

**IN THE DISTRICT COURT
AT ASHBURTON**

**I TE KŌTI-Ā-ROHE
KI HAKATERE**

**CRI-2019-003-000059
[2022] NZDC 12056**

WORKSAFE NEW ZEALAND
Prosecutor

v

MOUNT SOMERS SAND LIMITED
Defendant

Hearing: 27 June 2022
Appearances: D Neild for WorkSafe
O Lund for the Defendant
Judgment: 30 June 2022

**RESERVED JUDGMENT OF JUDGE J E MAZE ON COSTS
APPLICATION**

[1] This is a claim for costs by Mount Somers Sand Limited (MSSL) after a charge laid under the Health and Safety at Work Act 2015 was dismissed on the basis there was no case to answer. The application includes a request for costs on an application to add further particulars, heard and dismissed approximately two months before the trial began on 9 August 2021.

[2] In support of the application, I have an affidavit from Ian Claridge and his partner on behalf of MSSL confirming costs incurred and his claim is to be awarded costs as follows:

Expert costs (Dr Adams) exclusive of GST	\$30,211.63
Disbursements exclusive of GST	\$5,129.75
Legal fees exclusive of GST (from 29 July)	\$101,766.00
Legal fees exclusive of GST (pre 29 July)	\$21,430.20

[3] On 29 July 2021 MSSL, wrote to WorkSafe inviting withdrawal of the charge in return for which no costs application would be made. That invitation was declined and the matter proceeded to trial.

[4] Both Mr Claridge and Ms Green attest to the adverse physical and emotional impact of these proceedings as well as the cost. I acknowledge the impact of stress on both deponents from these proceedings but, as a matter of law, the only matter I am able to consider is whether to order a reasonable contribution to the costs of the defendant and, if so, in what sum. As requested, I have disregarded exhibit IC3 annexed to Mr Claridge's affidavit.

[5] The costs application seeks an award based upon actual disbursements and expert fees, indemnity costs for all work after 29 July 2021 and costs for work completed before 29 July 2021, whether on the civil scale (2B) or as a percentage of actual costs.

[6] The applicable law is set out in the Costs in Criminal Cases Act 1967 (the Act). Under the Act "costs" means: "any expenses properly incurred by a party in ... carrying on a defence ..." A defendant may seek costs if acquitted or the charge is dismissed or withdrawn, whether on the merits or otherwise. Subject to the regulations, the Court may order the applicant for costs be paid such sum as the Court thinks just and reasonable towards the costs of defence (s 5).

[7] When considering an award of costs, the Court must have regard to all relevant circumstances, including those non-exhaustive factors listed in s 5(2).

[8] There is no presumption for or against an award of costs and costs do not automatically follow from being acquitted (s 5(3) and (4)).

[9] The regulations fix maximum costs amounts which, however, the Court may exceed if satisfied that, having regard to the special difficulty, complexity or importance of the case, the payment of greater costs is desirable (s 13). Bad faith or negligence on the part of the prosecution may make the case one of special difficulty.¹ A full indemnity or an award in excess of the scale may be appropriate in cases of bad faith or where the applicant for costs established innocence or should never have been charged.

[10] Schedule 1 to the Regulations fixes the maximum rate for a solicitor's fees for each half day or part half day in Court at \$226, with a lesser sum of \$113 per half day for the hearing where the charges are withdrawn (subject to the ability under s 13 to exceed that rate). Costs of disbursements and expert witnesses can be the subject of additional award.

[11] Payment of court-ordered costs is by the Ministry of Justice unless the Court directs otherwise because of the negligence or bad faith of the prosecuting authority (s 7).

[12] There is a public interest in the way in which alleged offences are investigated. Any prosecuting body has a duty of care to members of the public to ensure they undertake proper and careful investigations into alleged wrongdoing. That duty of care balances the considerable powers prosecuting bodies have available to them. There is, therefore, public interest both in the use of statutory powers to investigate complaints of offending and in the proper and careful use of those powers (with a duty of care towards those affected by the investigation whether as complainants, witnesses or those suspected of having committed an offence).

