IN THE COURT OF APPEAL OF NEW ZEALAND

CA95/05

	BETWEEN	KEITH HUGH NICOLAS BERRYMAN First Appellant
	AND	MARGARET BERRYMAN Second Appellant
	AND	THE NEW ZEALAND DEFENCE FORCE Respondent

Hearing: 27 June 2006

Court: Hammond, Chambers and O'Regan JJ

Counsel: E G Strachan for Appellants
H S Hancock and J R Burns for Respondent

Judgment: 13 July 2006

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The first and second appellants are jointly and severally liable to pay to the respondent, as costs on this appeal, $750 plus usual disbursements.

REASONS OF THE COURT

(Given by Hammond J)

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Introduction

[1] We have before us an appeal against a costs judgment of Wild J delivered on 11 May 2005 (HC WN CIV-2003-485-1041). Mr and Mrs Berryman were ordered to pay to the New Zealand Defence Force legal costs in a sum of $7,975, together with disbursements of $973.40 (a total of $8,948.40), in respect of an unsuccessful interlocutory application for non-party discovery. The application arose in the course of a proceeding for judicial review.

Background

[2] In 1994 Mr and Mrs Berryman were farming on Te Rata Station, near Taumarunui.

[3] Access to their property was across a bridge over a deep gorge. This bridge had been designed and built by the New Zealand Defence Force (Army) Engineering Corps in 1986, as a training project, to replace a previous bridge which had collapsed.

[4] Mr J K Richards, a bee-keeper, died on 22 March 1994 when this bridge collapsed as he was driving his truck across it, and his vehicle plummeted some 30 metres into the river below.

[5] An inquest was held by the Coroner at Taumarunui. By a decision delivered on 20 June 1997, the Coroner determined that Mr and Mrs Berryman were substantially responsible for Mr Richards' death, through their failure to inspect and appropriately maintain the bridge.

[6] In September of 1994 the Army had convened a Court of Inquiry into this incident. That court produced a report dated 29 September 1994. Even though the report contained some findings adverse to the Army, the Army did not disclose it to the Coroner at the time of the Coroner's inquest. It was considered that it did not fall within the grounds of the Official Information Act 1982.

[7] When Mr and Mrs Berryman learned of the existence of this report, they sought to have the inquest reopened. Their solicitor wrote to the Solicitor-General in July 2001 inviting him to exercise certain powers under s 38(2) and s 40 of the Coroners Act 1998 to bring about a further inquest into Mr Richards' death. On November 2001 the Solicitor-General declined to exercise those powers.

[8] In May 2003 Mr and Mrs Berryman commenced proceedings for a judicial review under the Judicature Amendment Act 1972 against "Her Majesty's Solicitor-General for New Zealand" and the Coroner. To put it simply, the review sought to require the Solicitor-General to take the necessary steps to order the Coroner to hold a new inquest.

[9] Various causes of action were pleaded, with wide-ranging allegations. For present purposes it suffices to note that Mr and Mrs Berryman were seeking to obtain through this judicial review proceeding what they had not been able to obtain through a re-opening of the issue by the Solicitor-General: viz, that at a new or revisited coronial inquest, they should be enabled to contend that it was the Army which was at fault in relation to Mr Richards' death, and not them.

The Berrymans make an application for non-party discovery

[10] Mr and Mrs Berryman were of the view that (amongst other things) a report by a Mr Butcher ("the Butcher report"), which had been prepared for the Army

inquiry, might well assist them to further their objective. But they did not have a copy of it. Accordingly, by an interlocutory application dated 8 October 2003, Mr and Mrs Berryman sought non-party discovery from the New Zealand Defence Force of this material.

[11] The parties endeavoured to avoid the necessity for a judicial determination of this issue. They reached an agreement about discovery in a document dated 2 February 2004, which relevantly provided as follows:

> 6. Without either the prior written approval of counsel for the NZDF or Court order, the plaintiffs and their solicitors shall not disclose the contents of the above documents to, or discuss the content of those documents with, any other party not a party to this proceeding.
>
> 7. The above documents shall not be admitted as evidence in any proceeding, judicial or otherwise (r 158 of the Armed Forces Discipline Rules of Procedure 1983). For the avoidance of doubt, this prohibition applies to these judicial review proceedings.
>
> 8. Should there be any breach of these orders then the NZDF shall be at liberty to proceed against the plaintiffs in any manner it thinks fit, including for contempt of court.

This document was described as a "consent memorandum", although it was never the subject of a court order.

[12] Notwithstanding that memorandum, Mr and Mrs Berryman filed a formal application for non-party discovery of documents.

The application for non-party discovery fails

[13] Ultimately, in a judgment of 18 February 2005, Wild J held (reviewing a decision given earlier on this issue by Associate Judge Gendall) that Mr and Mrs Berryman were not entitled to discovery of the "Butcher report". The Judge reached this conclusion on the basis that the Solicitor-General had not been sued in a "Crown" capacity, meaning the Crown was not a party to the proceedings for the purposes of the Crown Proceedings Act 1950. The Judge also held that discovery was unnecessary as the Berrymans' solicitor already had the "Butcher report" according to the terms of the consent memorandum. Further, rules 158 and 159 of

the Armed Forces Discipline Rules of Procedure 1983 applied, with the consequence that the "Butcher report" was inadmissible in evidence. In particular, rule 159 provides that the materials could not be disclosed without authority from a superior Commander of the Army. Such authority had not been forthcoming.

