IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA138/2018
[2019] NZCA 379

BETWEEN	PAUL NEVILLE BUBLITZ Appellant
AND	THE QUEEN Respondent

CA168/2018

BETWEEN	LANCE DAVID MORRISON Appellant
AND	THE QUEEN Respondent

Hearing:	25 September 2018
Court:	Kós P, Winkelmann and Williams JJ
Counsel:	R S Reed QC and H M Z Ford for Appellant Bublitz D H O'Leary and R J Beca for Appellant Morrison B J Horsley and R K Thomson for Respondent
Judgment:	22 August 2019 at 11 am

JUDGMENT OF THE COURT

A Mr Bublitz's appeal is dismissed.

B Mr Morrison's appeal is dismissed.

C There is no order made as to costs.

REASONS OF THE COURT

[1] Mr Bublitz and Mr Morrison were charged, initially, with multiple criminal counts under ss 220 and 242 of the Crimes Act 1961 and s 377 of the Companies Act 1993, arising from the collapse of two finance companies, Viaduct Capital Ltd and Mutual Finance Ltd. After nine months, their trial was aborted by Woolford J because of what the Judge described as "extensive" and "unprecedented" late disclosure by the Crown.[1]

[2] Mr Bublitz and Mr Morrison sought costs. The Judge awarded Mr Morrison $75,000 under s 5 of the Costs in Criminal Cases Act 1967 and made an award of $50,000 under s 364 of the Criminal Procedure Act 2011 to be split five ways between Mr Bublitz, Mr Morrison, two other defendants and the Crown.[2]

[3] Mr Bublitz appeals the quantum of the CPA award. Mr Morrison appeals the quantum of the CCCA award.

Background

[4] The charges arose from the 2010 collapse of two companies controlled by Mr Bublitz, Viaduct Capital Ltd and Mutual Finance Ltd. Following extensive investigations by the Financial Markets Authority,[3] in 2014 Mr Bublitz and Mr Morrison were charged with the offences noted at [1], along with four other men.[4]

[5] The two companies had the benefit of Crown guarantees under the Crown Retail Deposit Guarantee Scheme. The Crown case was that the defendants, led by Mr Bublitz, entered into a series of transactions that breached limitations on related party transactions in the companies' trust deeds and the Crown guarantees. The Crown also alleged the defendants misled potential investors and the Crown by failing to

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1 *R v Bublitz* [2017] NZHC 1059 [Reasons to abort trial] at [63] and [66].

2 *R v Bublitz* [2018] NZHC 373 [Costs decision] at [131]. We refer to the Costs in Criminal Cases Act 1967 and Criminal Procedure Act 2011 as the CCCA and CPA respectively.

3 We refer to the Financial Markets Authority as the FMA.

4 Bruce McKay, Richard Blackwood, Nicholaas Wevers and Peter Chevin were also charged. Mr Chevin pleaded guilty to all charges against him. Mr Wevers died shortly after he was charged. Mr McKay and Mr Blackwood did not appeal the costs decision. We refer to Mr McKay, Mr Blackwood, Mr Bublitz and Mr Morrison collectively as the defendants.

disclose these transactions in prospectuses and investment statements. It was alleged those actions were undertaken to deal with cashflow problems in other investment companies controlled by Mr Bublitz that occurred in the wake of the 2007–2008 global financial crisis.

[6] The defendants pleaded not guilty. Their trial commenced in the High Court at Auckland before Woolford J on 8 August 2016. The trial significantly exceeded the allocated three months. Mr Bublitz funded his defence privately until the start of the fifth month of the trial, at which point he was approved for legal aid. Mr Morrison retained private counsel until October 2015, whereupon he represented himself with the assistance from May 2016 of counsel appointed by the Court. During the Crown case, a number of charges were either withdrawn or dismissed, reducing the charges to 15 in all against the appellants.

