IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA303/2024
[2024] NZCA 423

BETWEEN	GAUTAM JINDAL Applicant
AND	IMRAN MOHAMMED KAMAL First Respondent
	LIQUIDATION MANAGEMENT LIMITED Second Respondent
	KEVIN JOHN DAVIES Third Respondent
	PRINCIPLE INSOLVENCY GP LIMITED Fourth Respondent

Court:	Courtney and Thomas JJ
Counsel:	Applicant in person S J Price, B J Sanders and B A Mathers for First and Second Respondents F E Geiringer and J A Langford for Third and Fourth Respondents
Judgment: (On the papers)	5 September 2024 at 12.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B One set of costs is awarded to both sets of respondents, calculated on a band A basis, together with usual disbursements.

REASONS OF THE COURT

(Given by Thomas J)

[1] The applicant, Gautam Jindal, applies for leave to appeal against a costs decision of Associate Judge Skelton awarding costs in favour of the four respondents who are the defendants in a defamation proceeding brought by Mr Jindal.[1]

[2] The respondents oppose the application for leave.

Background

[3] We gratefully adopt the Judge's background as set out in the security for costs decision.[2]

[4] Mr Jindal is the sole director and shareholder of Orange Capital Ltd (OCL). In 2017, OCL was placed into liquidation.[3]

[5] The first respondent, Imran Kamal, operating through his company, the second respondent, Liquidation Management Ltd, was the first liquidator of OCL.[4] Mr Kamal resigned in August 2021 and was replaced by the third respondent, Kevin Davies, operating through the fourth respondent, Principle Insolvency GP Ltd (Principle Insolvency).[5]

[6] Mr Jindal's key grievance is with a six-monthly report, dated 23 July 2021, prepared by Mr Kamal (and Liquidation Management Ltd) and provided to the Registrar of Companies under the Companies Act 1993 as part of the liquidation process.[6] This report is the basis for his defamation proceedings.[7] Mr Jindal contends that Mr Davies and Principle Insolvency are liable as joint publishers of the defamatory statements in the report.[8] He seeks a separate damages award from each of the two groups of defendants in the defamation proceeding.[9] Each group says its defences are distinct and reflect their respective roles and responsibilities in relation to the report.

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1 *Jindal v Kamal* [2023] NZHC 2990 [costs decision] at [17][18].
2 *Jindal v Kamal* [2023] NZHC 2820 [security for costs decision].
3 At [2].
4 At [3].
5 At [4].
6 At [5].
7 At [6].
8 At [6].
9 At [7].

[7] Following commencement of the proceedings, each defendant group applied for security for costs, supported by separate affidavit evidence.

[8] In what the respondents describe as the "unusually drawn out" case management process which followed, Mr Jindal repeatedly contested timetabling directions and raised multiple additional issues by memoranda requiring responses from the respondents, and resulting in two case management conferences and two further minutes from the Court.

[9] On 26 June 2023, Mr Jindal offered the respondents a total of $30,000 as security, to be paid in three tranches. The offer made no provision for costs to date and was declined by the respondents.

[10] On 9 October 2023, by the security for costs decision, the Judge ordered Mr Jindal to provide security totalling $60,000 (to be paid in three tranches) in respect of all the respondents.[10] The Judge also awarded the respondents costs on a 2B basis plus disbursements, saying there was no reason costs should not follow the event.[11]

The costs decision

[11] The Judge was however required to issue a separate costs decision (the subject of this application) because Mr Jindal did not agree with the respondents' schedule of costs, and the matter was referred back to the Judge.[12] The respondents had filed a joint memorandum with a schedule of costs calculated on a 2B basis, with the two defendant groups each seeking separate costs.

[12] Mr Jindal filed a further memorandum on 24 October 2023, specifying the aspects of the costs schedule he disputed. He contended the costs position should be reversed and he should be awarded 2B costs with a 25 per cent uplift because he had made a *Calderbank* offer which the respondents unreasonably rejected. They had also failed to indicate the quantum of the security sought at an early stage.[13]

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10 At [94].
11 At [95].
12 Costs decision, above n 1, at [2].
13 At [5].

