

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 78/2021
[2021] NZSC 144**

BETWEEN THECIRCLE.CO.NZ LIMITED
First Applicant

DAVID ALAN JOHNSON
Second Applicant

AND TRENDS PUBLISHING
INTERNATIONAL LIMITED (IN
LIQUIDATION)
First Respondent

CALLAGHAN INNOVATION
Second Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: R B Hucker and R F Selby for Applicants
D H McLellan QC, A E Ferguson and C D Boswell for Second
Respondent

Judgment: 2 November 2021

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The application for leave to cross appeal is dismissed.**
- C There is no order as to costs.**
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REASONS

[1] TheCircle.co.nz Ltd (The Circle) and Mr Johnson apply for leave to appeal against a decision of the Court of Appeal¹ which allowed their appeal in part against a High Court costs decision.² Callaghan Innovation (Callaghan) seeks leave to cross appeal against the Court of Appeal decision.

Background

[2] Trends Publishing International Ltd (Trends) was in the business of publishing magazines, but the growth of online marketing challenged its business model. In 2012, it applied to the Ministry of Science and Innovation (the Ministry) for a grant to digitise its business. That grant was completed in late 2013. In 2014, it successfully applied to Callaghan for a further grant. Callaghan was the entity then performing the role the Ministry had previously performed.

[3] The first two claims for reimbursement of expenditure in relation to the grant were paid. Callaghan sought further information about the third claim. The information provided did not satisfy Callaghan. A draft report prepared by Deloitte New Zealand Ltd in November 2014 concluded that the expenditure claimed, although of the same nature as had previously been reimbursed under the Ministry grant, did not constitute eligible research and development expenditure.

[4] On 17 December 2014, Callaghan delivered a letter suspending the grant and gave Trends a copy of a draft press release (to be released later that day) saying that the matter had been referred to the Serious Fraud Office.

[5] Deloitte's final report was delivered in April 2015, and Callaghan cancelled the purported funding agreement and demanded repayment of the grant amounts already paid. In May 2015, Trends proposed a compromise with its creditors. This was approved at a creditors' meeting on 22 May 2015. The compromise with creditors was

¹ *TheCircle.co.nz Ltd v Trends Publishing International Ltd (in liq and in rec)* [2021] NZCA 235 (Clifford, Brewer and Dunningham JJ) [CA judgment].

² *Trends Publishing International Ltd (in rec and in liq) v Callaghan Innovation* [2020] NZHC 1626 (Powell J) [HC costs judgment].

set aside by the High Court.³ The High Court's decision was upheld by the Court of Appeal⁴ and by this Court.⁵ Trends had filed a counterclaim for \$61 million. This was dismissed by the High Court in April 2019.⁶

The costs orders

[6] The High Court awarded indemnity costs on the basis the counterclaim was “fundamentally misconceived or otherwise hopeless from conception”.⁷ It also ordered, as Callaghan had sought, the costs to be payable by The Circle and Mr Johnson as non-parties.⁸ Both Trends and The Circle were owned and controlled by Mr Johnson and Trends' counterclaim had been funded by The Circle.⁹

[7] On appeal, the Court of Appeal allowed the appeal in part and replaced the indemnity costs order with an order of standard scale costs uplifted by 50 per cent.¹⁰ The Court of Appeal took a different view on whether the counterclaim was hopeless, taking into account that the work described in the application was the work that was actually carried out.¹¹ It was only at the time of the third claim that Callaghan focused on whether it was, in fact, eligible research and development expenditure. Callaghan had known from the start that there was some doubt as to this.¹² It was thus open to argument that this affected the interpretation of the agreement. Further, the High Court had not properly addressed the significance of the confidentiality provision in the agreement.¹³

[8] The Court of Appeal also dismissed the appeal relating to disbursements and the third party costs orders.¹⁴ With respect to the latter, the Court rejected the submission that the steps taken in the litigation were for Trends' corporate benefit and

³ *Advicewise People Ltd v Trends Publishing International Ltd* [2016] NZHC 2119 (Heath J).

⁴ *Trends Publishing International Ltd v Advicewise People Ltd* [2017] NZCA 365, [2018] NZCCLR 7 (Cooper, Asher and Clifford JJ).

⁵ *Trends Publishing International Ltd v Advicewise People Ltd* [2018] NZSC 62, [2018] 1 NZLR 903 (Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ).

⁶ *Trends Publishing International Ltd v Callaghan Innovation* [2019] NZHC 907 (Powell J).

