IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 89/2024
[2024] NZSC 149

BETWEEN	SARAH GORDON First Applicant
AND	GILES NEWTON-HOWES Second Applicant
AND	ATTORNEY-GENERAL First Respondent
AND	DIRECTOR-GENERAL OF HEALTH Second Respondent

Court: Glazebrook, Ellen France and Miller JJ

Counsel: I H V Reuvecamp for Applicants
K Laurenson and I M C A McGlone for Respondents

Judgment: 6 November 2024

JUDGMENT OF THE COURT

A The application for leave to file submissions in reply is granted.

B The application for leave to appeal is dismissed.

C There is no order as to costs.

REASONS

[1] The applicants have sought leave to appeal a decision of the Court of Appeal declining a protective costs order in connection with an appeal to that Court.[1]

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[1] *Gordon v Attorney-General* [2024] NZCA 327, [2024] NZRMA 331 (French and Ellis JJ) [CA judgment].

[2] The application was made in a proceeding in which the applicants wish to challenge provisions of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the 1992 Act) for inconsistency with rights affirmed by the New Zealand Bill of Rights Act 1990.[2] It is a proceeding which was brought in the abstract, in that there are no facts in issue pertaining to any particular patient or applicant. The applicants themselves have no material private or personal interest in the proceeding but are acting in the public interest. The relief sought comprised declarations directed to the interpretation of the legislation and, in the alternative, declarations of inconsistency.

[3] A protective costs order was made in the High Court,[3] and the respondents did not argue before the Court of Appeal that it was made in error.[4] Rather, they took the position that there was insufficient public interest to justify an order on appeal, having regard to the fact that the proceeding had been heard and dismissed.

[4] The Court of Appeal agreed.[5] The Court did not say that the appeal had no merit, but it did observe that some of the key reasons given by the High Court for declining the claims seemed unlikely to be easily addressed.[6] It accepted the respondents' submission that it is undesirable and difficult to deal with the issues in a factual vacuum. Lastly, it noted that the Crown accepts the legislation is dated and there is a reform process under way.[7] The applicants sought to file submissions in reply to address two developments since their submissions on the leave application were filed; they are the introduction of the Mental Health Bill 2024 and this Court's recent costs decision in *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waiōweka, Ngāti Patumoana, Ngāti Rutākenga and Ngāi Tamahaua (Te Kāhui Takutai Moana o Ngā Whānau Me Ngā Hapū o Te Whakatōhea)*.[8] We grant leave to file the submissions.

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2 See *Gordon v Attorney-General* [2023] NZHC 2332, [2023] 3 NZLR 625.
3 *Gordon v Attorney-General* [2022] NZHC 2801, (2022) 13 HRNZ 773.
4 CA judgment, above n 1, at [12].
5 At [39].
6 At [37].
7 At [38].
8 Mental Health Bill 2024 (87-1); and *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waiōweka, Ngāti Patumoana, Ngāti Rutākenga and Ngāi Tamahaua (Te Kāhui Takutai Moana o Ngā Whānau Me Ngā Hapū o Te Whakatōhea)* [2024] NZSC 119 [*Edwards*].

[5] In support of the application for leave to appeal the applicants argue that the jurisdiction to make protective costs orders ought to be widened. They emphasise that the subject matter of the appeal is important and will continue to affect many people pending the replacement of the 1992 Act. They have not said that they will not pursue the appeal without a protective costs order, and they acknowledge that the Court of Appeal might limit their exposure to costs in some way.[9]

[6] This Court recently addressed the related topic of prospective costs orders, generally confirming the principles on which the Court of Appeal acted in this case.[10] The order must be necessary in the interests of justice in the circumstances of the particular case. The difficulty for the applicants in this case is that the case is general and declaratory, and their prospects of success in the underlying appeal do not appear sufficient to justify forcing the Crown to again bear the costs of the appeal in the event it is unsuccessful.

[7] For these reasons, the application for leave to appeal is dismissed.[11]

[8] There is no order as to costs.

Solicitors:
Vida Law, Wellington for Applicants
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondents
B J Peck for Te Kāhui Tika Tangata | Human Rights Commission as Observer

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9 See Court of Appeal (Civil) Rules 2005, rr 53 and 53A(1).
10 *Edwards*, above n 8, at [44]. But see at [44], n 56.
11 See Senior Courts Act 2016, s 74(1).