO COSTS

A In SC 82/2013:

(a) By consent, the Minister of Conservation and the Director General of Primary Industries must each pay the Environmental Defence Society Inc $5,625 by way of costs.

(b) The New Zealand King Salmon Company Ltd must pay the Environmental Defence Society Inc $23,650 by way of costs, together with disbursements of $4,764.

B In SC 84/2013:

(a) There is no order for costs. Costs will lie where they fall.

REASONS

ELIAS CJ and WILLIAM YOUNG J

(Given by Elias CJ)

[1] The Environmental Defence Society in SC 82/2013 and The New Zealand King Salmon Co Ltd in SC 84/2013 apply pursuant to leave reserved in the judgment of this Court of 17 April 2014 for costs in the respective appeals in which they were successful.[1]

[2] EDS, a public interest litigant, was successful as appellant in SC 82/2013 in which King Salmon, an applicant for resource consents to set up salmon farms in the Marlborough Sounds, the Minister of Conservation and the Director-General of the Ministry for Primary Industries were respondents. It seeks to recover $46,550 plus disbursements in total against all respondents. EDS has reached agreement with the two Crown respondents that they will pay costs and disbursements of $11,250. The Court is asked to make consent orders apportioning this amount equally between the Minister of Conservation and the Director-General of the Ministry for Primary Industries. With that deduction, the amount of costs EDS seeks from King Salmon is $35,300 together with disbursements. EDS has advised the Court that it has to date incurred legal costs of $20,000 plus disbursements but says it has entered into "a contingency arrangement" which "allows for a further fee to be rendered in the event of a successful outcome on the appeal and costs".

[3] King Salmon was successful as respondent in the appeal brought by Sustain Our Sounds Inc, another public interest litigant, in SC 84/2013. King Salmon does not seek costs against SOS unless costs are awarded against it in favour of EDS in SC 82/2013. If costs are awarded to EDS, however, King Salmon contends that costs should also follow the event in the unsuccessful SOS appeal. SOS argues that it should not be ordered to pay costs and disputes the quantum claimed.

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[1] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593; and *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673.

Costs in the Supreme Court

[4] Rule 44(1) of the Supreme Court Rules 2004 permits the Court to make "any orders that seem just concerning the whole or any part of the costs and disbursements of a civil appeal or an application to bring such an appeal". In seeking costs from New Zealand King Salmon, EDS invokes the principle, applied in this Court in *Prebble v Awatere Huata (No 2)*, that a reasonable contribution to costs will normally be awarded to a successful party to an appeal to the Supreme Court.[2] That is the principle also relied upon by King Salmon in seeking costs from SOS in the appeal in which it was successful, with the indication that it does not seek such costs if costs are to lie where they fall in the EDS appeal.

[5] The Supreme Court in *Prebble* adopted the approach which had been followed in New Zealand courts before its establishment that costs generally follow the event.[3] In that case, it was argued that no award of costs should be made due to the public interest in the interpretation and application of the legislation at issue.[4] The Court took the view that, in fulfilling its obligation under r 44 to make such orders as are just, it would seldom be just to require a successful party to bear the full costs of its case.[5] It also rejected the suggestion that distinctions should be drawn for the purposes of costs in the Supreme Court according to the type of case, and declined to make distinctions between "public law and family cases and commercial litigation".[6] The Court pointed out that, in the Supreme Court, "[a]ll cases, because of the nature of the leave criteria, are likely to raise substantial issues of principle" and their resolution by the Court may therefore be expected to have public benefit.[7]

[6] The Court in *Prebble* also adhered to the long-standing practice of the New Zealand courts that costs awarded should be a reasonable contribution to the costs of a successful party, rejecting the argument there advanced that the Supreme Court should adopt the practice of the Privy Council in awarding costs

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2 *Prebble v Awatere Huata (No 2)* [2005] NZSC 18, [2005] 2 NZLR 467 at [10].
3 At [3].
4 At [4].
5 At [5].
6 At [11].
7 At [11].