[13] The Judge began the costs decision by discussing the legal principles relevant to costs, noting they were ultimately a matter of the Court's discretion with the overall objective being to achieve an outcome that best meets the interests of justice.[14] He noted that the discretion was qualified by the applicable rules contained in pt 14 of the High Court Rules 2016 (the Rules). The primary principle is that costs follow the event.[15] The Judge then discussed the position where a settlement offer is made, referring to r 14.10 of the Rules.[16] He noted that the party who made an offer may be entitled to costs on steps taken in the proceeding after the offer is made if the amount of the offer exceeds the amount of any judgment obtained by the other party, would have been more beneficial to the other party than the judgment obtained, or is close to the value or benefit of any judgment obtained by the other party.[17] He also noted that the court may refuse or reduce costs otherwise payable if, without reasonable justification, a party fails to accept an offer of settlement under r 14.10, or some other offer to settle or dispose of the proceeding.[18]

[14] The Judge affirmed his decision that the respondents were entitled to costs because Mr Jindal had unsuccessfully opposed their application for security for costs.[19] He noted that the order for security for costs was twice that of Mr Jindal's offer and, in the circumstances, r 14.11 did not apply to reverse the costs decision.[20] He did not consider the respondents acted unreasonably in not accepting the offer. He did not accept Mr Jindal's contention that they failed to indicate the amount of security sought, noting they did so in their submissions nearly two weeks in advance of the hearing.[21]

[15] The Judge then addressed the respondents' schedule of costs and disbursements, observing that it appeared to be in accordance with the Rules and reasonable. He observed that Mr Jindal had not raised any issues with the respondents' calculations of their costs and disbursements, and concluded the respondents were

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14 At [6]–[9].
15 At [6], citing High Court Rules 2016, r 14.2(1)(a).
16 At [7]–[8].
17 At [8], citing High Court Rules, r 14.11(3) and (4).
18 At [9], citing High Court Rules, r 14.7(f)(v).
19 At [12]–[14].
20 At [11]–[12].
21 At [13].

entitled to them accordingly.[22] He awarded the first and second respondents' costs of $11,494 and disbursements in the sum of $500, and the third and fourth respondents' costs of $13,719 and disbursements in the sum of $813.[23]

[16] The Judge made an order pursuant to r 7.48 that, if the costs were not paid within 14 days of the judgment, then the respondents were not required to progress any further steps in the proceeding until the costs were paid.[24]

Leave decision

[17] On 14 November 2023, Mr Jindal filed an application in the High Court seeking reversal, discharge or variation of the costs award, or that the judgment be recalled or, alternatively, that leave to appeal be granted. His applications were declined on 18 April 2024.[25] Mr Jindal now applies to this Court for leave to appeal.

Relevant leave provision

[18] The application is made in reliance on s 56(3) of the Senior Courts Act 2016, which provides that there can be no appeal from a High Court order or decision on an interlocutory application in respect of any civil proceeding unless leave is given by the High Court or, failing that, by this Court.[26]

[19] When considering an application for leave to appeal, the court should be mindful that:[27]

> … we consider leave should not be granted unless the proposed appeal raises some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the appeal. Moreover, leave should not be granted unless the proposed appeal has some reasonable prospect of success.

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22 At [15].
23 At [17]–[18].
24 At [19], citing *Kidd v van Heeran* [2006] 1 NZLR 393 (HC).
25 *Jindal v Kamal* [2024] NZHC 827 [leave decision] at [62]–[64]. The discussion of Mr Jindal's application for leave to appeal can be found at [54]–[61].
26 Senior Courts Act 2016, s 56(5).
27 *Moir v IHC New Zealand Inc* [2018] NZCA 130, (2018) 24 PRNZ 45 at [6], citing *Snee v Snee* (1999) 13 PRNZ 609 (CA) at [15]; and *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413.

[20] In *Greendrake v District Court of New Zealand*, this Court consolidated the relevant factors to be considered in an application for leave to appeal:[28]

(a) a high threshold exists;

(b) the applicant must identify an arguable error of law or fact;

(c) the alleged error should be of general or public importance warranting determination or otherwise of sufficient importance to the applicant to outweigh the lack of general or precedential value;

(d) the circumstances must warrant incurring further delay; and

(e) the ultimate question is whether the interests of justice are served by granting leave.