[7] On 23 March 2017, after the Crown case had closed but before the conclusion of Mr Bublitz's defence, the Crown disclosed to the defence a list of documents from the files of Deloitte, investigative agents for the FMA. These documents had been reviewed by Crown counsel between September and October 2016 and were not disclosed on the grounds that they were irrelevant or able to be withheld. The late disclosure of this list was an admitted breach of ss 13(2)(b) and (5) of the Criminal Disclosure Act 2008.[5] Woolford J aborted the trial on 10 May 2017 on the basis that the prosecution's non-compliance with the Criminal Disclosure Act gave rise to a reasonable danger of a miscarriage of justice, compounded by a prosecution of "unnecessary length and complexity".[6]

[8] The Crown chose not to proceed against Mr Morrison again. The remaining charges against him were dismissed. Subsequently Mr Bublitz was retried and convicted on four charges of theft by a person in a special relationship and two charges of making a false statement as a promoter of securities.[7] Toogood J sentenced Mr Bublitz to three years and two months' imprisonment on these charges.[8] Mr Bublitz's appeal to this Court against conviction and sentence was recently allowed

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5 Costs decision, above n 2, at [11].
6 Reasons to abort trial, above n 1, at [93]–[98].
7 Crimes Act 1961, ss 220, 223(a) and 242.
8 *R v Bublitz* [2019] NZHC 592 [Sentencing notes] at [110].

in part. Convictions on the two false statement charges were set aside. The other convictions were sustained. His sentence was reduced to 11 months' home detention.[9]

Application for costs

[9] Following the aborted trial, but before the conclusion of the retrial, Mr Bublitz and Mr Morrison applied to the High Court for costs. Mr Bublitz sought costs of $1,284,493.57. Of that, $200,000 was sought under the CCCA and $1,084,493.57 under the CPA.[10] Mr Morrison applied for costs totalling $212,992.90 under the CCCA and CPA but did not specify how much was sought under each Act.[11]

Statutory scheme

[10] Section 364 of the CPA provides:

> **364 Costs orders**
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> (1) In this section,—
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> **costs order** means an order under subsection (2)
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> **procedural failure** means a failure, or refusal, to comply with a requirement imposed by or under this Act or any rules of court or regulations made under it, or the Criminal Disclosure Act 2008 or any regulations made under that Act
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> **prosecution**—
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> (a) means any proceedings commenced by the filing of a charging document; but
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> (b) does not include an appeal.
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> (2) A court may order the defendant, the defendant's lawyer, or the prosecutor to pay a sum in respect of any procedural failure by that person in the course of a prosecution if the court is satisfied that the failure is significant and there is no reasonable excuse for that failure.
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> (3) The sum must be no more than is just and reasonable in the light of the costs incurred by the court, victims, witnesses, and any other person.

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9 *Bublitz v R* [2019] NZCA 364.
10 Costs decision, above n 2, at [15].
11 At [19].

(4) A costs order may be made on the court's own motion, or on application by the defendant, the defendant's lawyer, or the prosecutor.

(5) Before making a costs order, the court must give the person against whom it is to be made a reasonable opportunity to be heard.

(6) A costs order may be made even if the defendant has not yet been convicted, or is eventually discharged, or the charge is dismissed.

(7) The court may make more than 1 costs order against the same person in the course of the same prosecution.

(8) The court may order that some or all of the amount ordered to be paid under a costs order be paid to any person connected with the prosecution.

(9) Subsections (2) to (8) do not limit or affect the Costs in Criminal Cases Act 1967.

[11] Section 5 of the CCCA provides:

5 Costs of successful defendant

(1) Where any defendant is acquitted of an offence or where the charge is dismissed or withdrawn, whether upon the merits or otherwise, the court may, subject to any regulations made under this Act, order that he be paid such sum as it thinks just and reasonable towards the costs of his defence.

(2) Without limiting or affecting the court's discretion under subsection (1), it is hereby declared that the court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate) to—

(a) whether the prosecution acted in good faith in bringing and continuing the proceedings:

(b) whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence:

(c) whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty:

(d) whether generally the investigation into the offence was conducted in a reasonable and proper manner:

(e) whether the evidence as a whole would support a finding of guilt but the charge was dismissed on a technical point:

(f) whether the charge was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty:

(g) whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.

(3) There shall be no presumption for or against the granting of costs in any case.

(4) No defendant shall be granted costs under this section by reason only of the fact that he has been acquitted or that any charge has been dismissed or withdrawn.