more nearly reflecting actual costs.[8] In *Prebble*, the Court adopted a presumptive approach to costs based on a flat rate, such as had for some time been the approach of the Court of Appeal. The rate used was calculated on an indicative reasonable preparation time of four days (including one day of preparation for the determination of leave) to be added to the day's hearing for the substantive appeal, with allowances for second counsel and additional hearing days where appropriate. The calculation also adopted an indicative daily rate, set by reference to the highest scale then provided in the High Court Rules (although it was slightly more generous than the rate then applying in the High Court).[9]

[7] The presumptive flat rate indicated in *Prebble* resulted in costs of $12,500 for a one-day hearing with one counsel and $15,000 where there were two counsel, together with reasonable disbursements.[10] Although the award made was explained by reference to this indicative register,[11] it is clear that it was intended as a general guide only. Subsequently, in more recent cases, the Court has applied a flat rate of $25,000 for a one-day hearing in cases where the parties have not sought to be heard on the question of costs.[12]

[8] In *Prebble*, it was indicated that unless counsel said at the hearing that they wished the question of costs to be reserved for submission, the Court would in general proceed to award costs on the flat rate described without further reference to the parties.[13] The general approach described in *Prebble* has been followed ever since, with the more recent lift in the indicative daily rate already mentioned.

[9] In a small number of cases, the Court has declined to make any award of costs, on the basis that it considered it just to leave costs where they fell in the particular circumstances, such as where both parties had some success in the

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8 See at [7].
9 At [12].
10 At [12].
11 At [13].
12 See, for example, *BFSL 2007 Ltd v Steigrad* [2013] NZSC 156, [2014] 1 NZLR 304 at [123]–[124].
13 *Prebble v Awatere Huata (No 2)* [2005] NZSC 18, [2005] 2 NZLR 467 at [11].

appeal.[14] Since *Prebble*, only in one case before the present application, *West Coast ENT Inc v Buller Coal Ltd*,[15] have parties sought to be heard on the question of costs.

[10] In *West Coast ENT*, the Court declined to order costs on the application of the successful respondent in an appeal under the Resource Management Act 1991 against an unsuccessful public interest appellant. In its costs judgment, the Court referred to its earlier decision in *Prebble* and to the decision of the Privy Council in *New Zealand Maori Council v Attorney-General.*[16]

[11] In *New Zealand Maori Council*, the Privy Council declined to order costs against appellants who were "not bringing the proceedings out of any motive of personal gain" but to protect an aspect of New Zealand heritage and in circumstances where the different views expressed in the Court of Appeal had given rise to "an undesirable lack of clarity … in an important area of the law".[17] In *West Coast ENT*, the Court considered that the decision in *New Zealand Maori Council* was more closely in point than *Prebble*,[18] which, although concerned with a point of public law of great importance, was litigation in the personal interest of the unsuccessful respondent. Even so, in *West Coast ENT*, the fact that the unsuccessful appellant was not acting for personal benefit was not itself determinative. Important to the Court's decision not to award costs in favour of the successful respondent was the circumstance that the proceedings in the Environment Court (in respect of which the issue in the Supreme Court was "very much a subset") "were plainly closely balanced".[19] The underlying issue of law was "difficult and its resolution had a significance which went well beyond the present case".[20]

[12] The fact that a litigant may represent an aspect of the public interest and have no prospect of personal advantage in litigation is, then, not sufficient basis to exclude the general rule that costs follow the result. It is, however, a relevant circumstance

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14 See, for example, *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2012] NZSC 68, [2012] 3 NZLR 68.
15 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 133.
16 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).
17 At 525.
18 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 133 at [4].
19 At [4].
20 At [4].

in determining whether costs should be ordered and in what amount, as it is treated in the United Kingdom and Canada.