The application

[21] In his application for leave to appeal, Mr Jindal identified a number of errors he claimed had been made by the Judge, including that the exercise of his discretion in awarding costs lacked objectivity, he did not fairly consider Mr Jindal's submissions, and that Mr Jindal would be prejudiced by what he described as a disproportionate costs award because of the Judge's direction that the respondents were not required to take any further steps until costs were paid. He claimed the wider interests of justice were served by the grant of leave.

[22] The two sets of respondents filed separate oppositions essentially contending that the proposed appeal has no merit, the alleged errors are not arguable and, in any event, are not of general or public importance so as to warrant granting leave in relation to an interlocutory decision.

Submissions

Mr Jindal's submissions

[23] In his submissions, Mr Jindal focuses on two issues which he says have rarely, if ever, been considered by this Court:

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[28] *Greendrake v District Court of New Zealand* [2020] NZCA 122 at [6], citing *Finewood Upholstery Ltd v Vaughan* [2017] NZHC 1679 at [13]; and *Ngai Te Hapu Inc v Bay of Plenty Regional Council* [2018] NZCA 291.

(a) the proper application of r 14.15 of the Rules which mandates that there must be a single set of costs awarded if several defendants defend a proceeding separately and they have a commonality of interests; and

(b) the level of objectivity required in declaring the successful party in a purely financial matter, like security for cost applications, in cases where a *Calderbank* offer is made and the outcome is closer to the *Calderbank* offer.[29]

[24] As to r 14.15, Mr Jindal submits that:

(a) The Judge erred in departing from r 14.15, which is expressed in mandatory terms, without giving good reasons. He says the respondents had the same interests in seeking security, sought the same quantum ($80,000) and could have (but did not) run vastly separate cases. The Judge failed to apprehend their common interests in respect of security for costs (in contrast to their having potentially divergent interests at trial).

(b) The unprincipled and unexplained non-application of r 14.15 and the resultant unreasonable costs liability (350 per cent of "usual scale costs") means this case requires a lower threshold than that applied to other applications for leave to appeal.[30] Otherwise, irreversible unfairness and injustice will result.

(c) The Judge took the opportunity in the leave decision to provide reasons why r 14.15 did not apply but those should have been given in the costs decision which was rushed and not well thought out. This Court should take the opportunity to clarify the proper application of r 14.15.

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29 Rules 14.10 and 14.11 of the High Court Rules govern *Calderbank* offers.
30 Citing *Greendrake v District Court of New Zealand*, above n 28.

(d) Mr Jindal's right to review by an independent tribunal, affirmed by s 27(2) of the New Zealand Bill of Rights Act 1990, is being limited unjustifiably by s 56(3) of the Senior Courts Act.

[25] As to the treatment of the *Calderbank* offer, Mr Jindal submits that:

(a) Determinations of success are "more complex" where both sides "share some measure of success", especially where a *Calderbank* offer comes into play.

(b) The Judge erred in focussing solely on the fact that security for costs obtained by the respondents was twice the value or benefit of Mr Jindal's offer. The Judge should have done justice between the parties, recognised each party's level of success, and adjusted costs on that basis.

[26] Mr Jindal also filed submissions in reply, commenting on r 14.15 and reiterating his contention that the respondents should have cooperated at the interlocutory stage, even if they have different defences in the substantive proceedings.

Respondents' submissions

[27] The respondents filed one set of submissions, saying:

(a) There was no error in the costs decision which represented a straightforward and unremarkable application of the costs regime. It was appropriate to award two sets of scale costs, one to each group, as they faced separate claims with separate defences and required separate representation. The total costs awarded included extra steps necessitated by Mr Jindal's own actions.

(b) Even if it were an error not to specify reasons, this is not an error that would justify a change to the costs decision.

(c) As to the treatment of the *Calderbank* offer, there was no question of mixed success. Mr Jindal's offer was exactly half the amount of the sum awarded. The offer did not exceed the award and was not more beneficial than or close to the value of the judgment for the purposes of r 14.11.