The New Zealand Defence Force applies for costs

[14] Subsequently, the application for judicial review was discontinued. The New Zealand Defence Force then applied to the High Court for costs in respect of the application for non-party discovery. Costs were not sought on an indemnity basis, but on what is usually referred to as a 2B basis.

[15] The Judge recorded Mr Hancock for the Army as having submitted that there had been an important issue in the case relating to the status of evidence given before Army courts of inquiry. Mr Hancock further argued that the consent memorandum of 2 February 2004 was a reasonable and sensible discovery resolution of the opposing parties' interests. It was accepted as such by Mr and Mrs Berryman at the time. But, as a result of Mr and Mrs Berryman wishing to go beyond the consent memorandum, the Defence Force had been put to additional and unnecessary expense.

The costs order is opposed

[16] The thrust of Mr Moodie's submissions before the High Court was that the Court was entitled to take into account matters which had brought the proceeding about (*Voyce v Laurie* [1952] NZLR 984 (SC)); and that there had been misconduct on the part of the Army which should not lead to an order of costs in its favour. It was said that the Army did nothing to bring its faulty construction to the attention of the Coroner at the inquest; and that it exacerbated that omission (when it was indicated the Coroner might well make adverse findings against the Army), thereby misleading that Court.

[17] The submission was put in very strong terms. Mr Moodie said that the New Zealand Defence Force should not be rewarded by an award of costs against "the very persons who have been the victims of the Army's incompetent, duplicitous and dishonest conduct".

The costs application is dismissed

[18] Wild J dismissed the application for costs on this interlocutory proceeding. The Judge held that, on the usual principles which apply to costs, the New Zealand Defence Force should have costs, unless "the [Army's] conduct somehow debars it" (at [39]). The Judge held that the Army's conduct did not render inappropriate the application of usual costs principles.

The appeal

[19] In this Court, Ms Strachan did not challenge the principle that costs normally follow the event, or the very distinct limitations which constrain an appellate Court from interfering in a discretionary matter of the kind which was before the High Court in this instance.

[20] Rather, she argued that once the High Court Judge had become aware of the "misconduct" of the Army, he ought to have vindicated the administration of justice by penalising the Army. She said that the Judge should have disallowed the New Zealand Defence Force costs on the non-party discovery application. Ms Strachan said this misconduct was "reason enough" to "deviate from the usual principle that costs follow the event in the usual case". She endeavoured to support that proposition by reference to other doctrines in our law, such as s 27 of the New Zealand Bill of Rights Act 1990, and the equitable doctrine of clean hands.

Discussion

[21] Non-party discovery applications are a relatively recent, and beneficial, procedure in our law. The ability to make such an application was introduced

because sometimes litigants were stymied in their proceeding by not being able to "access" documents held by a non-party to the proceeding.

[22] The non-party is, by definition, not part of the litigation. Yet that person may be compelled, in a sense, to "participate" (at least to a limited extent) by producing documents which may be relevant in the proceeding. Effectively, that party has been dragged into the litigation, routinely against his or her will. Hence, the usual rule is that, absent compelling circumstances which will rarely be made out, the non-party should have their costs in order to off-set the expense which has been visited upon him or her.

[23] Moreover, that award of costs is to be assessed in accordance with the modern rules for costs, that is, in the context of each interlocutory proceeding as it progresses, and not "in the air", as it were, of the proceeding at large.

[24] In such a context, the reluctance of reviewing courts to interfere with costs orders must necessarily obtain with even greater than usual force. The Judge, who has close control of the intermittent interlocutory skirmishes which attend on any piece of litigation, is infinitely better placed to come to appropriate decisions than a reviewing court.

[25] The present appeal, like the Berrymans' opposition to the Army's application for costs, is misconceived. The Berrymans sought discovery of a document to which it has been held they had no right. The Army's opposition to having to discover the Butcher report was upheld. The Army's stance with regard to that application having been upheld, it should get costs – particularly in circumstances where the Army is not a party to the litigation. Indeed, the Berrymans were fortunate to escape an order for indemnity costs. The Army's alleged misconduct in relation to other matters was completely irrelevant, even if established. A costs application on non-party discovery is not the occasion for "punishing" the Army for alleged negligence in the construction of the Berrymans' bridge or for its alleged misconduct before the Coroner. Indeed, had Wild J taken into account such extraneous considerations when determining costs on the non-party discovery application, we would have been

bound to correct him on appeal, as that would have been an erroneous application of costs principles. But, of course, the Judge did not fall into that error.

[26] The Judge's decision on costs was correct. Ms Strachan's submissions advocated a course, with respect, which is quite contrary to proper costs principles.

Conclusion

[27] The appeal is dismissed.

[28] The New Zealand Defence Force will have costs of $750 on this appeal; and usual disbursements.

Solicitors:
Moodie & Co, Feilding for Appellants
Crown Law Office, Wellington