[13] In the Canadian Federal Court Rules,[21] as in the New Zealand High Court Rules,[22] the public interest in having a matter litigated is identified as a factor bearing on the discretion to award costs. In addition, other courts in Canada have affirmed an inherent jurisdiction to take into account the fact that a litigant advancing a public interest argument stands to gain no personal benefit. In Ontario, for example, a public interest litigant is generally excused from paying costs.[23] And the Supreme Court of Canada has also affirmed an inherent discretion to award costs in advance to litigants raising a matter of public importance which is not resolved by other cases and which is prima facie meritorious, where the matter might otherwise not be able to be brought to trial.[24]

[14] In the United Kingdom, courts have discretion under the Civil Procedure Rules as to whether costs are payable by one party to another, the amount of any such costs and when they are to be paid,[25] although costs will usually follow the event.[26] In a number of "public interest" cases, courts have declined to make adverse costs orders against unsuccessful claimants or have limited the costs payable.[27]

[15] In Australia, there appears to be more reluctance to depart from the usual rule that costs follow the event simply because a litigant is representing the public

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21 Federal Court Rules 1998 (Can), r 400(3)(h).

22 High Court Rules, r 14.7(e). The Rules are set out in the Judicature Act 1908, sch 2.

23 See, for example, *Incredible Electronics Inc v Canada (Attorney-General)* (2006) 80 OR (3d) 723 (ONSC); and *Lancaster v Compliance Audit Committee* 2013 ONSC 7631.

24 *British Columbia (Minister of Forests) v Okanagan Indian Band* 2003 SCC 71, [2003] 3 SCR 371 at [35]–[36].

25 Civil Procedure Rules (UK), r 44.2.

26 Rule 44.2(2)(a).

27 See *R v Secretary of State for the Environment, ex parte Shelter* [1997] COD 49 (QB); *R (Friends of the Earth and Greenpeace) v Secretary of State for the Environment, Food and Rural Affairs* [2001] EWCA Civ 1950; and *R (Davey v Aylesbury Vale District Council* [2007] EWCA Civ 1166, [2008] 1 WLR 878 at [21].

interest, at least in the absence of additional circumstances.[28] But specific rules may affect that approach, as in the case of r 4.2(1) of the Land and Environment Court Rules 2007 (NSW), which permits the Court not to make an order for payment of costs against an unsuccessful applicant if the proceedings have been brought "in the public interest".

Equivalence in treatment of successful and unsuccessful public interest parties

[16] While the fact that an unsuccessful party is a public interest litigant is often treated in New Zealand and in other jurisdictions as relevant to whether an award of costs should be made against him, there does not seem to be much discussion in the cases of the position when a public interest litigant is successful and seeks costs. The memoranda submitted by the parties do not refer to such authority. The quick review we have undertaken suggests that costs in such cases follow the event, to the advantage of the public interest litigant who might be expected to have avoided costs if unsuccessful. The question of equivalence does not seem to have been considered and it only arises so starkly in the present case because of the unusual circumstance that the argument by SOS to be excused from paying costs might equally have been advanced by EDS if it had not been successful in its appeal.

[17] Questions of equivalence in treatment of public interest litigants and others have arisen in the United Kingdom,[29] Australia[30] and Canada[31] in relation both to

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28 *Oshlack v Richmond River Council* (1998) 193 CLR 72 (where, however, a majority of the High Court approved the view of the trial Judge that a departure from the usual approach was justified where the "worthy motive" of the appellant was widely shared by the public, the point was arguable and the decision had resolved significant issues as to the interpretation and future application of the statutory provisions): at [20] and [49] per Gaudron and Gummow JJ and at [133] and [136]–[144] per Kirby J. See also *Ruddock v Vadarlis (No 2)* [2001] FCA 1865, (2001) 115 FCR 491 at [13]; *Blue Wedges Inc v Minister for the Environment, Heritage & the Arts* [2008] FCA 8 at [68]–[75]; *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)* [2004] NSWLEC 434 at [19]; and GE Dal Pont *Law of Costs* (3rd ed, LexisNexis Australia, Chatswood (Australia), 2013) at 259.

29 See, for example, *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600; and *R (on the application of Buglife – The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209.

30 See, for example, *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864; and *Bare v Small* [2013] VSCA 204 at [48].