(5) No defendant shall be refused costs under this section by reason only of the fact that the proceedings were properly brought and continued.

Judgment appealed

Costs under the CCCA

[12] The Judge considered that costs under the CCCA were available only to Mr Morrison. The "unique circumstances" of the case meant it was inappropriate to hear Mr Bublitz's application while significant charges remained outstanding against him.[12] The analysis of the dismissed charges would depend on the outcome of the retrial.[13] All charges against Mr Morrison having been dismissed, there was no barrier to determining his CCCA application.[14]

[13] In determining whether Mr Morrison should be awarded costs under s 5 of the CCCA, the Judge considered the factors under s 5(2),[15] as well as various other issues unique to the trial, including the breadth and complexity of the Crown charge notice, a Crown application to admit hundreds of documents under the co-conspirator's rule, the unavailability of a Crown expert, the admitted breach by the Crown of the Criminal Disclosure Act and the length of the trial.[16] In light of these factors, the Judge considered that an award under s 5 was appropriate.

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12 At [36]–[37].
13 At [38]–[40].
14 At [41]–[44].
15 At [46]–[55].
16 At [56].

[14] In terms of quantum, the Judge found that scale costs would be inadequate.[17] The question of quantum therefore became one of discretion and judgment. Bearing in mind all the factors for and against Mr Morrison's application (including Mr Morrison's failure to establish his innocence despite all charges against him having been dismissed), the Judge considered that Mr Morrison was entitled to a substantial amount, although not reaching the level of indemnity costs. The Judge decided an award of $75,000 would be just and reasonable in the circumstances.[18]

Costs under the CPA

[15] Turning to the applications for costs under s 364 of the CPA, it was common ground that the prerequisites of a "significant procedural failure" with "no reasonable excuse" had been met.[19] The Judge concluded that orders should be made under s 364 against the FMA to sanction its procedural failure in carrying out the investigation and initiating the prosecution.[20] On appeal, there was no challenge by the Crown to that conclusion, and it was common ground that the FMA was the appropriate prosecutor.

[16] The remaining question was, what quantum would be just and reasonable in the circumstances?

[17] In order to answer this question, the Judge considered the purpose of s 364 and against whom the order should be made.[21] In light of the wording of the section, legislative history and wider context the Judge found that s 364, in contrast to the CCCA, was "primarily intended to serve as a means of sanction, but may well offer some compensation to defendants and others who have incurred loss".[22] It would be unthinkable to suggest the defence compensate the Crown for its actual costs if a similar inadvertent error were made by defence counsel or the defendant resulting in an aborted trial.[23] Looking at the "global position", the Judge considered that an

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17 At [59], pursuant to CCCA, s 13(3).
18 At [60]–[64].
19 At [76].
20 At [122].
21 At [76].
22 At [107].
23 At [128].

overall award of $50,000 was appropriate to censure the FMA for its non-compliance, to be paid to each of the four defendants and the Court equally.[24]

Issues

[18] This appeal raises five issues: [25]

(a) Issue One: does s 364 of the CPA give rise to an appeal against discretion or a general appeal?

(b) Issue Two: does s 364 of the CPA have a primarily penal purpose?

(c) Issue Three: did the Judge err in determining the quantum of the award under s 364 of the CPA?

(d) Issue Four: did the Judge err in determining the quantum of the award under s 5 of the CCCA?

(e) Issue Five: did the Judge err in failing to make a costs award following the successful costs application?

[19] The first three issues arise on Mr Bublitz's appeal; the latter two on Mr Morrison's.

Issue One: does s 364 of the CPA give rise to an appeal against discretion or a general appeal?

[20] Mr Bublitz's appeal is brought under s 271 of the CPA, which provides a right of appeal against a decision to make or refuse to make a costs order.[26] This Court may confirm, vary or set aside the costs decision made below, or make any other orders it deems appropriate.[27] An issue arises as to whether the Judge's decision regarding

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24 At [129]–[130].

25 Mr Bublitz also advanced an argument in his written submissions based on s 162 of the Senior Courts Act 2016. It was not pursued in oral submissions and we are satisfied it does not offer an independent source of jurisdiction additional to the CPA and CCCA in the context of this appeal.