(d) The high threshold for the appeal of an interlocutory costs decision is not met. Mr Jindal has not identified an arguable error of fact or law. The costs decision turns on factors specific to the case and the exercise of the discretion regarding costs.

(e) The issues are not of sufficient importance to the parties to justify the cost and delay of an appeal and nor is it in the interests of justice for leave to be granted.

Analysis

[28] The leave provisions in s 56 of the Senior Courts Act are designed to secure the expeditious completion of the interlocutory stages of a case and so minimise delays in its ultimate disposition. Leave to appeal should be granted only where the significance or implication of an arguable error of fact or law, either for the particular case or for the applicant or as a matter of precedent, warrants the further delay which the appeal process would involve.[31]

[29] We do not accept Mr Jindal's case falls into a category of cases where a lower threshold for leave might be applied. The case referred to by Mr Jindal does not support the application of a lower threshold for leave in respect of s 56(3) but rather concerned the purposive application of s 56(4) to decisions that have the effect of bringing the whole of the proceeding to an end.[32] In that decision, due to the application of s 56(4), leave was not required under s 56(3).[33] That is certainly not the

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[31] See *Meates v Taylor* (1992) 5 PRNZ 524 (CA) at 526, discussing s 24G of the Judicature Act 1908, the predecessor to the Senior Courts Act. Similar principles were confirmed to apply to applications under s 56(5) in *Ngai Te Hapu Inc v Bay of Plenty Regional Council*, above n 28, at [16]–[17].

[32] *Dokad Trustees Ltd v Auckland Council* [2022] NZCA 177 at [10].

[33] At [11].

case here. The exemption in subs (4) only serves to make it clear that leave must be sought in respect of all other appeals from interlocutory matters.[34]

[30] We turn to the tension between the leave requirements in s 56(3) and the right to justice affirmed by s 27 of the New Zealand Bill of Rights Act. It is settled that a costs order flowing from an interlocutory application is subject to s 56(3).[35] Section 56(3) clearly and unambiguously provides that any appeal from any order or decision of the High Court on an interlocutory application in respect of any civil proceeding, except those under subs (4), requires a grant of leave. We do not consider it seriously arguable that s 56(3) represents an unjustified limitation on Mr Jindal's right to justice.[36] However, even if we did, we consider that there is no alternative reading of the provision.[37]

[31] We now address Mr Jindal's arguments concerning the application of r 14.15. The rule reads:

> **14.15 Defendants defending separately**
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> The court must not allow more than 1 set of costs, unless it appears to the court that there is good reason to do so, if—
>
> (a) several defendants defended a proceeding separately; and
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> (b) it appears to the court that all or some of them could have joined in their defence.

[32] Rule 14.15 applies to interlocutory proceedings. The need for separate representation in the substantive proceedings is relevant to the extent to which defendants would otherwise be expected to share the burden of interlocutory costs.[38]

[33] The substantive proceedings involve Mr Jindal's claim he has been defamed by the respondents. The respondents are running different arguments in relation to publication and the alleged defamatory content of the statement. The first and second respondents admit that they published the relevant statements in the report. The third

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34 *Siemer v Legal Complaints Review Officer* [2024] NZCA 219 at [31].
35 At [29].
36 New Zealand Bill of Rights Act 1990, s 5.
37 Section 6.
38 *Houghton v Saunders* [2013] NZHC 3452 at [36].

and fourth respondents deny publication. All the respondents deny that the statements in the report are defamatory.[39]

[34] The respondents are also running different defences.[40] The respondents say, while there is some degree of overlap, the two positions are not the same and the evidence filed by each respondent group in the application for security for costs was markedly different. They say the High Court was required to assess the merits of the respective claims against each respondent group separately. That this was so is clear from the security for costs decision. It is also clear from reviewing that decision that there was a certain amount of cooperation between counsel for the two sets of respondents in addressing the legal test for security for costs and the threshold test, as well as the elements of the various defences.[41]