31 In *British Columbia (Minister of Forests) v Okanagan Indian Band* 2003 SCC 71, [2003] 3 SCR 371, a majority of the Supreme Court of Canada stated that courts may decline to order pre-hearing costs where it would be unfair to private litigants "caught in the crossfire" of the dispute: at [41].

protective costs orders (orders made at an early stage of proceedings to limit the exposure of an eventually unsuccessful claimant to an award of costs) and pre-hearing costs orders (orders which award costs prior to the hearing of the substantive case). (Pre-hearing costs have been awarded in New Zealand, but not recently.[32])

[18] The policy behind protective and pre-hearing costs orders is not dissimilar to that behind the reluctance to make an order of costs against a public interest litigant – a view that the risk of costs will otherwise impede access to justice and the representation of the public interest.[33] Such orders permit public interest litigants security from the fear of an adverse costs order, provide them with the security of a cap, or advance the costs they need to carry on the litigation.

[19] The principles on which the courts will make protective costs orders were discussed by the Court of Appeal of England and Wales in *R (on the application of Corner House Research) v Secretary of State for Trade and Industry*.[34] Relevant considerations include the fact that the claimant has no private interest in the outcome of the case[35] and the likelihood that without such an order the claimant will have to discontinue the proceedings. To be suitable for a protective costs order, the case must raise issues of general public importance, the resolution of which is itself in the public interest. It must be fair and just to make the order having regard to the financial resources of all parties. It is a relevant circumstance likely to enhance the merits of the application if those acting for the claimant are doing so on a pro bono basis.[36] Significantly for present purposes, the Court in *Corner House* considered

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32 See *Re UEB Industries Limited Pension Plan* [1989] 2 NZLR 252 (HC) at 255; and *Berkett v Cave* [2001] 1 NZLR 667 (CA) at [13].

33 Thus in Canada, the Supreme Court has confirmed that in the enforcement of constitutional rights the discretion on costs should be exercised to ensure that "ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole": *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371 at [27] per LeBel J, delivering the reasons of the majority of the Court.

34 *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600.

35 Subsequent cases have stressed the need for flexibility in applying the *Corner House* guidelines, especially the guideline that the applicant should have "no private interest": see the discussion in *R (on the application of the Plantagenet Alliance Ltd) v Secretary of State for Justice* [2013] EWHC 3164 (Admin) at [17]–[28].

36 *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600 at [74].

that, as a matter of fairness to the defendant, it might be appropriate to impose, as a condition, a limitation on costs, should the claimant prove to be successful:[37]

> … The purpose of the PCO [protective costs order] will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest.

There is however no rule that equivalence should always be attempted. The Court of Appeal of England and Wales has said explicitly in another case that there should be no assumption that it is appropriate to cap the defendant's liability for costs to the same amount where the claimant's liability for costs is capped.[38]

[20] In certain Australian jurisdictions, legislation permits courts to make protective costs orders or "maximum costs orders". One such rule, r 40.51 of the Federal Court Rules 2011 (Cth), has been interpreted to require an order for maximum costs to apply equally to both parties.[39] Similarly, in Victoria, the Court of Appeal reserved its position as to whether protective costs orders should invariably be reciprocal but as the proceeding was a 'test case', considered it would be fair to cap the parties' recoverable costs at the same amount.[40] On the other hand, legislation in New South Wales specifically permits different maximum costs orders to be made in respect of different parties to the proceeding.[41] The position is similar in Queensland.[42]

[21] We mention these cases not because they are directly relevant but because they indicate that courts have been exercised about questions of reciprocity once it is accepted to be relevant to costs that a litigant is pursuing a public interest position in which either he does not stand to benefit personally or where the litigation involves

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37 *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600 at [76].

38 *R (on the application of Buglife – The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209 at [26].

39 See, for example, *Maunchest Pty Ltd v Bickford* [1993] FCA 318; and *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 at [5].

40 *Bare v Small* [2013] VSCA 204 at [48].

41 Rule 42.4 of the Uniform Civil Procedure Rules 2005 (NSW); and see *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* [2009] NSWLEC 165 at [12].

