IN THE COURT OF APPEAL OF NEW ZEALAND

CA717/2012
[2013] NZCA 555

BETWEEN	NEW ZEALAND CLIMATE SCIENCE EDUCATION TRUST Appellant
AND	NATIONAL INSTITUTE OF WATER AND ATMOSPHERIC RESEARCH LIMITED Respondent

Hearing:	15 October 2013
Court:	Harrison, Miller and Dobson JJ
Counsel:	G M Illingworth QC and B E Brill for Appellant JBM Smith QC and G M Richards for Respondent
Judgment:	11 November 2013 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal against the award of costs in the High Court is dismissed.

B The appellant must pay the respondent costs in the Court of Appeal as for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Miller J)

[1] This judgment deals with costs in this Court, where the substantive appeal was abandoned during argument, and an appeal against costs awarded in the High Court. In each case the appellant says that scale costs ought to have been discounted because it has pursued a public interest.

Background

[2] The respondent, which we will call NIWA, collects and publishes temperature and other weather data from numerous weather stations in New Zealand, and has done so for many years. It maintains what it calls a National Climate Database, though the database has no official status. At issue in this proceeding were its decisions to publish three documents: the Seven-Station Temperature Series, published in 1999, the Eleven-Station Temperature Series, published in 2009, and a review of the Seven-Station Temperature Series covering the period 1909 to 2008.

[3] Relying on its National Climate Database and the three publications, NIWA has concluded that New Zealand is experiencing a warming climate. Its views have an impact on policy-making and public discourse.

[4] The appellant, which we will call "the trust," is a charitable trust whose objectives include the promotion of accurate information about the science and policy of climate change in New Zealand. It does not accept NIWA's conclusions about a warming climate, claiming that NIWA has misinterpreted the data.

[5] The trust sought judicial review of the decisions to publish the three documents. It alleged, broadly speaking, that NIWA had failed in its statutory purpose of undertaking research in accordance with the principle of excellence.[1] It contended that for judicial review purposes Crown Research Institutes are analogous to State-Owned Enterprises, decisions of which are in principle amenable to judicial review.[2]

[6] The application for review rested squarely on alleged mistakes of fact. In essence, the trust contended that NIWA had been using the wrong methodology to adjust historic temperature data to reflect changes in the locations of monitoring stations. That such adjustments are needed was not in dispute. The trust said that NIWA made the adjustments using a methodology which did not reflect received scientific opinion.

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1 Crown Research Institutes Act 1992, ss 4 and 5(1)(b).

2 *Mercury Energy Ltd v Electricity Corp of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 387–388.

[7] NIWA did not accept that it had made any mistake. It claimed that its methodology was based upon what the trust says is the correct approach.

[8] There was a great deal of evidence in the High Court. It amounted to a debate among scientists about the correct approach to adjustments. Venning J found it unnecessary to resolve the debate.[3] It sufficed that there was credible evidence of scientific opinion supporting NIWA's approach.

[9] Before us, Mr Illingworth QC sought to challenge the High Court decision on the facts. That necessitated that we reject some of the evidence from NIWA scientists which was given in affidavits and was not the subject of cross-examination. The appeal was abandoned when we made it plain that, like Venning J, we were in no position to resolve these questions on the record before us.

Should costs be discounted for public interest reasons?

[10] The next issue is the appeal against the award of costs made against the trust in the High Court. Venning J awarded costs of $85,091 with disbursements of $4,147.90.[4] The costs were largely calculated on a category 2B basis, but category C applied to some steps and an uplift of 50 per cent was allowed for NIWA's preparation of the pre-trial list of issues and preparation for hearing generally, recognising that much of the trust's pleadings were abandoned at the last minute and NIWA was required to refocus its submissions.[5]

[11] The Judge declined NIWA a further uplift. He also refused the trust a discount, rejecting the submission that it was serving a public interest as a disinterested citizen seeking to hold a public body to account. The Judge held that the public interest exception to the normal rule that costs follow the event is available where the case concerns a matter of genuine public interest beyond the interests of the immediate litigant, the case has merit, and the litigant concerned has

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3 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 2297, [2013] 1 NZLR 75 at [157] [Substantive decision].

4 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 3560 at [57] [Costs decision].

5 At [56].

acted reasonably.[6] He accepted that climate change may be seen as a matter of public debate, but the case could not resolve that issue, which is a scientific problem not suitable for determination by a court.[7] Further, the proceedings were pursued by the trust to advance its own interest in challenging NIWA's records.

[12] On appeal, Mr Illingworth again invoked the "watchdog principle", contending that the proceeding was properly brought in the public interest and was not merely vexatious; further, the trust sought no pecuniary gain. In the circumstances, he submitted, the principle that it is appropriate for responsible lobby groups to test decisions taken by government agencies was applicable.

[13] We accept the principle, which is well established. It suffices to refer to *Ratepayers and Residents Action Assoc Inc v Auckland City Council*.[8] We are prepared to assume too that the trust did not act for pecuniary gain. The question is whether it has acted reasonably.

[14] As to that, we observe that only after the late intervention of former counsel was the case sensibly articulated in the High Court. Even then, it had no prospect of success, both because of the inherent difficulty of challenging a decision of this kind and because the challenge turned on disputed facts which were not susceptible to determination on judicial review. By way of illustration, we observe that the trust initially characterised NIWA's temperature records as the official New Zealand record, but that allegation was abandoned in the High Court.[9] It was also open to the Judge to conclude that the trust has mounted something of a crusade against NIWA's records.[10]

[15] In the circumstances, we are not persuaded that the Judge was wrong to refuse the trust a reduction in its liability for costs on public interest grounds. On the contrary, we agree with him that the trust did not act reasonably.

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6 At [45]. See *Taylor v District Court at North Shore (No 2)* HC Auckland CIV-2009-404-2350, 13 October 2010.

7 At [46].

8 *Ratepayers and Residents Action Assoc Inc v Auckland City Council* [1986] 1 NZLR 746 (CA).

9 Substantive decision, above n 3, at [39].

10 At [47].

[16] There being no other challenge to the High Court award, the appeal is dismissed.

Costs in this Court

[17] For the reasons just given, we are not prepared to discount costs in this Court, where despite Mr Illingworth's best efforts in introducing commendable focus to the argument on appeal, the trust cannot claim to have acted reasonably. The appeal could not succeed. Accordingly, costs will follow the abandonment.

[18] NIWA will have costs as for a standard appeal on a band A basis. We certify for two counsel.

Solicitors:
VGA Chartered Accountants Ltd, Auckland for Appellant
Atkins Holm Majurey, Auckland for Respondent