

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

**CRI 2008-404-000297**

**DENNIS GIBSON OVERINGTON**  
Appellant

v

**AUCKLAND CITY COUNCIL**  
Respondent

Hearing: (On the papers)

Appearances: D G Overington in person  
W J R Kiewik for Respondent

Judgment: 25 June 2009 at 4:30pm

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**[COSTS] JUDGMENT OF WYLIE J**

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This judgment was delivered by Justice Wylie  
on 25 June 2009 at 4.30pm  
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar  
Date:

Solicitors:  
Simpson Grierson, Private Bag 92 518, Auckland 1141

Copy to:  
D G Overington, 22 Patey Street, Remuera

[1] I gave judgment in this matter on 17 March 2009. Mr Overington then filed an application seeking leave to appeal to the Court of Appeal. In the event that application was withdrawn immediately prior to hearing.

[2] I have received an application for costs from the respondent Council relating to Mr Overington's application for leave. The Council referred to ss 8(1) and (5) of the Costs in Criminal Cases Act 1967, and submits that it is open to me to award costs, either on a scale basis in accordance with regulations made under the Act, or on a wider basis, permitting full or partial indemnity to the Council. It noted that Mr Overington's application for leave was confined to one particular issue – namely whether or not the infringement notices the subject of the appeal to this Court, had been filed within the requisite six month period allowed by s 14 of the Summary Proceedings Act 1957. It noted that:

- a) this issue had been raised before the Justices of the Peace in the District Court;
- b) the Justices of the Peace considering the case had determined the matter;
- c) prior to the hearing in the High Court, the Council through its solicitors had explained its position in relation to Mr Overington's time limit argument; and
- d) Mr Overington elected not to present the argument when the appeal was filed and when it was heard before me.

The Council submitted that I did not deal with the issue raised in the application for leave in my substantive judgment, that Mr Overington elected to continue, and that he has put the Council to unnecessary trouble and expense. The Council asserted that the application for leave to appeal to the Court of Appeal was an abuse of process and that any costs order should reflect the Court's disapproval of Mr Overington's conduct.

[3] Mr Overington has filed two replies to the application for costs. The first is dated 19 June 2009, and the second 22 June 2009. Amongst other things, he asserts that the jurisdiction as to costs contained in the Costs in Criminal Cases Act does not exist, because the notices of hearing were filed after the six month time limit had expired. He further argues that the Council's costs (estimated to be \$3,625) are excessive, and that the Council was not required to prepare written submissions. He then states that he is having extreme financial difficulties, and is struggling to "keep afloat" at present. He states that he believes that he had a valid point to argue on appeal and that his need to withdraw should not be held against him, or his argument "treated as defeated".

### **Analysis**

[4] Council's application for costs turns on s 8 of the Costs in Criminal Cases Act. Relevantly that section states as follows:

(1) Where any appeal is made pursuant to any provision of the Summary Proceedings Act 1957 or the Crimes Act 1961 the Court which determines the appeal may, subject to any regulations made under this Act, make such order as to costs as it thinks fit.

(5) If the Court which determines an appeal is of opinion that the appeal includes any frivolous or vexatious matter, it may, if it thinks fit, irrespective of the result of the appeal, order that the whole or any part of the costs of any party to the proceedings in disputing the frivolous or vexatious matter shall be paid by the party who raised the frivolous or vexatious matter.

[5] Section 8 applies when the Court determines an appeal made pursuant to the provisions of the Summary Proceedings Act 1957 or the Crimes Act 1961. In the present case, Mr Overington was seeking leave to appeal under s 144 of the Summary Proceedings Act. An application for leave to appeal is not an appeal pursuant to the provisions of the Summary Proceedings Act. There will only be an appeal if leave is granted, and a notice of appeal is then filed. On its face, s 8 has no application.

[6] Nor does s 4 of the Costs in Criminal Cases Act. Resisting an application for leave to appeal is not part of the costs of a prosecution in the sense in which those words are used in that section.

[7] I have considerable sympathy for the position the Council finds itself in. Mr Overington's application for leave to appeal was lacking in merit; it could even be said to be frivolous and vexatious. It was pursued in the face of warnings and despite discussions with the Council's legal advisers. Mr Overington put the Council to considerable trouble and unnecessary expense in resisting an argument which had little or no prospect of success. If I was able to do so I would award substantial costs to the Council, as I can see no reason why the costs the Council has incurred should fall on ratepayers as a whole.

[8] I am however bound by the Costs in Criminal Cases Act. The Court has no inherent jurisdiction to award costs in the circumstances which have arisen here.

[9] In my view the circumstances of this case demonstrates a gap in the legislation. Further and in any event, the Costs in Criminal Cases Act is seriously outdated and has long been in need of a major overhaul. When and if that overhaul occurs, it may well be that attention should be given to providing for costs in cases such as the present.

[10] In the circumstances, there is no order for costs in respect of Mr Overington's abandoned application for leave to appeal.

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Wylie J