IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-1793
[2022] NZHC 1060

UNDER	Judicial Review Procedure Act 2016, Habeas Corpus Act 2001 and Declaratory Judgments Act 1908
BETWEEN	DERMOT GREGORY NOTTINGHAM and ROBERT EARLE MCKINNEY Applicants
AND	ATTORNEY-GENERAL Respondent

Hearing: On the papers

Counsel: Applicants in person
S Kinsler and M Clarke-Parker for Respondent

Judgment: 16 May 2022

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Monday, 16 May 2022 at 12:15 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors: Meredith Connell (Office of the Crown Solicitor)

Copy to: Applicants

[1] On 9 March 2022 I gave judgment striking out three proceedings brought by the plaintiffs.[1] The Attorney-General now applies for costs.

Background facts

[2] The plaintiffs applied for judicial review, declaratory orders, and a writ of habeas corpus. Each proceeding was a challenge to the Government's actions taken in response to the COVID-19 pandemic. They were case managed together.

[3] The judicial review proceeding sought orders striking down the COVID-19 (Public Health Response) Act 2020 and related legislation, as well as orders that the Government repay loans, compensate those impacted by lockdowns and vaccination, and that the Prime Minister apologise. I found the Court had no jurisdiction to grant these orders.[2]

[4] The declaratory orders sought were a declaration that s 10 of the New Zealand Bill of Rights Act 1990 is a non-derogable right, and other orders necessary to enforce this. I found the terms of the orders sought were too broad and vague, and s 10, which relates to medical experimentation, was not engaged.[3]

[5] The plaintiffs had already unsuccessfully applied for habeas corpus. On appeal from that decision the Court of Appeal found they were not detained in the sense intended by the Habeas Corpus Act 2001.[4] I found I was bound by that decision.[5] I also noted it appeared the plaintiffs were using the habeas corpus procedure as a means of obtaining a priority fixture for their other proceedings.[6]

Defendant's submissions

[6] The Attorney-General submits 2B costs are appropriate, under r 14.8(1)(a) of the High Court Rules 2016 (Rules), which provides that costs on opposed interlocutory

---

1 *Nottingham v Attorney-General* [2022] NZHC 405.
2 At [28].
3 At [34]–[35].
4 *Nottingham v Ardern* [2020] NZCA 144, [2020] 2 NZLR 207 at [25].
5 *Nottingham v Attorney-General*, above n 1, at [37].
6 At [37].

applications must be fixed in accordance with the Rules when the application is determined. The Attorney-General applies for costs as follows:

Costs on a 2B basis (per day)		**$2,390.00**
1	Commencement of defence by defendant (judicial review proceeding)	$4,780.00
1	Commencement of defence by defendant (declaratory orders proceeding)	$4,780.00
1	Commencement of defence by defendant (habeas corpus proceeding)	$4,780.00
11	Filing memorandum for first or subsequent case management conference or mentions hearing (memo of 2 November 2021)	$956.00
11	Filing memorandum for first or subsequent case management conference or mentions hearing (memo of 29 November 2021)	$956.00
13	Appearance at first or subsequent case management conference (27 October 2021 before Walker J)	$717.00
13	Appearance at first or subsequent case management conference (3 November 2021 before Woolford J)	$717.00
13	Appearance at first or subsequent case management conference (1 December 2021 before Peters J)	$717.00
22	Filing interlocutory application (12 November 2021)	$1,434.00
23	Filing opposition to interlocutory application (8 November 2021 – submissions on priority fixture)	$1,434.00
24	Preparation of written submissions for interlocutory application (3 February 2021)	$3,585.00
25	Preparation by applicant of bundle for hearing	$1,434.00
26	Appearance at hearing of defended application for sole or principal counsel	$2,390.00
	Total costs (12 days)	**$28,680.00**

[7] The Attorney-General also claims as disbursements the filing fees for three statements of defence, that is, one for each of the plaintiffs' applications ($110.00 each); filing fees for its interlocutory application for strike-out ($500.00); and the hearing fee ($640.00). The disbursements claimed total $1,470.00.

[8] In total, the Attorney-General claims $30,150.00 in costs and disbursements.

[9] The Attorney-General notes Mr Nottingham is an undischarged bankrupt, but submits financial hardship is no answer to a claim for a costs award, particularly where the case lacks merit.[7]

[10] The Attorney-General also anticipates two arguments against costs.