26 A costs order is defined as an order for the payment of costs under s 364 of the CCCA: CPA, s 270.

27 Section 274.

quantum under s 364 is "an evaluative decision" to be assessed as a general appeal by way of rehearing,[28] or an assessment of a discretionary decision, to be determined under the more limited review outlined in *May v May*.[29]

[21] Ms Reed QC submitted that the question of what quantum is "just and reasonable" under s 364 is a question of law requiring an evaluative, and not discretionary, consideration analogous to the question of whether evidence should be admissible under the Evidence Act 2006.[30]

[22] Mr Horsley, on the other hand, submitted that whether to make a costs award and how much to award under s 364 is a purely discretionary decision. The only touchstone for the Court is that the sum must be "no more than is just and reasonable"; the summary context in which costs awards are made suggests that these are procedural rather than principled decisions; and more than one view of the appropriate quantum is legally possible.[31]

Discussion

[23] Both parties recognised that little turns on this distinction, as Mr Bublitz's primary argument is that the Judge exercised the discretion on wrong principle. Indeed, as recognised by this Court in *Taipeti v R*, the distinction is incapable of precise definition, and its value has been questioned.[32]

[24] It is unnecessary for us to decide this issue given Mr Bublitz's primary argument. However, were we required to do so we would have held that the Judge's decision under s 364 as to quantum is one of the residual areas remaining of discretionary determination, having regard to the indicia noted in *Taipeti*:

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28 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5].
29 *May v May* (1982) 1 NZFLR 165 (CA) at 170, approved in *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].
30 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [49].
31 *Taipeti v R* [2018] NZCA 56, [2018] 3 NZLR 308.
32 At [50], citing M B Rodriguez Ferrere "The Unnecessary Confusion in New Zealand's Appellate Jurisdictions" (2012) 12 Otago LR 829.

> [49] These decisions show that the classes of case which appeal courts classify as an exercise of discretion are dwindling. Three possible indicia of the presence of discretion emerge. First, the extent to which the decision-maker can apply his or her own "personal appreciation" has been identified as a "key indication". Clearly, the greater the level of prescription in terms of what is required of the decision-making process the more likely the decision is an evaluative process, rather than the exercise of a discretion. Second, procedural decisions are more likely to be an exercise of discretion than wider issues of principle involving the application of law to the facts. Third, if only one view is legally possible, that points away from a discretion. In other words, where there is scope for choice between multiple legally "right" outcomes, that points towards a discretion.
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> (footnotes omitted)

[25] We would have done so essentially for the reasons offered by Mr Horsley at [22] above. Ultimately, once the evaluative decision is made to impose a sanction under s 364, the precise quantum is a matter of discretionary impression for the Judge, subject to review grounds rather than general right of appeal.

[26] For the appeal to succeed it follows we would need to be satisfied that the Judge's decision involved an error of law or principle, took account of irrelevant considerations, failed to take account of a relevant consideration or was plainly wrong.[33]

Issue Two: does s 364 of the CPA have a primarily penal purpose?

[27] Ms Reed submitted that the Judge erred in principle by interpreting s 364 as having a primarily penal purpose. Such an interpretation would be consistent with the CPA's purpose of promoting the fair and efficient disposition of criminal proceedings, as wasted costs orders promote fairness and efficiency. Given the plain meaning of the section, Ms Reed submitted that there was no need for the Judge to have recourse to extrinsic materials. In any case, the legislative documents, supported by the approach to wasted costs in England and Wales, indicated that compensation should be the touchstone for quantum.

[28] Mr Horsley submitted that Parliament's purpose when designing the CPA was squarely on improving procedural efficiency through a system of incentives and

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[33] *Kacem v Bashir*, above n 29, at [32].

punishment, not compensating defendants for the costs of their prosecution. While s 364 may be used to compensate parties affected by failures to abide by procedural requirements, this is an incidental effect rather than the primary purpose of the provision.

