

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2019-485-676
[2020] NZHC 2110**

UNDER the Judicial Review Procedure Act 2016 and
Part 30 of the High Court Rules 2016

IN THE MATTER OF an application for judicial review

BETWEEN NEW ZEALAND COUNCIL OF
LICENSED FIREARMS OWNERS
INCORPORATED
Applicant

AND MINISTER OF POLICE
First Respondent

GOVERNOR-GENERAL
Second Respondent

Appearances: J E Hodder QC and T Nelson for the Applicant
A Powell and C Tocher for the Respondents

Judgment: 20 August 2020

**JUDGMENT OF COOKE J
(Costs)**

[1] By judgment dated 25 June 2020 I dismissed the claims brought by the applicant relating to restrictive measures imposed in relation to certain military style ammunition following the Christchurch mosque shootings, and directed that memoranda should be filed if costs could not be resolved.¹ By memorandum dated 10 July 2020 the respondents have sought costs on a 2B basis. In response by memorandum dated 27 July 2020 the applicant does not dispute the quantification of

¹ *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police* [2020] NZHC 1456 at [132].

the claim for costs but contends that costs should not be ordered, or should be reduced because the proceeding concerned a matter of public interest, and that any costs award should be stayed pending appeal. Those proposals have been opposed by the respondents by memorandum dated 3 August 2020.

Reduced costs award

[2] I do not summarise the relevant background which is fully set out in the substantive judgment.

[3] Under r 14.7(e) of the High Court Rules 2016 costs can be declined or reduced if the proceeding concerned a matter of public interest and the party opposing costs acted reasonably in the conduct of the proceeding. This has been applied in relation to litigation brought by interest groups involving matters of public interest not for pecuniary gain.² This is commonly where the unsuccessful party is under resourced, or at least not publicly funded.³ As the respondents submit, however, that principle cannot squarely be invoked by the applicant here as the members of the firearms community it represents were seeking declarations that they were entitled to compensation, and challenging the legality of the prohibition of ammunition.

[4] There is, however, a closely related reason for departure from the normal costs consequences — that is when the litigation involves fundamental rights. In *Attorney-General v Udompun* a full court of the Court of Appeal held that applying the normal costs rules for litigation involving the rights outlined in the New Zealand Bill of Rights Act 1990 could discourage litigants from bringing claims in relation to such rights, and indemnity costs could sometimes be seen as appropriate when an applicant succeeded.⁴ This was not articulated by the Court of Appeal in reference to r 14.7, but might be said to involve a combination of sub-paragraphs (e) and (g).

² See *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2013] NZCA 555 at [13] referring to *Ratepayers and Residents Action Association Inc v Auckland City Council* [1986] 1 NZLR 746 (CA).

³ *Chief Executive of the Department of Corrections v Sutherland* [2018] NZCA 623, (2018) 29 CRNZ 126 at [69].

⁴ *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [186]. See also Hammond J at [219]–[225]. The right to bring such proceedings is itself reflected in s 27(2) of the New Zealand Bill of Rights Act 1990.

[5] The applicant's case here did involve a question of fundamental rights even though the rights are not articulated in the New Zealand Bill of Rights Act. It is not suggested that declarations of inconsistency could be made in these circumstances. But the Court concluded that the measures imposed were not consistent with the common law right not to be deprived of property without compensation, although Parliament had clearly legislated inconsistently with the right. I also accept that the evidence before the Court suggested that the Crown's view was that the right was not engaged at all. It can accordingly be said that the Court's judgment vindicated the right notwithstanding that the claims were unsuccessful.

[6] As I indicated in the substantive decision, the Court plays an important role in cases of this kind to ensure that the rights of a minority group, and the rule of law have been respected.⁵ Questions of legality, and legal principle, should be central when the government is responding to a crisis or emergency.⁶ Litigation challenging decisions made in such circumstances is not to be discouraged by costs awards, particularly if it properly concerns the protection of individual rights. Such access to the Court emphasises the rule of law, and a culture of legality. These factors should be taken into account in deciding costs in this case.

[7] But the impact of these factors has must be proportionate. There were two main aspects of the applicant's challenge, and the second was a more conventional challenge to the legality of the definition of prohibited ammunition by Order in Council. That did not involve a question of individual rights, at least in any direct sense. The applicant should meet costs on this aspect of its claim on a conventional basis. Secondly, whilst the other main aspect of its challenge involved inconsistency with rights, its claim was still unsuccessful. Neither is the applicant said to be an impoverished group for whom such proceedings were financially onerous.

[8] This is not a case where costs should not be awarded to the Crown. But it is a case where some reduction in the costs award is appropriate. The reduction should be proportionate to the extent the vindication of rights and the principle of legality is

⁵ *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police*, above n 1, at [5].

⁶ Consider *Quake Outcasts v Ministry for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 and *Borrowdale v Director-General of Health* [2020] NZHC 2090 at [291] in relation to decisions made during emergency response situations.

important to the proceeding. The costs claim is for a total of \$25,071.15. I have concluded that there should be a 20 per cent reduction in that award. Costs are awarded to the respondents on that basis.

Stay

[9] The applicant has lodged an appeal to the Court of Appeal. It seeks a stay of the costs award either under the inherent jurisdiction, or r 12 of the Court of Appeal (Civil) Rules 2005 on the basis it is pursuing an appeal in good faith, the Crown will not be adversely affected by the stay, the appeal raises novel and important questions, and that its appeal is strongly arguable. The respondents oppose on the basis that an appeal does not operate as a stay, there is no suggestion of impecuniosity on the applicant's part, and there is no reason for concern that any reversal of costs caused by successful appeal would not be met by the Crown.

[10] I see no reason why the costs order should be stayed. The position would be different if a party in the applicant's position had financial difficulty in the conduct of the appeal, especially given that the challenge involves fundamental rights. But there is no evidence of this here. For these reasons I decline the application for a stay.

Cooke J