[13] The first question is whether costs ought to be awarded at all. It will be plain from the reserved decision of 7 September 2021 that MSSL has established its innocence. From 15 June 2021 (the refusal to allow addition of further particulars) WorkSafe must have appreciated the very limited basis upon which the prosecution could proceed. Indeed, I concluded that to grant WorkSafe's application to add particulars fundamentally changing the basis of the charge would be at that date

¹ *T v Collector of Customs* HC Christchurch AP 167/94, 28 February 1995.

an abuse of process, and I am satisfied it was an admission that WorkSafe would face difficulties proceeding on the charge as laid. On 23 July 2021, WorkSafe received Dr Adam's expert report. Not one of the WorkSafe witnesses disputed that evidence and WorkSafe did not call expert evidence in contradiction. From 23 July 2021, therefore, WorkSafe knew or ought to have known that it would have difficulty establishing a case to answer and would (and indeed did) struggle to meet the requirements of the Solicitor General's guidelines. The rejection of MSSL's proposals for disposition was unfortunate and negligent.

[14] I accept an award of costs in favour of MSSL is entirely justified. The charge was dismissed on the merits. The question is then what award is just and reasonable towards the costs of MSSL's defence of the charge.

[15] It is well established now that if a charge ought never to have been brought or continued, or if there is a failure to meet the standard of care expected in a prosecution, an award in excess of the scale is permitted. I accept there is a logical basis to differentiate between the legal costs incurred before 29 July 2021 and the costs in continuing to trial after that date. However, disbursements and the costs of the expert report must be met in their entirety by WorkSafe. They were entirely justified. There has been no challenge to the evidence of Dr Adams which confirmed the innocence of MSSL on the charge as laid. There is no suggestion the quantum of those costs was unreasonable. I therefore award costs of \$5,129.75 in disbursements and \$30,211.63 in expert fees to MSSL, to be paid by WorkSafe.

[16] I refer to paragraphs [42] to [51] of the reserved judgment of 7 September 2021. It is a list of evidence necessary from the moment this charge was laid and yet WorkSafe did not have it then and never obtained it. That evidence was never presented. Further, WorkSafe ought to have applied for leave to withdraw this charge at the very least upon receipt of Dr Adams' report. Although all WorkSafe witnesses accepted the validity of the report at the hearing, each had already read it and decided to accept it well before the hearing. The insistence upon proceeding, as communicated on 4 August (see email exhibited to Mr Claridge's affidavit) reflects a further error of judgement by failing again to perceive that WorkSafe did not have reasonable prospects of success on the charge as laid.

[17] I am satisfied the charge ought never to have been laid and, once brought, it ought to have been withdrawn as soon as practicable, as on any objective assessment it should have been obvious the necessary evidence to prove the charge was not available. Costs in excess of the scale are necessary and justified to provide a just and reasonable contribution towards MSSL's actual legal costs. The requirements of s 13 are met.

[18] It is noteworthy that both prosecution and defence each used two counsel. There has been no challenge to the reasonableness of the legal costs incurred.

[19] I refer to the indication by His Honour Judge Erber in *Reriti v Police* that full indemnity awards under s 13 might be unusual where there is a case to answer or a defendant brought the prosecution on his own head" but:²

... where the defendant should never have been charged because he was innocent of wrongdoing, and the prosecution knew or ought to have known that, in my judgment it cannot be said he should bear any of the costs of demonstrating that innocence to a Court.

[20] While His Honour referred to prosecutions brought in bad faith or inexcusable negligence, actual bad faith is not logically required. An absence of good faith can satisfy the same test. The Solicitor General's guidelines for a prosecution must always be addressed and satisfied. Even if not before, at the very least by 29 July 2021, WorkSafe must have known it could not meet those guidelines. Continuing in those circumstances demonstrates a lack of good faith and a high degree of carelessness. I am satisfied that, in the circumstances, costs should be awarded, as sought, in the sum of \$101,766 for the preparation and costs of proceeding to trial after 29 July 2021. That sum is reasonable and less than fees actually charged.

[21] The award sought for the period prior to 29 July is also less than actual costs for that period and reasonable for the work necessary to demonstrate innocence of the charge as laid. Mr Claridge's evidence, unchallenged, is that total fees and expenses amounted to more than \$290,000. The further costs sought for work preceding

² *Reriti v Police* DC Christchurch CRN3009023671, 18 April 1994

29 July 2021 are reasonable and short of indemnity costs. Both sums are therefore awarded as a contribution towards legal costs.

[22] On that basis, costs are awarded in favour of MSSL and are to be paid by WorkSafe given the negligence in proceeding, at the very least, after Dr Adams' report was accepted. The costs award in favour of MSSL against WorkSafe is as follows:

Expert costs	\$30,211.63
Disbursements	\$5,129.75
Legal fees prior to 29 July 2021	\$21,430.20
Legal fees post 29 July 2021	\$101,766.00


J E Maze
District Court Judge

Released on 30/06/2022 at 3 pm