Discussion

[29] Prior to the introduction of s 364, the court's source of power to order costs for dereliction of duty lay in its inherent jurisdiction to make wasted costs orders against counsel. Although such an order could be expressed in compensatory terms, its primary purpose was to punish practitioners who had failed to fulfil their duty towards the court.[34] Given the existence of this separate power, the Law Commission's 2000 report on reforming the CCCA did not address the need for costs as procedural sanctions.[35] By contrast, the Law Commission viewed the CCCA as primarily compensatory in nature, achieving the appropriate balance between providing "a level of reimbursement to innocent defendants and a means to censure improper prosecution conduct".[36]

[30] In 2005, the Law Commission released a report recommending large-scale reform of criminal procedure. In the report, the Law Commission recommended that costs orders for failures without reasonable excuse to comply with procedural obligations be introduced as a sanction, to be used as a last resort to change entrenched practices of procedural non-compliance within the criminal justice system.[37] The Law Commission stated:

> [400] A costs order on a prosecutor, who is employed by a state agency, might be colloquially described as a money-go-round: money given by the government with one hand (in the budget process) is then taken with the other (a costs order to the benefit of the consolidated fund). The agency is a trustee of money on behalf of the state and ultimately the taxpayer. If the agency is fined to the detriment of whatever other service it is supposed to be providing, it is embarrassing for the agency and its responsible Minister, but the taxpayer rather than the agency is the ultimate loser. However, costs orders on government agencies are still salutary and we consider that they should be imposed if appropriate. Not only do they promote accountability

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34 *Harley v McDonald* [2002] 1 NZLR 1 (PC) at [49].
35 Law Commission *Costs in Criminal Cases* (NZLC R60, 2000) at [6].
36 At [4].
37 Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, 2005) at [383] and [398]–[400].

> by making performance failure explicit and public, but their impact on the budget of the agency concerned is likely to be sheeted home to the individual in their performance assessment, and therefore modify their behaviour, and the behaviour of their colleagues, in the future.
>
> (footnotes omitted)

[31] Of relevance also is the footnote to that paragraph, which discusses the possibility of the defendant being the recipient of such a payment:[38]

> Arguably, it is the defendant's right to be promptly tried that has been affected: the defendant, not the consolidated fund, should therefore be remunerated for delays. However, whether those who are found guilty should benefit financially from a failure of the criminal justice system, when they have only been exposed to that system by virtue of proven criminal offending, is likely to be a matter for some debate, and regarded as a last resort, if appropriate at all. For recent consideration of a similar issue, see the Prisoners' and Victims' Compensation Bill first reading debate. See also, in relation to an acquitted person, *R v Brown* in which the majority of the five member bench of the Court of Appeal declined to express a view on the availability of compensation for breach of fair trial rights, but acknowledged the strength of the views expressed (obiter dicta) by William Young J in a separate judgment. Young J stated that he would regret such a development; it was not one that had found favour overseas; and there were better remedies within the jurisdiction of trial and appellate courts, which would be consistent with evidentiary exclusion for investigative breaches of the Bill of Rights.

[32] The Law Commission evidently viewed the scope of requisite reform as a sanction or penalty for failure to comply with procedural requirements. Little weight was given to the possibility that this could result in any compensation to the defendant. Certainly, it was not the primary purpose of the order proposed by the Law Commission.

[33] In due course the Criminal Procedure (Reform and Modernisation) Bill 2010 was introduced.[39] In the debate on the Bill's second reading, the then Minister of Justice, the Hon Simon Power, observed that the most significant changes included "enabling costs ordered against a party for not complying with procedural requirements to be paid to people connected to the proceedings who incurred additional costs because of the non-compliance".[40] Throughout the debate the costs provisions were described as sanctions for "procedural non-compliance", rather than

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38 At 119, n 219 (citations omitted).
39 Criminal Procedure (Reform and Modernisation) Bill 2010 (243–1).
40 (27 September 2011) 676 NZPD 21418.

as a compensatory measure. A departmental report on the Bill also noted that the "suite of incentives and sanctions in the Bill are intended to encourage parties to comply with procedural requirements".[41] This reflected the views of District Court judges, who considered that the ability to impose costs orders would incentivise compliance.[42] The report specifically described the orders a "sanction".[43] However, the report also proposed the following amendment:

> [229] Clause 361(3) indicates that the amount imposed needs to reflect costs incurred by the court, victims, witnesses and any other person. However, there is no requirement that payment received for those costs must be passed on to those persons. Consistent with the principles of reparation, this oversight should be addressed.
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> [230] Therefore, advisers recommend that clause 361 should be amended to provide that, when a costs order is made that is intended to reflect costs incurred by any person connected with the proceedings, the court may order that some or all of the amount is to be paid [to] the affected person(s).