42 Under s 49(2) of the Judicial Review Act 1991 (Qld). See, for example, *Alliance to Save Hinchinbrook Inc v Cook* [2005] QSC 355.

constitutional rights. It is true that protective costs orders arise only in the extreme case that a public interest point which ought to be heard is likely not to be ventilated if a party without any personal stake is at risk of an undetermined exposure to costs. But they are prompted by the same underlying concern to ensure access to justice for public interest matters that arises when costs are sought against an unsuccessful public interest litigant. So it is of interest in the present circumstances to note that courts in other jurisdictions considering protective costs orders have thought it necessary to consider the converse case where a public interest litigant is successful and have thought fairness may require in some cases that a protective cost order be conditional on such a litigant not being awarded costs if successful.

[22] It is not necessary to do more that advert to the point. It may be necessary in a future case where the point arises and the matter is fully argued to look closely at whether it is appropriate to consider whether a public interest litigant which might well have avoided costs if unsuccessful should be granted costs if successful. The considerations referred to in connection with protective cost orders in England may suggest that a readiness to shield a public interest litigant from costs despite lack of success prompts closer consideration in a particular case, for reasons of fairness, of whether the court should be reluctant to award costs to a successful public interest litigant. Unease about lack of equivalence in treatment may otherwise lead to greater reluctance to depart from the general approach that costs follow the result. It is not evident that access to justice or the interests of justice will be well-served in the long run if asymmetry in approach is not better justified (as it may well be in a particular case by closer attention to the type of litigation and any statutory framework under which it is undertaken).

[23] It is not necessary to develop these points (which would in any event require further argument) because we are of the view that this is a case where the costs which have not been agreed upon should lie where they fall in both sets of proceedings. We explain why in the final section of these reasons.

No orders for costs

[24] The present litigation concerned an application for consents under the Resource Management Act. That legislation provides a framework for arriving at decisions in the public interest through a contested public process.[43] In the case of a substantial application, such as was entailed in the resource consents sought by King Salmon, aspects of the public interest may well not be represented because the case is beyond the means of private individuals. Public interest litigants in such cases may meet a real need in presenting important perspectives that would otherwise be unrepresented in the decision-making processes. Such representation may assist in the legitimacy of the process and its outcome. In complex cases, such participation may be helpful, whether or not the litigant is formally successful. An award of costs against a formally unsuccessful litigant who has conducted litigation responsibly may therefore impede the proper administration of justice.

[25] Both EDS and SOS responsibly represented aspects of the public interest which were properly ventilated in the litigation. The proceedings were conducted under Part 6AA of the Act as a matter of national significance under the tight time constraints provided by Part 6AA. Both EDS and SOS had a measure of success in the hearing before the Board and in the High Court. No doubt for these reasons costs were left to lie where they fell in both the Board's determination and in the decision of the High Court.

[26] Although the appeal taken to this Court by SOS ultimately failed, the points raised by it were undoubtedly matters of significant public importance. The testing against the Act of the system of adaptive management of impacts on water quality and arguments advanced that a precautionary approach was required in cases of scientific uncertainty were important in themselves and the litigation provided principles of significance for future cases, even if in the end the Court concluded that they were not determinative of the present appeal on the facts.

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[43] See *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [27] per Elias CJ and at [46] per Keith J; and *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [157].

[27] In the circumstances, we would not make an award of costs against SOS or in favour of EDS. The reasons – the fact that costs have not been awarded at any stage of the litigation, and the fact that the unsuccessful parties represented views that needed to be put forward if the decision-making process was to have legitimacy – would also have led us to conclude that an award of costs against EDS would not have been appropriate should it have been formally unsuccessful. We have not had to consider the positions of the Minister of Conservation and the Director-General of Primary Industries because of the agreement reached as to costs. The position of the Crown parties on costs may be different.

[28] There is a further circumstance. The legislation required King Salmon to demonstrate public interest in the consents it sought. It substantially discharged that burden on the facts, losing the EDS appeal on a view of the law which reversed authority applied in the lower Courts. The case, like *West Coast ENT*, was of real difficulty (as the division of opinion in this Court indicates) and the principles of interpretation applied had significance well beyond it. Although King Salmon was not disinterested in the outcome and looked to a commercial opportunity, the private benefit was by no means certain and required further investment and effort. In those circumstances we do not think the Court should be too astute to build distinctions based on self-interest on the one hand and public interest on the other.

