

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA55/2020
CA381/2020
[2021] NZCA 61**

BETWEEN FOURTH ESTATE HOLDINGS (2012)
LIMITED
First Appellant

TODD ALLEN SCOTT
Second Appellant

AND STEVEN LEONARD JOYCE
Respondent

Court: Miller, Brown and Goddard JJ

Counsel: P W G Ahern and N A Farrands for First and Second Appellants
Z G Kennedy and H M Jaques for Respondent

Judgment: 12 March 2021 at 10.00 am
(On the papers)

JUDGMENT OF THE COURT

A The application for recall is declined.

B The appellants must pay costs of \$478.00 to the respondent, with usual disbursements.

REASONS OF THE COURT

(Given by Goddard J)

The costs issues raised by the appellants following judgment in the appeal

[1] On 9 October 2020 this Court delivered a judgment in relation to an appeal by the appellants¹ against a decision of the High Court granting a declaration that the appellants were each liable to the respondent, Mr Joyce, in defamation, and awarding solicitor and client costs against the appellants.² This Court also had before it a cross-appeal by Mr Joyce in relation to the High Court substantive judgment (the cross-appeal), and an appeal by the appellants from a separate High Court judgment determining the amount of the solicitor-client costs payable by the appellants to Mr Joyce under s 24 of the Defamation Act 1992 (the costs appeal).³

[2] This Court made orders:

- (a) allowing the appeal;
- (b) setting aside the High Court substantive judgment; and
- (c) ordering that Mr Joyce pay costs to the appellants for a standard appeal on a band A basis with usual disbursements, and certifying for second counsel.

[3] The appellants filed a memorandum dated 23 December 2020 asking this Court to make further costs orders in relation to the cross-appeal filed by Mr Joyce, and the appellants' costs appeal. By memorandum dated 29 January 2021 Mr Joyce opposed the making of any further orders for costs in relation to the cross-appeal and the costs appeal.

¹ *Fourth Estate Holdings (2012) Ltd v Joyce* [2020] NZCA 479 [October 2020 judgment].

² *Joyce v Fourth Estate Holdings (2012) Ltd* [2019] NZHC 3356 [High Court substantive judgment].

³ *Joyce v Fourth Estate Holdings (2012) Ltd* [2020] NZHC 1299 [High Court costs judgment].

[4] We will treat the appellants' memorandum as an application for a recall of this Court's judgment on the basis that the Court overlooked addressing the question of costs in relation to the cross-appeal and the costs appeal.

The High Court proceedings — an overview

[5] Mr Joyce brought proceedings against the first appellant, Fourth Estate Holdings (2012) Ltd (Fourth Estate), and Mr Matthew Hooton in relation to two specific passages in an article written by Mr Hooton and published by Fourth Estate (the passages). Mr Joyce did not claim damages. Rather, he made a claim under s 24 of the Defamation Act for a declaration that the defendants were liable to him in defamation, and for an award of solicitor and client costs.

[6] Mr Hooton settled the claim against him and apologised to Mr Joyce. The claim against him was discontinued. Mr Joyce continued the claim against Fourth Estate. He also added the second respondent, Mr Scott, as a defendant, alleging that three tweets published by Mr Scott had the effect of republishing the article and the defamatory statements in it.

[7] Mr Joyce's claims against Fourth Estate and Mr Scott succeeded in the High Court.⁴ Jagose J considered that the passages did not convey the particular imputations against Mr Joyce that had been pleaded. But the Judge found that they did convey certain other, less injurious, imputations against Mr Joyce: that Mr Joyce was prepared to engage in unethical and otherwise improper behaviour, in pursuit of his (rather than his party's) political objectives.⁵ The Judge concluded that those imputations defamed Mr Joyce.⁶

[8] The Judge also concluded that Mr Scott's tweets conveyed, to those who had previously read the article, that Mr Scott considered the imputations made in the article were true.⁷ Those tweets therefore also defamed Mr Joyce.⁸

⁴ High Court substantive judgment, above n 2.

⁵ At [35].

⁶ At [37].

⁷ At [41]–[43] and [47].

⁸ At [46].

[9] The Judge granted a declaration that Fourth Estate and Mr Scott were each liable to Mr Joyce in defamation. Mr Joyce was awarded solicitor and client costs against each of Fourth Estate and Mr Scott.⁹

The appeal to this Court

[10] Fourth Estate and Mr Scott appealed to this Court. They advanced a number of criticisms of the approach adopted in the High Court judgment. In particular, they argued that it was not open to the Judge to find them liable on the basis of meanings of the passages that differed from the meanings pleaded by Mr Joyce.

[11] There was also a cross-appeal by Mr Joyce. He argued that if the Judge was not entitled to adopt the meanings that he attributed to the passages, then the passages bore the pleaded meanings so were defamatory in any event.

[12] As noted above, this Court also had before it the appellants' costs appeal.

[13] This Court concluded that the passages that Mr Joyce complained about, when read in context, did not convey either the meanings attributed to them by the Judge or the meanings pleaded by Mr Joyce. The appeal succeeded on the ground that the passages did not convey the relevant defamatory imputations.¹⁰ In those circumstances, it was not necessary to determine the other issues raised by the appellants in support of their appeal. Nor was it necessary to determine the costs appeal.

Appellants' application in relation to costs of cross-appeal and costs appeal

[14] The appellants say that they were successful on the cross-appeal. This Court rejected Mr Joyce's argument that the passages bore the pleaded meanings, so were defamatory in any event.

⁹ At [53].

¹⁰ October 2020 judgment, above n 1, at [68].

[15] The appellants also say that although this Court was not required to determine the costs appeal, they incurred costs in connection with that appeal, and the October 2020 judgment contained observations that were supportive of their argument on the costs appeal.