[34] This amendment was adopted by the Justice and Electoral Committee,[44] resulting in s 364(8) referring to "any person connected with the prosecution". Ms Reed submitted that this demonstrates that compensation should be the touchstone for quantum. However, in our view, the amendment is more consistent with s 364's primary purpose being to operate as a sanction, while providing the ability to compensate in appropriate cases.

[35] In light of this history, we consider that the focus of the regime created by s 364 is certain kinds of procedural default.[45] Only a failure or refusal to comply with the CPA or the Criminal Disclosure Act and associated rules and regulations can result in a costs award. There are other kinds of default which could lead to delay (such as witness mismanagement) for which there is no provision for costs orders. We infer that the primary purpose of the provision is to encourage compliance with the CPA and Criminal Disclosure Act, to avoid defaults which may delay or derail a trial, thereby ensuring the efficiency of the criminal justice system.

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41 Criminal Procedure (Reform and Modernisation) Bill 2010 (243–1) (departmental report for the Justice and Electoral Committee) at [203].

42 At [222].

43 At [225].

44 Criminal Procedure (Reform and Modernisation) Bill 2010 (243–2), cl 361(8).

45 CPA, s 364(1).

[36] When Parliament enacted s 364 it would of course have been aware of the CCCA regime, which operates to compensate the cost of defending criminal proceedings where appropriate: s 364(9) provides that s 364 does not limit or affect the CCCA. A court may legitimately take into account, when making an order under the CCCA, the extent of any recovery under s 364. It would not, for example, be just and reasonable to make an award under the CCCA which resulted in over-recovery of costs, because of an earlier award under the CPA.

[37] While all this is tempered by the fact that costs under the CCCA are unlikely to be available where the proceedings have not yet been finally determined, whereas the CPA is not limited thus, we agree with the Judge that other factors point away from an interpretation that the two provisions complement one another for compensation purposes.[46]

[38] The only preconditions for the making of an order under s 364 are that the court is satisfied that the procedural failure is significant and there is no reasonable excuse for the failure.[47]

[39] The ultimate merits of the trial or the defendant's responsibility for the offending are not listed as relevant to the making of the costs award.[48] Rather, the sum awarded must be no more that is just and reasonable in light of the costs incurred by the court, victims, witnesses and any other person.[49] While we accept that s 364 does contemplate awards having some potential compensatory effect, and that the extent of any wasted costs is a mandatory relevant consideration, other factors will also weigh in the setting of just and reasonable costs.

[40] Where a failure has led to significant costs being incurred by other parties, a larger award may be appropriate.[50] Equally, where a failure has not resulted in costs

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46 Costs decision, above n 2, at [86].

47 CPA, s 364(2).

48 Indeed, an order may be made at any stage before the conclusion of the prosecution against the defendant or the prosecuting agency regardless of the eventual outcome and may be made multiple times against the same party if necessary: s 364(6) and (7). This may be contrasted with the discretion to make an award under the CCCA, which is explicitly linked to the outcome of the proceedings: CCCA, ss 5 and 6.

49 CPA, s 364(3).

50 Costs decision, above n 2, at [89].

being incurred, this may reduce the amount that is "just and reasonable" in the circumstances. But in contrast to the CCCA regime, compensation is not the sole or even primary focus of any award. This is apparent in the language of s 364.

[41] That the focus of the provision is not compensatory is made clearer still by the fact that neither the prosecutor nor defendant are expressly named in the list of those whose costs may be taken into account under s 364(3). Although we do not doubt that the prosecutor and defendant are captured within the catch all "any other person", their absence from the list is telling of the purpose of the provision. This may be compared to the discretion to an award under s 5 CCCA, which is expressly referable to the defendant.

[42] Further evidence that compensation is not the focus of the s 364 jurisdiction is that absent an order under s 364(8) that the costs be paid to a person connected with the prosecution, the costs are to be paid to the court — that is the default position.