[29] We have some reservations about whether legal bills not rendered, but rather conditional on a court order for costs are properly within the scope of r 44 of the Supreme Court Rules, despite the fact that the High Court Rules contain no equivalent of r 44.1(3) of the United Kingdom's Civil Procedure Rules, introduced to counter the "indemnity principle".[44] That point does not require further consideration on the view we take but may need consideration in a future case where it arises.

[30] For these reasons we would leave costs to lie where they fall in both appeals except to the extent that the parties have consented to such orders. In the event therefore we would make orders by consent that the Minister of Conservation and

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[44] As to which see Lord Justice Jackson (ed) *Civil Procedure 2014: the White Book Service* (Sweet and Maxwell, London, 2014) at [44.1.7].

the Director-General of Primary Industries each pay EDS $5,625 by way of costs. The majority being of the contrary view, however, the orders of the Court are that:

(a) In SC 82/2013:

(i) By consent, the Minister of Conservation and the Director-General of Primary Industries must each pay the Environmental Defence Society Inc $5,625 by way of costs.

(ii) The New Zealand King Salmon Company Ltd must pay the Environmental Defence Society Inc $23,650 by way of costs, together with disbursements of $4,764.

(b) In SC 84/2013:

(i) There is no order for costs. Costs will lie where they fall.

McGRATH, GLAZEBROOK and ARNOLD JJ
(Given by Arnold J)

Background

[31] In *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* (the EDS appeal) and *Sustain Our Sounds Inc v The New Zealand King Salmon Company Ltd* (the SOS appeal), the Court reserved the question of costs and gave leave to the parties to file memoranda if they were unable to reach agreement.[45] The parties have had discussions and have now filed memoranda indicating that they have been unable to agree. Accordingly, we must determine costs.

[32] The position reached between the parties is as follows:

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[45] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [174]; and *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [160].

(a) In the EDS appeal, the Environmental Defence Society Inc (EDS) and the Crown parties have reached agreement. The Crown parties will pay costs of $11,250 to EDS. EDS and the Crown parties seek a consent order that the Minister of Conservation and the Director-General for Primary Industries each pay the appellant the sum of $5,625. EDS seeks a further $35,300 by way of costs (plus disbursements of $4,764) from The New Zealand King Salmon Company Ltd (King Salmon). King Salmon disputes liability and quantum, except that the disbursements figure has been agreed.

(b) In the SOS appeal, Sustain Our Sounds Inc (SOS) submits that costs should lie where they fall, as occurred in the High Court on both appeals.[46] The Crown parties have indicated that they do not seek costs from SOS.

(c) King Salmon's primary submission is that costs should lie where they fall on both appeals. However, if it is required to pay costs to EDS in the EDS appeal, it seeks an award of costs against SOS in the SOS appeal.

Approach

[33] Under r 44(1) of the Supreme Court Rules 2004 the Court is permitted to make "any orders that seem just concerning the whole or any part of the costs and disbursements of a civil appeal or an application to bring such an appeal". In *Prebble v Awatere Huata (No 2)* the Court outlined the approach that it would take in relation to costs.[47] Two points of particular importance emerged. First, costs would normally follow the event.[48] Second, the Court would, like the High Court and the Court of Appeal, generally make an award which was a reasonable contribution to the costs actually incurred, although the Court retained a discretion to make a higher award if it considered that to be just.[49]

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46 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRMA 371 at [178]–[179].
47 *Prebble v Awatere Huata (No 2)* [2005] NZSC 18, [2005] 2 NZLR 467.
48 At [3]–[5].
49 At [10]–[12].