[11] Firstly, costs may be reduced on proceedings that concern a matter of public interest, where the party opposing costs acted reasonably in the conduct of the proceeding.[8] The Attorney-General submits the public interest in the proceedings was minimal, as, in my words, the proceedings disclosed no reasonably arguable cause of action.[9] In addition, the plaintiffs did not act reasonably as they sought remedies beyond the jurisdiction of the Court and attempted to relitigate an issue that had already been determined.

[12] Secondly, that costs are awarded on habeas corpus applications only in "exceptional circumstances".[10] The Attorney-General submits the habeas corpus application was abusive, and in no meaningful sense a habeas corpus application. He refers to *AN v Counties Manukau District Health Board*, in which costs were awarded against an applicant who had the ability to appeal the relevant decision, but instead pursued a habeas corpus application despite being advised it would be futile.[11]

Plaintiffs' submissions

[13] The plaintiffs submit costs should not be awarded as the judgment was wrongly decided, that I should have recused myself, and that, having determined the proceedings, I am functus officio and cannot determine costs.

[14] Briefly, the plaintiffs repeat many of their submissions on the substantive judgment, and submit I wrongly described their submissions as "unintelligible", relied

---

7 *Foni v Foliaki* [2018] NZHC 3126 at [5].
8 High Court Rules 2016, r 14.7(e).
9 *Nottingham v Attorney-General*, above n 1, at [40].
10 *Manuel v Superintendent, Hawkes Bay Regional Prison* [2006] 2 NZLR 63 (CA).
11 *AN v Counties Manukau District Health Board* [2016] NZCA 226, [2016] NZFLR 468.

on precedent, particularly in relation to the purpose of the Habeas Corpus Act, instead of coming to my own conclusions, and made incorrect findings on the burden of proof. They also add that I was likely biased, as I am a former partner at the law firm acting for the Attorney-General.

[15] Secondly, I did not award costs in my judgment of 9 March 2022. The plaintiffs submit I am functus officio and cannot now return to the proceedings to award costs.

Discussion

[16] I am unable to address the plaintiffs' arguments about the merits of the decision on an application for costs. My judgment on costs must assume the substantive judgment is correct. Its merits are no longer in dispute.[12] If the plaintiffs wish to challenge the merits of that judgment, the correct procedure is to appeal it.

[17] While I made no order for costs in my judgment of 9 March 2022, this does not preclude an application for costs now, in line with the general principle that costs follow the event.[13]

[18] The subject matter of the hearing; the COVID-19 lockdown and vaccination orders, was clearly of public interest. As the Attorney-General submits, the specifics of the applications were of lesser public interest, as they sought orders the Court was unable to grant, re-litigated an issue already decided by the Court of Appeal, and, in the case of the application for declaratory orders, did not relate to any specific vaccination mandate as the application was filed before any such mandate was implemented.

[19] The plaintiffs did not act reasonably by attempting to relitigate the habeas corpus proceeding. Nor was it reasonable to seek orders outside the jurisdiction of the Court. However, I accept the plaintiffs acted in good faith and in the belief their applications were reasonable.

---

12 *Stokes v Prain* [2021] NZCA 683 at [13].
13 *Dowden v Commissioner of Inland Revenue* [2021] NZCA 206 at [3].

[20] In any event, there is an additional requirement for reduced costs on matters of public interest; the application must have some merit.[14] I found the plaintiffs' applications unmeritorious. Therefore, an order for reduced costs under r 14.7(e) is not appropriate.

[21] I agree with the Attorney-General's submission that the general rule on costs on habeas corpus applications does not apply. In *Manuel v Superintendent, Hawkes Bay Regional Prison*, the Court of Appeal explained that "money barriers should not be placed on that avenue of freedom".[15] The plaintiffs were not making a bid for freedom from prison; they were not detained.

[22] Finally, I accept the Attorney-General's submission that financial hardship is no barrier to an award of costs. However, I note the observation of Muir J that:[16]

> … the Court may fairly look to the Crown to adopt a responsible position in relation to recovery, mindful of the context in which the costs application is made.

Result

[23] Costs and disbursements are payable by the plaintiffs to the Attorney-General totalling $30,150.

Woolford J

---

14 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2013] NZCA 555 at [11].
15 *Manuel*, above n 10, at [34].
16 *HA v Refugee and Protection Officer* [2018] NZHC 1011 at [16].