[35] The security for costs decision depended upon the Judge's consideration of the merits of Mr Jindal's claim against each group. He considered Mr Jindal's claim faced a number of significant difficulties, specifically the respondents' contentions that Mr Jindal's pleadings of the alleged meanings are impermissibly vague and do not relate to his character or conduct and that Mr Jindal's arguments on publication in respect of the third and fourth respondents is based on an error of law. Further, the Judge considered that qualified privilege was likely to apply; and that even if the claims were to succeed, there were good arguments that damages were likely to be minimal.[42]

[36] While the question of r 14.15 was not explicitly addressed by the Judge in the costs decision, and nor had it been referred to by Mr Jindal,[43] the Judge was given the opportunity to comment on it because Mr Jindal filed what the Judge referred to as a "omnibus application" seeking reversal, discharge or variation of the costs decision, or that it be recalled, or seeking leave to appeal.[44] In that application, Mr Jindal raised the issue of r 14.15. We have considered what the Judge said in the leave decision but,

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39 See security for costs decision, above n 2, at [34].
40 See [39]–[61].
41 See [35]–[60].
42 At [63]–[66].
43 See leave decision, above n 25, at [6].
44 At [10].

in any event, we note it is not materially different from the matters we have referred to above.

[37] It is apparent that two sets of costs were appropriate.

[38] As to the Judge's treatment of the *Calderbank* offer, it is plain that Mr Jindal strenuously opposed the respondents' application for security for costs, putting forward affidavit evidence in opposition which was somewhat at odds with evidence he had previously put before the High Court.[45] In his notices of opposition, Mr Jindal opposed the making of any order.[46] The Judge spent some time in his decision addressing the threshold test and whether the Court should exercise its discretion to order security for costs.[47]

[39] The respondents point out that their applications for security sought orders for "such a sum as the Court considers sufficient" or "a sum to be determined by the Court". In support of their applications, they filed evidence concerning the quantum of costs in other defamation cases and argued that an order for $80,000 per respondent group was the appropriate sum. The actual amount of security was dealt with briefly at the end of the security for costs decision.[48] There is nothing unusual about an award of costs to a successful party, even though the amount of the security is less than the amount sought.

[40] The Judge took an orthodox approach to the question of costs, applying the primary principle that the unsuccessful party pays costs to the successful party.[49] He correctly identified and applied the relevant rules in addressing the impact of the *Calderbank* offer on costs.[50] Costs are a matter of the Court's discretion and there is nothing to suggest the Judge erred in law or principle, did not address relevant matters, took into account irrelevant matters, or was "plainly wrong".[51]

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45 At [25] and [32].
46 See security for costs decision, above n 2, at [24].
47 At [27]–[30] and [32]–[91].
48 At [92].
49 Costs decision, above n 1.
50 At [11]–[14].
51 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32] per Blanchard, Tipping and McGrath JJ, citing *May v May* (1982) 1 NZFLR 165 (CA) at 170; and *Blackstone v Blackstone* [2008] NZCA 312, (2009) 19 PRNZ 40 at [8].

[41] It is clear that Mr Jindal is concerned at the level of the costs awards, which he claims is 350 per cent above the standard 2B scale costs. In this regard, we note and accept the analysis undertaken by the respondents that, with a minimum disbursement award of $550 and using the category 2 band B rates, a standard costs award after a half-day hearing on an interlocutory application in the High Court will likely be for a minimum of $9,632. The important point, however, is that these figures assume the minimum number of steps prior to hearing. In this case, there were a significant and unusual number of additional case management steps, and it is apparent that they related to the way in which Mr Jindal approached the application. We note Mr Jindal did not dispute the steps claimed by the respondents but indeed adopted their costs calculations, arguing they should be applied to him as the successful party.[52]

[42] Returning then to the test for leave to appeal, we are not satisfied Mr Jindal has identified an arguable error of law or fact. The errors alleged are not of general or public importance warranting determination or otherwise of sufficient importance to outweigh the lack of general or precedential value. The circumstances do not warrant incurring any further delay and it is not in the interests of justice to grant leave.

Result

[43] The application for leave to appeal is declined.

[44] One set of costs is awarded to both sets of respondents, calculated on a band A basis, together with usual disbursements.

Solicitors:
Darroch Forrest Lawyers, Wellington for First and Second Respondents
Langford Law, Wellington for Third and Fourth Respondents

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[52] See costs decision, above n 1, at [5].