[34] In relation to a daily rate for counsel, the Court in *Prebble* adopted $2,500, which was $350 more than the highest daily rate applicable under the High Court Rules.[50] The Court indicated that, in the case of a one day appeal, it would allow four days (in addition to hearing time) for preparation in respect of the leave application and the hearing. If additional preparation time for second counsel was not allowed for, it was appropriate to allow for second counsel at the hearing at the same rate as senior counsel. Accordingly, for a one day hearing where two counsel appeared, six days would be allowed at $2,500, that is, $15,000. The Court subsequently applied this approach,[51] although more recently it has tended to award costs of $25,000 on such appeals.[52]

[35] The Court also addressed the question of costs in *Manukau Golf Club Inc v Shoye Venture Ltd*[53] and *West Coast ENT Inc v Buller Coal Ltd*.[54] In *Manukau Golf Club*, the Court of Appeal had, without explanation, refused to award costs to the successful party on an appeal. This Court overturned that decision, reaffirming the "fundamental principle" that costs follow the event[55] and emphasising the need for some explanation of the reasons (even if brief) where that principle was not being applied.[56]

[36] The *West Coast ENT* case concerned the relevance of climate change to land use and other consents required to operate an open cast coal mine, specifically, whether the climate change consequences of burning coal should be taken into account by the consenting authority. By a majority, this Court held that such considerations were not relevant. The successful parties sought costs from the two public interest groups that had pursued the unsuccessful argument, West Coast ENT Inc and the Royal Forest and Bird Protection Society of New Zealand Inc.

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50 At [12].

51 See, for example, *Bryson v Three Foot Six Ltd* [2005] NZSC 54, [2005] ERNZ 461 at [1]; and *Otago Station Estates Ltd v Parker* [2005] NZSC 35 at [1].

52 See, for example, *BSFL 2007 Ltd v Steigrad* [2013] NZSC 156, [2014] 1 NZLR 304 at [123]–[124].

53 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305.

54 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32. The costs judgment is *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 133 [*West Coast* (Costs)].

55 *Manukau Golf Club*, above n 53, at [8] and [16].

56 At [16].

[37] The Court declined to make any order for costs against the unsuccessful parties. It considered that the situation had some similarities to that in *New Zealand Maori Council v Attorney-General*, where the Privy Council did not award costs against the Maori Council, even though it was unsuccessful on its appeal, in light of the Maori Council's altruistic reasons for bringing the appeal, the difference of views in the Court of Appeal and the need to achieve clarity in an important area of law.[57] The Court in *West Coast ENT* emphasised the difficulty of the issues in the appeal and the fact that they had a significance well beyond the particular case.[58]

This case

[38] We make two preliminary points. First, given the leave criteria which this Court must apply, most (if not all) civil appeals will raise a point of general or public importance. That is the nature of the Court's work. Moreover, because the Court will normally have the benefit of a decision of the Court of Appeal, the issues which it is called upon to resolve will generally be reasonably well focussed, which should facilitate the parties' preparation. These factors, particularly the first, mean that some considerations bearing on the fixing of costs in other courts may have less relevance to fixing costs in this Court. For example, a party should not be able to pursue a hopeless appeal in this Court, whereas that may well happen in courts where there is an appeal as of right.

[39] Second, we address King Salmon's proposition that if an award is made in favour of EDS in the EDS appeal, then an award should be made against SOS in its favour in the SOS appeal. While we accept that symmetry of treatment has some attraction given the interrelationship of the two appeals, we do not accept that it is a decisive consideration. As we have said, the general rule is that costs follow the event. Ultimately, however, the Court must do what it considers just in the circumstances, and this does not necessarily mean that the costs result must be the same in each appeal. The considerations at play, and the weight to be attached to them, may differ.

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57 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 525.
58 *West Coast* (Costs), above n 54, at [4].

[40] We deal with the EDS appeal first. This was the first occasion on which an appellate court had been asked to consider the overall scheme and operation of the Resource Management Act 1991 (RMA) and the issues raised can fairly be described as fundamental to its operation. Like the Maori Council in the case discussed above,[59] EDS did not pursue the appeal from any motive of personal gain. Rather, it considered that the accepted approach, applied by the Board of Inquiry in the decision at issue, was inconsistent with the RMA's requirements. EDS was successful, and the Court's decision will have a significant impact on the future operation of the RMA.

[41] By contrast, King Salmon's interest was in securing the use of a public resource for its commercial purposes. That is entirely legitimate, of course, and, like EDS, it had to grapple with the large questions raised by the appeal. Moreover, as it submits, it was required to explain and defend the Board's position. But nevertheless, as a company seeking to further its commercial objectives, it is in a different position to EDS and that has some relevance in this context.

