IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV 2021-485-341
[2023] NZHC 527

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	LAWYERS FOR CLIMATE ACTION NZ INCORPORATED Applicant
AND	THE CLIMATE CHANGE COMMISSION First Respondent
	MINISTER FOR CLIMATE CHANGE Second Respondent

On the papers

Counsel:	J S Cooper KC, J C Every-Palmer KC, M C Smith and S T Coupe for Applicant V E Casey KC, S A H Bishop and H M L Farquhar for First Respondent A L Martin and H T N Fong for Second Respondent
Judgment:	16 March 2023

JUDGMENT OF MALLON J
(Costs)

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[1] Lawyers for Climate Action NZ (LCANZ) brought an application for judicial review against the Climate Change Commission (the Commission) and the Minister for Climate Change (the Minister). The judicial review challenged advice given to the Minister under the Climate Change Response Act 2002 (the Act) by the newly-established Commission following significant amendments to that Act in response to the climate emergency.

[2] The judicial review application was dismissed.[1] Although that was the formal disposition of the application, in giving judgment I agreed with LCANZ on several contested issues, for example: that the Commission's advice was amenable to review;[2] the expert evidence was admissible;[3] the Commission's advice on the level of New Zealand's emissions reductions required by 2030 to be compatible with the global efforts to limit global warming to 1.5°C was potentially misleading;[4] and that s 5W of the Act had a dual purpose – that emissions budgets would be set with a view to meeting the 2050 Target and also to contribute to the 1.5°C goal, and that consistency with the 2050 Target alone was insufficient because the rate of reductions was important to the 1.5°C goal.[5]

[3] My judgment concluded with the following:

> [315] If there are any questions as to costs, the parties may submit brief submissions (seven pages) within three weeks of the date of this judgment. I note that the Commission was critical in a number of respects about LCANZ's position and approach. It may be helpful for the Commission to be aware that I saw no real merit in that criticism. The Commission's task is a very important one. Professor Donald Wuebbles describes climate change as "not only quickly developing into the most important issue of our time, but perhaps the most important issue humanity has ever faced". Judicial review provides an important check on this very important statutory task vested in the Commission. Challenge and debate can lead to better outcomes. Unsuccessful challenges can bring with it the public benefit of legitimacy to the Commission's work.

[4] The Minister does not seek costs, reflecting the Crown's perspective of the public interest litigation and the reasonableness of LCANZ's conduct of the proceeding so far as it is concerned. It takes no position on whether the Commission should have costs. The Commission does seek costs in the sum of $128,492 (calculated mostly on a category 3C basis with one item on a category 3B basis). In doing so, the Commission advises that it "respectfully disagrees" with the comments in [315] just quoted. It goes on to submit that:

> … it is not to the public benefit for the Commission to be diverted from its work and expend resources (including the capacity of expert staff whose work is required for the Commission's tasks) to defend unsuccessful legal

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1 *Lawyers for Climate Action NZ Incorporated v The Climate Change Commission* [2022] NZHC 3064.
2 At [68].
3 At [77]–[80].
4 At [119] and [127].
5 At [151], [171] and [180].

> challenges. The discipline that the costs regime is intended to exercise is an important protection to preserve the ability of the Commission to perform its role.

[5] In making this submission, the Commission points out that its important work is likely to be contentious and the government actions that follow have the potential to have a major impact on many aspects of our society and economy. It submits that, as a result, many groups from across the range of interests and perspectives may seek to challenge its work through court proceedings. It is concerned that the Court not take a position that costs should always lie where they fall in such challenges because climate change is generally an issue of high public importance.

[6] The concern is a legitimate one. However, there is no question that any challenge to the Commission's work, no matter when it is brought, what interests are represented by the application, what the grounds are, how the challenge is conducted and no matter its outcome, will be exempt from a costs order. The starting point under the High Court Rules for any such challenge is the general principle that "the party who fails … should pay costs to the party who succeeds".[6] The Court will only depart from that general principle if persuaded by the circumstances before it that it is appropriate to do so because "the proceeding concerned a matter of public interest, and the party opposing costs acted reasonably in the conduct of the proceeding".[7]

[7] In this case, I consider it is appropriate in the circumstances to depart from the general principle. Pursuant to the significant amendments to the Act that established the Commission, the Commission's role is to provide periodic advice to the Minister and to review the Government's progress towards emissions reduction and adaptation goals. LCANZ's proceeding concerned the first occasion that the Commission advised the Minister pursuant to those amendments. It did so as a not-for-profit group formed for the purposes of promoting more ambitious climate change action in the face of the climate change emergency. It was not seeking a pecuniary or other direct benefit for itself. It was a group qualified and skilled to consider the legal issues on which the grounds of review were based. It advanced high-level principles and interpretation issues of general application rather than minor or narrow issues of limited significance. In doing so, subject to the outcome of any appeal, its challenge has settled points that

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6 High Court Rules 2016, r 14.2(1)(a).
7 Rule 14.7(e).

will not require re-litigation. Adopting the words of the Supreme Court in *West Coast Inc v Buller Coal Ltd*, “the underlying [issues were] difficult and [their] resolution [have] a significance which went well beyond the present case”.[8] Again adopting the words of the Supreme Court, this time in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*:[9]

> … Public interest litigants in such cases may meet a real need in presenting important perspectives that would otherwise be unrepresented in the decision-making processes. Such representation may assist in the legitimacy of the process and its outcome. …

[8] Those words were said in the context of a public interest litigant’s participation in a substantial Resource Management Act 1993 application. In that context, it was said that aspects of the public interest “may well not be represented because the case [would be] beyond the means of private individuals”.[10] A similar point applies in the context of the Commission’s advice that has potentially such important impact on our future society in that, without the resources of a group such as LCANZ, no one person might be in a position to so thoroughly test whether the Commission’s advice, on the first occasion required of it, was in accordance with the task the legislature set for it.

[9] While there was a material cost to the Commission in having to defend the proceeding, the factors just discussed make this an appropriate case for costs to lie where they fall. The Commission contends that LCANZ should not have proceeded with its judicial review. This is because in correspondence and in-person discussions, the Commission had fully responded to LCANZ’s concerns and invited it to reconsider its intended litigation on the basis that it had no prospects of success. I do not agree that this amounted to unreasonable conduct on the part of LCANZ. This was not a case where LCANZ’s claims clearly had no prospect of success. As noted earlier, although it did not obtain relief, it succeeded on some points.

[10] Costs are to lie where they fall.

Mallon J

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8 *West Coast Inc v Buller Coal Ltd* [2013] NZSC 133 at [4].

9 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 167 at [24].

10 At [24].