[43] This interpretation is supported by the High Court's only other substantive examination of s 364, *McLean v Auckland District Court*.[51] Lang J considered it "obvious" that s 364 was intended to increase the criminal justice system's efficiency and effectiveness.[52] The power to award costs was not contingent upon actual costs being incurred, although any order would be reduced if no costs had been incurred.[53] However, no such orders were made in that instance, as the Court considered that the procedural failures were not "significant" for the purposes of s 364(2).[54]

[44] We conclude that the primary purpose of s 364 is penal, for non-compliance, rather than compensatory. As s 364(3) makes plain, wasted costs of the courts, victims, witnesses and parties will be relevant to fixing the award of costs. In determining what is a just and reasonable award, the court will have regard to all relevant factors, including the extent of non-compliance, its effect on the administration of justice and also upon the participants in the proceeding. Just what weight will be given to these various factors will depend upon the particular circumstances of the case assessed

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51 *McLean v Auckland District Court* [2018] NZHC 552, [2018] NZAR 684.
52 At [8].
53 At [12]–[13].
54 At [40] and [48].

against the purpose of incentivising compliance with the parties' procedural obligations.

Issue Three: did the Judge err in determining the quantum of the award under s 364 of the CPA?

[45] It was submitted by Ms Reed that the need to impose a sanction ought not prevent the Court from making an order that meaningfully compensates the party affected by the failure. The Judge therefore erred in allowing s 364's potential to serve a punitive purpose to drive the determination of quantum. Rather, the appropriate quantum ought to have been determined by reference to what is a just and reasonable sum in light of the costs incurred. This required consideration of the significance of the breach, the significance of the resulting wasted costs, the carelessness involved, the need for deterrence, the fact that the FMA had the means to pay such an award, the civil costs scale and the need for overall fairness. In light of these factors, a more significant award was warranted.

[46] Furthermore, Ms Reed submitted that the Judge erred in his treatment of the impact upon Mr Bublitz of the Crown's breach, having rejected the argument that Mr Bublitz would be unable to secure counsel of his choice at the retrial.[55] Ms Reed would not act for him on that basis, and other counsel he had approached had turned him down. By the time of the appeal, Mr Bublitz's retrial was under way in the High Court. Further evidence was adduced to the effect that Mr Bublitz had been able to secure services of counsel through legal aid at a higher charge out rate than normal.

[47] Mr Horsley submitted that what will be relevant to quantum must be decided with respect to each case, rather than there being particular mandatory relevant factors. Section 364(3) sets an upper limit to the costs order that can be made but does not require that the costs will equal the costs incurred. The relevant circumstances can be enumerated as the Judge did. Neither the civil costs scale nor the costs scale under the Costs in Criminal Cases Regulations 1987 are relevant factors or points of comparison, because they are aimed at providing some measure of compensation for

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55 Costs decision, above n 2, at [125].

litigants, not sanctioning procedural failures. The Judge therefore made no error of principle when setting the costs order at $50,000.

Discussion

[48] We consider that, in the circumstances, Woolford J's award was appropriate. While having a primarily punitive purpose, the assessment of quantum under s 364 requires consideration of both the nature and seriousness of the breach and the consequences for the other parties, as mandated by s 364(3). The expression "just and reasonable" emphasises that there is flexibility to respond to the justice of the particular case, the ultimate question being whether the sanction provides an appropriate incentive to ensure future compliance both in the instant proceeding and more generally. The court must then decide under subs (8) whether some or all of the sanction should be paid to affected parties connected with the prosecution.

[49] We are satisfied that the Judge had regard to the significance of the breach, the significance of the resulting wasted costs, the carelessness involved, the need for deterrence, the fact that the FMA had the means to pay such an award and the need for overall fairness. The civil costs scale we do not consider relevant to quantum under s 364. We do not consider that the Judge made any error of principle in his consideration of these issues. It is true that this Court might have made a more substantial order, given the scale of the FMA's neglect and to reflect the fact that, at the time of hearing, it appeared that Mr Bublitz would be unable to be represented by his preferred counsel at his retrial.