[42] In the result, we consider that there is no reason to displace the general rule that costs should follow the event in this instance. We address quantum later in this judgment.

[43] In relation to the SOS appeal, SOS submits that costs should lie where they fall, principally on the basis that it had a significant measure of success in the appeals. First, it notes that it presented arguments on the issues that were the focus of the EDS appeal, in particular on the "overall judgment" approach and the meaning of pt 2 of the RMA. It argues that its critique was essentially accepted, albeit enlarged upon, in the Court's decision. Accordingly, it made a material contribution to the success of the EDS appeal. Second, while acknowledging that its appeal in relation to the three remaining salmon farms was dismissed on the facts, SOS says that the issues addressed in that appeal – the requirements of adaptive management and the precautionary approach in circumstances of scientific uncertainty – were important and had not previously been addressed by an appellate court in New

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[59] *New Zealand Maori Council v Attorney-General*, above n 57.

Zealand. SOS says it had some measure of success in this appeal because the approach set out in the Court's judgment is consistent with its submissions.

[44] We accept that there is force in the points made by SOS. The submissions it made in the EDS appeal were of assistance to the Court and are reflected in the Court's analysis. The SOS appeal in relation to the three remaining salmon farms raised, as King Salmon acknowledged, issues of "major resource management significance". The Court's analysis will have a significant impact on decision-making under the RMA in the future. Although SOS did not succeed on the facts, it did have a measure of success given the analysis adopted by the Court. Accordingly, we consider that it would not be right to apply the usual rule that costs follow the event. Rather, we consider that costs should lie where they fall.

[45] We should emphasise that our decision on the SOS appeal does not mean that whenever a group claiming to be acting in the public interest brings an appeal to this Court, it will be insulated from paying costs if unsuccessful. Rather, the outcome will be determined by the particular circumstances of this case. Here, it is the fact that SOS did have some success in the appeals that persuades us that costs should lie where they fall, although it is also relevant that the appeals concerned matters of public interest, that SOS was not pursuing a commercial benefit and that it acted reasonably in its conduct of the appeal.[60]

[46] We turn now to quantum. EDS submits that the daily rate identified by the Court in *Prebble* should be raised. It will be recalled that the daily rate was set by taking the highest rate in the High Court Rules and increasing it by $350, producing a rate of $2,500. EDS argues that because the daily rates in the High Court Rules have been increased, there should now be a corresponding increase in the daily rate in this Court. King Salmon opposes this.

[47] Rule 14.3 of the High Court Rules requires that proceedings be classified as category 1, 2 or 3 proceedings. Rule 14.4 provides that the appropriate daily

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[60] Although the High Court Rules are not binding on this Court, we note that under r 14.7(e) a court may refuse to make an order for costs, or may order reduced costs, where "the proceeding concerned a matter of public interest, and the party opposing costs acted reasonably in the conduct of the proceeding".

recovery rates for these categories are the daily rates specified in sch 2. The daily rate appropriate to category 3 proceedings is $2,940. EDS argues that this maximum daily rate should be increased by $350 as in *Prebble*, giving a daily rate in this Court of $3,290. Applying the six day multiplier as identified in *Prebble*, this results in costs of $19,740 for a one day hearing with two counsel, although EDS argues for a greater multiplier to reflect the fact that there was an oral leave hearing and the hearing of the combined appeals took three and a half days. As noted earlier, in recent times, the Court has tended to award $25,000 in costs for a one day hearing where two counsel appear.

[48] Looking at the matter overall, we consider that a reasonable total contribution to EDS' costs is $34,900. This comprises $25,000 in accordance with the Court's current practice in relation to a one day hearing with two counsel appearing; $6,600 to cover two counsel for a second hearing day; and $3,300 (that is, an allowance for one counsel) to reflect the fact that there was, unusually, an oral leave hearing, which required additional preparation and appearance time. Deducting the $11,250 paid by the Crown parties from the total of $34,900 leaves $23,650 to be paid by King Salmon. In addition, King Salmon must pay the agreed disbursements.

[49] Accordingly, we would make the orders set out at [30] above.

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