[16] They say they should receive a further set of costs in respect of each of the cross-appeal and the costs appeal.

Mr Joyce's submissions

[17] Mr Joyce's primary position is that costs have already been determined by the October 2020 judgment. Under that judgment the appellants are entitled to one set of costs and disbursements in relation to the appeal. They are not entitled to apply for any further award of costs.

[18] Mr Joyce says that in any event, the appellants are not entitled to claim additional costs and disbursements relating to the cross-appeal or the costs appeal.

[19] In relation to the cross-appeal, he submits that:

- (a) It was not necessary for this Court to determine the cross-appeal.
- (b) There was significant overlap between the appeal and cross-appeal. Although submissions were filed by each party on the cross-appeal, they overlapped with the submissions filed on the appeal. The appeal and cross-appeal were heard together. The majority of the hearing time was spent addressing the question of the meaning of the passages.

[20] In relation to the costs appeal, he submits that:

- (a) The question whether this Court retains a discretion when considering costs under s 24 of the Defamation Act was raised by the appeal. This Court's observations on that point relate to the appeal, rather than the issues of quantum raised by the costs appeal.

- (b) This Court did not determine the quantum issues raised by the costs appeal. There was no “event” that would trigger a presumption that an award of costs should be made to follow that event.
- (c) It would not be appropriate to award further costs in respect of the costs appeal. The costs appeal was consolidated with the appeal and was heard at the same time. The additional costs incurred in filing a separate appeal from the High Court costs judgment were the result of an oversight on the part of the appellants’ lawyers: they had failed to file an amended notice of appeal in respect of the substantive appeal, addressing the issue of quantum of costs, within the time for filing an appeal as of right from the High Court costs judgment.

Decision

[21] The appellants are right to say that the cross-appeal was unsuccessful. But we do not consider that this justifies a separate award of costs in respect of the cross-appeal. This was in reality a single appeal from the High Court decision, which focused on the meaning of the two passages. The issues raised by the appeal and cross-appeal were closely related. The specific issues raised by the cross-appeal could have been raised in a notice of intention to support the High Court judgment on other grounds: Mr Joyce was not seeking relief that differed from the relief awarded in the High Court. In those circumstances, a cross-appeal was not necessary.

[22] The approach the Court took in determining the appeal — which was to ask what meaning the passages were capable of bearing — resolved both the appeal and the cross-appeal.

[23] Unsurprisingly, in those circumstances, when counsel were asked at the hearing about costs sought in this Court, neither counsel for the appellants nor counsel for the respondent raised the possibility of separate awards of costs on each of the appeal and cross-appeal. Counsel for the appellants expressly confirmed that costs were sought on the basis of a standard appeal on a band A basis, with an allowance for second counsel. They did not seek a further award of costs in respect

of the cross-appeal, or an increase in the costs awarded on the appeal, in the event that the appeal was successful.

[24] In these circumstances, we do not consider that it would be reasonable for any additional costs to be awarded to the appellants in respect of the cross-appeal.

Costs appeal

[25] This Court did not need to consider and determine the costs appeal. Because the appeal was successful, the award of costs to Mr Joyce was set aside and the costs appeal (which was concerned with the quantum of those costs) fell away. We accept Mr Joyce's submission that in these circumstances, there was no "event" giving rise to a presumption that costs would be awarded to follow that event.

[26] Nor do we consider that the additional time and cost involved in pursuing the costs appeal justifies any further award of costs to the appellants in circumstances where the costs appeal was not ultimately determined. The need to file a separate notice of appeal was, as the appellants acknowledged, the result of an oversight on the part of their lawyers. The additional cost involved in adding some 50 documents to the existing case on appeal will have been modest. The parties' submissions in relation to the costs appeal were incorporated in their submissions in relation to the appeal and were (appropriately) very brief. Little time was occupied by submissions on costs issues at the hearing before this Court.

[27] The observations made by this Court in relation to awards of costs in claims under s 24 of the Defamation Act addressed questions about relief under s 24 that were raised by the substantive appeal rather than the costs appeal. This Court did not engage with, or determine, the issues of quantum raised by the costs appeal.

[28] In these circumstances, a separate award of costs in relation to the costs appeal is not justified.

Conclusion

[29] For the reasons set out above, we do not consider that any further orders in relation to costs are appropriate. The award of a single set of costs for a standard appeal on a band A basis, with usual disbursements, fairly reflects the confined scope of the issues before this Court, and the time required to prepare for and appear at the hearing of the appeal, cross-appeal and costs appeal.

[30] We therefore decline to recall the October 2020 judgment and decline to make any further orders as to costs.

Costs in respect of this application

[31] Mr Joyce claims costs of \$478.00 in relation to the application to consolidate the appeal and costs appeal, which he says would have been unnecessary but for the appellants' oversight in relation to timely filing of the costs appeal. Mr Joyce also seeks costs incurred in filing his memorandum dated 29 January 2021 opposing the appellants' application for further orders in relation to costs.

[32] No application for costs in relation to the consolidation of the appeals was made on behalf of Mr Joyce at the hearing before us, and it is too late for it to be raised now.

[33] Mr Joyce is entitled to costs in respect of his 29 January 2021 memorandum in relation to the appellants' claim for further costs. We award costs of \$478.00.¹¹

Result

[34] The application for recall is declined.

[35] The appellants must pay costs of \$478.00 to the respondent, with usual disbursements.

Solicitors:
Morrison Kent, Auckland for First and Second Appellants
MinterEllisonRuddWatts, Auckland for Respondent

¹¹ Calculated on the basis of 0.2 days at the daily recovery rate for a standard appeal of \$2,390.