⁷ HC costs judgment, above n 2, at [18].

⁸ At [85].

⁹ At [84].

¹⁰ CA judgment, above n 1, at [66].

¹¹ At [45]–[56].

¹² At [43](a).

¹³ At [45].

¹⁴ At [27] and [64].

that therefore the High Court's reliance on factors of control and financial interests had been misplaced.¹⁵ The Court of Appeal endorsed the reasoning of the High Court set out below:¹⁶

[82] This was not a simple case of related party advances, nor was the litigation simply to recover monies to be applied for creditors and shareholders generally. Likewise, by no conceivable stretch of the imagination could the actions of either Trends or the non-parties be considered as falling within the liquidator's exception identified by the Privy Council in *Dymocks*.¹⁷ ...

...

[84] On the contrary, it is clear that the approach taken by Mr Johnson and together with The Circle stands in marked contrast to the situation considered by the Court of Appeal in *Kidd v Equity Realty* in which a non-party costs order was found to be inappropriate simply because the director controlled the company and the company subsequently became insolvent.¹⁸ Instead, it is abundantly clear that in this case the principal potential beneficiaries of the counterclaim given the quantum sought (\$61 million) and the lack of creditors other than The Circle, were clearly Mr Johnson and The Circle and it is artificial to attempt to draw a distinction between the two. Mr Johnson through his ability to control both Trends and The Circle controlled both the direction of the litigation and the funding of it, with The Circle willingly providing the funds to enable the counterclaim to proceed. This clearly took them into the category identified by the Privy Council in *Dymocks* as non-parties who 'promote and fund proceedings by an insolvent company solely or substantially for [their] own financial benefit' and who 'should be liable for the costs if [their claim] fails'.¹⁹

The application for leave to appeal

Submissions

[9] The Circle and Mr Johnson essentially reprise the same arguments they advanced in the Court of Appeal in relation to the third party costs order as well as disbursements.²⁰ They also argue that there is a matter of general importance that arises in the predictability of the costs regime as well as certainty to litigants and non-parties as to the costs exposures arising from litigation.

¹⁵ At [28]–[29].

¹⁶ HC costs judgment, above n 2, cited in CA judgment, above n 1, at [29].

¹⁷ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 [*Dymocks*].

¹⁸ *Kidd v Equity Realty (1995) Ltd* [2010] NZCA 452.

¹⁹ *Dymocks*, above n 17, at [29].

²⁰ See above at [8].

Our assessment

[10] There is no issue of principle involved. Whether the orders made by the Court of Appeal were appropriate is related to the particular facts of the case and nothing raised suggests that the Court of Appeal was in error. It follows that it is not in the interests of justice for leave to be granted.²¹

The application to cross appeal

Submissions

[11] In terms of the counterclaim, Callaghan seeks leave to appeal from the part of the Court of Appeal's judgment which overturned the award of indemnity costs made in the High Court. Callaghan argues that the Court of Appeal was not entitled to substitute its own view of the merits of one aspect of Trends' claim for that of the High Court. It is submitted that this is because it was an appeal from a discretionary decision on costs and thus only reviewable if there was an error of law or principle, the taking into account of an irrelevant consideration or the failure to take account of a relevant consideration, or the decision was plainly wrong.²² Callaghan also submitted that the Court of Appeal failed to take into account the flagrant misconduct inherent in the conduct of the trial and the unreasonableness of the conduct of the plaintiff.

Our assessment

[12] We do not accept these submissions. Even if a decision on costs is discretionary,²³ in this case the Court of Appeal took a different view of the facts on which the exercise of discretion was based and, with regard to the confidentiality issue, on the law. It was entitled to do so. It was also aware of the manner in which the litigation had been run.²⁴ Whether it was right to reduce the costs award raises no

²¹ Senior Courts Act 2016, s 74(2).

²² *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

²³ We do not need to decide this point.

²⁴ CA judgment, above n 1, at [57].

issue of principle. Nor is there any risk of a miscarriage of justice.²⁵ Consequently, it is not in the interests of justice for this Court to grant leave to appeal.²⁶

Result

[13] The application for leave to appeal is dismissed.

[14] The application for leave to cross appeal is dismissed.

[15] There is no order as to costs. They are to lie where they fall, given that both applications have failed.

Solicitors:
Hucker & Associates, Auckland for Applicants
Wilson Harle, Auckland for Second Respondent

²⁵ For the threshold required for a miscarriage of justice in civil cases, see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

²⁶ Senior Courts Act, s 74(2).