[50] The question for this Court is whether, in fixing the quantum under s 364 (a discretionary decision), the Judge erred in law, took account of irrelevant considerations, failed to take account of a relevant consideration or was plainly wrong. At the end of the day we are not persuaded the Judge erred in principle in setting a more modest sanction, and that is the end of the matter. Whether or not an award equal to the actual costs incurred could ever be warranted as the appropriate punitive response to ensure a fair trial is best left for a case where the issue is determinative.

Issue Four: did the Judge err in determining the quantum of the award under s 5 CCCA?

[51] We can deal with Mr Morrison's appeal relatively briefly. Both parties agreed that s 5 of the CCCA involves the exercise of a statutory discretion, so we do not consider that point further.

[52] Mr O'Leary submitted first, the Judge erred in adopting a "proof of innocence" test when he had declared a mistrial before Mr Morrison could open and prove his defence. Secondly, the Judge erred in failing to consider Mr Morrison's affidavit evidence of his innocence in his affidavit supporting the application for costs, and in taking into consideration a Crown memorandum outlining the evidence against Mr Morrison as tending to prove his supposed knowledge when determining the quantum of the award. Given these errors, the Judge's award was not "just and reasonable".

[53] Mr Horsley submitted that absence of cross-examination does not equate to acceptance of evidence. In this instance Mr Morrison's affidavit was not accepted by the Judge. It did not respond to many inferences the Crown suggested ought to be drawn from the evidence. In all the circumstances, the Judge was entitled to and able to draw his own conclusion about Mr Morrison's innocence. There was a logical inconsistency in Mr Morrison's submission that he both had no opportunity to establish innocence and that the Judge did not accept his affidavit in which he attempted to establish his innocence.

Discussion

[54] We consider it inherent in s 5(2) that the merits of the Crown (and by association, defence) case are relevant to the assessment of whether costs should be awarded under s 5 of the CCCA.

[55] We also think the Judge's assessment of Mr Morrison's position has been rather mischaracterised by counsel. The Judge took s 5(2)(b), (e) and (f) together and noted three things. First, the Crown memorandum as raising a case to be answered as to Mr Morrison's culpability. Secondly, that at no point did Mr Morrison seek a

discharge on the basis of evidential insufficiency. Thirdly, that none of the seven charges against him were dismissed on their merits, and that two had been the subject of a failed application by Mr Bublitz which in part at least was adverse to non-culpability by Mr Morrison.[56] Inherent in the Judge's reasoning is an assessment that there was sufficient evidence to convict absent evidence from the defence, that the charges were dismissed on technical rather than merits grounds and that the charges were not dismissed because Mr Morrison had established that he was not guilty. In other words, all three were hurdles Mr Morrison could not say he had cleared. The affidavit he tendered did not respond in any detail to the Crown memorandum demonstrating a basis to infer knowledge of related party transactions, but confined itself to broad-brush denials.

[56] The Judge was entitled to make his own assessment of these matters,[57] and we are not persuaded the Judge erred in exercising the discretion conferred by s 5(1) in determining that a $75,000 award was appropriate.

Issue Five: did the Judge err in failing to make a costs award following the successful costs application?

[57] Mr O'Leary submitted that the Judge did not expressly respond to Mr Morrison's separate application for costs in relation to his successful costs application. The normal rule that "costs follow the event" should apply in this case and Mr Morrison should have been awarded appropriate costs in relation to his successful costs application.

[58] We are however persuaded by Mr Horsley's submission that there was no demonstrable error by the Judge. Mr Morrison was not entitled to costs as of right,[58] and did not provide evidence of costs incurred on the costs application. The Judge was entitled to consider that the costs ought to lie where they fell.

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56 At [51]–[54].

57 Per *Reid v R* [2007] NZSC 90, [2008] 1 NZLR 575 at [21], an appellate court cannot overturn a decision because they would weigh discretionary factors differently.

58 There is no provision in the CCCA itself for costs to be awarded on a successful application for costs, and the power to do so under s 162 of the Senior Courts Act is discretionary.

Result

[59] Mr Bublitz's appeal is dismissed.

[60] Mr Morrison's appeal is dismissed.

[61] There is no order made as to costs.

Solicitors:
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Crown Law Office, Wellington for Respondent