IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2018-404-1501
[2019] NZHC 2828

BETWEEN	MALCOLM BRUCE MONCRIEF-SPITTLE First applicant
	DAVID CUMIN Second applicant
AND	REGIONAL FACILITIES AUCKLAND LIMITED First respondent
	AUCKLAND COUNCIL Second respondent
	PHILIP BRUCE GOFF Third respondent

Hearing:	On the papers
Appearances:	J E Hodder QC, J K Grimmer and T Nelson for the Applicants K Anderson and K E Morrison for the Respondents
Judgment:	1 November 2019

JUDGMENT OF JAGOSE J
[Costs]

The judgment was delivered by me on 1 November 2019 at 3.30pm.
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Counsel/Solicitors:
J E Hodder QC, Wellington
J K Grimmer Barrister, Auckland
T Nelson Barrister, Auckland
K Anderson Barrister, Auckland
K E Morrison, Anthony Harper, Auckland

[1] My judgment of 30 September 2019 reserved costs, while observing:[1]

> In my preliminary view, as the successful parties, the respondents are entitled to 2B costs and disbursements. That is because, from what I presently know of it, nothing in the steps taken by them in this averagely complex proceeding required other than a normal amount of time. If costs have not been ordered on the withdrawn interim orders application, I would increase the costs otherwise payable on those exclusive steps by 30 per cent as unnecessary on the application's withdrawal.

[2] The respondents seek 2B costs calculated in the amount of $46,532 – with a 30 per cent uplift for their opposition to the later withdrawn application for interim orders, their production of a list of documents on discovery on (and their application to strike out) subsequently discontinued causes of action, bringing the calculation to $49,007.30 – plus disbursements of filing fees in the amount of $940.

[3] The applicants respond I should refuse to make an order of costs, or reduce costs otherwise payable, on grounds "the proceeding concerned a matter of public interest, and the party opposing costs acted reasonably in the conduct of the proceeding".[2] They say the proceeding raised "novel and untested questions of public importance, relating to fundamental rights and freedoms under NZBoRA and at common law", and "important and novel questions relating to the reviewability of local government bodies, especially council-controlled organisations".

[4] I disagree in both respects, principally because:

(a) questions relating to fundamental rights and freedoms only were raised "to imbue [RFAL's] decision with the values [the applicants] espouse";[3]and

(b) nothing in the composition of council-controlled organisations required other than orthodox application of well-understood judicial review principle.[4]

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1 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2019] NZHC 2399 at [69] (footnotes omitted).
2 High Court Rules 2016 ("HCR"), r 14.7(e).
3 *Moncrief-Spittle v Regional Facilities Auckland Ltd*, above n 1, at [65].
4 At [39].

[5] Consistently with my conclusions RFAL exercised no public power in deciding to cancel the event – or public function, power or duty in cancelling the event – the proceeding did not concern any matter of public interest.[5] The applicants' self-interest, although not disqualifying in itself, here lacked the 'watchdog' quality informing public interest considerations on costs,[6] and constituted "something of a crusade" to inject the subject matter of that self-interest into RFAL's decision-making.[7]

[6] I therefore turn to the respondents' sought uplifts. The applicants say withdrawal of the interim application was necessary in the urgent circumstances in which it was set down for hearing, based on the information then known to them "(including Mayor Goff's public statements)", when it became "infeasible" for them to reply in that very constrained timeframe to opposition of "the size and scope of the Respondents' affidavits". (By "them", I include the original first plaintiff, Axiomatic Media Pty Limited.)

[7] Contrary to my preliminary view, I accept withdrawal of an interlocutory application for an injunction – in circumstances of new information becoming available, to which contest could not reasonably be raised in the timeframe available (if at all) – is responsible and should not attract any uplift. It cannot be said the applicants "contributed unnecessarily to the time or expense of the proceeding" in the face of such new information.[8] Their issuance of the application, absent the new information, was not "taking or pursuing an unnecessary step".[9] Neither, given the circumstances of the new information, was its withdrawal. *Persistence* in the face of such new information instead may have attracted increased costs, if unsuccessful.

[8] The respondents additionally seek increased costs on their provision of discovery, by reason of the original and amended claims' inclusion of contractual and

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5 At [46] and [51].

6 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2013] NZCA 555 at [13], citing *Ratepayers and Residents Action Assoc Inc v Auckland City Council* [1986] 1 NZLR 746 (CA).

7 At [14], citing *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 2297, [2013] 1 NZLR 75 at [47]. The original first plaintiff, Axiomatic Media Pty Limited, advised it had "the assistance of the Free Speech Coalition … to be able to participate in this proceeding", but there is no evidence that entity acted through the applicants after Axiomatic's withdrawal. Neither is there evidence of what role it may fulfil.

8 HCR, r 14.6(3)(b).

9 Rule 14.6(3)(b)(ii).

Fair Trading Act causes of action (not maintained in the third amended claim for my determination), and on their application to stay or strike out those causes respectively as being precluded by an alternative dispute resolution provision or legally untenable.

[9] I might allow, had the respondents been successful on their stay and strike out applications, such success established these causes were 'taken or pursued unnecessarily or lacked merit', thus 'contributing unnecessarily to the time and expense of the proceeding', justifying increased costs on associated steps.[10] But I am not prepared to make that assumption on an undetermined application.

[10] I therefore order the applicants pay the respondents costs in the amount of $46,532, plus disbursements in the amount of $940.

—Jagose J

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[10] Rule 14.6(3).