IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2022-404-307
[2023] NZHC 3878

BETWEEN	NEW ZEALAND COMMERCIAL LAW CORP LIMITED Applicant
AND	LEPIONKA & COMPANY INVESTMENTS LIMITED Respondent

Hearing: On the papers

Appearances: D Hayes for the Appellant
B Keown and S Leslie for the Respondent

Judgment: 22 December 2023

COSTS JUDGMENT OF BECROFT J

This judgment was delivered by me on 22 December 2023 at 10.30am pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors/Counsel:
Hunwick Law Ltd, Hamilton
Bell Gully, Wellington

D Hayes, Barrister, Hamilton

Why costs are sought and how much is asked for?

[1] The respondent/defendant, Lepionka & Company Investments Ltd (LCIL), applies for costs against the applicant/prosecutor New Zealand Commercial Law Corp Ltd (NZCLC) and its counsel, Mr David Hayes.

[2] This follows the dismissal of the prosecutor's application for leave to appeal the District Court's dismissal of a charge against the defendant of theft by a person in a special relationship[1]. Some more detail is required.

[3] This is a private prosecution. Judge AM Manuel dismissed the charge under s147 of the Criminal Procedure Act 2011, in the Auckland District Court on 1 July 2022.[2]

[4] The prosecutor sought leave to appeal the decision on a question of law[3] — in fact in respect of 21 alleged errors of law made by the District Court Judge. I dismissed that application, eventually by consent, on 15 May 2023. I reserved costs, in the rather futile hope that they might be agreed.

[5] Subsequently, Judge Manuel made a costs award of $35,000 jointly and severally against the prosecutor company (NZCLC) and Mr Hayes the barrister who appeared.[4] The amount was well in excess of the scale costs of $1,285 payable under regulations made under the Costs in Criminal Cases Act 1967 (CCCA). But it was well below the indemnity costs which were sought totalling $73,213.52 plus disbursements of $339.92. I am informed that no appeal is being pursued against that decision. The way is now clear to address the issue of costs in this Court.

[6] This application, also made under the CCCA, seeks that:

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1 Crimes Act 1961, ss 220 and 223; maximum penalty 7 years' imprisonment.

2 *New Zealand Commercial Law Corp Ltd v Lepionka & Company Investments Ltd* [2022] NZDC 12002.

3 Criminal Procedure Act 2011, s 296.

4 *New Zealand Commercial Law Corp Ltd v Lepionka & Company Investments Ltd* [2023] NZDC 13631 [Costs Decision].

(a) the prosecutor pay the respondent/defendant's actual (indemnity) costs of $57,138.50 and disbursements of $1,693.87, both exclusive of GST; and

(b) counsel for the prosecutor, Mr Hayes, be jointly and severally liable for the same costs under s 8 of the CCCA and/or the ruling *Harley v McDonald*.[5]

[7] It is worth observing that the arguments raised in the leave application, which often morphed into the merits of the case, rehashed all the points made before Judge Manuel during the s 147 hearing. Similarly, some of the arguments on this costs application were raised with Judge Manuel before she made her costs decision. In fact, some seem to be virtually identical.

[8] While this application must be considered separately, on its own terms, I align myself with Judge Manuel's general findings. In the interests of consistency, and where appropriate, I adopt and repeat some of her relevant conclusions.

Relevant background

[9] The long-running background to this private criminal prosecution is very important. It is well set out by Judge Manuel in her costs judgement. Her summary is helpful:

> [9] This was a private criminal prosecution. It was a further development in extensive litigation bought by Garth Paterson (and other entities associated with him) against Stefan Lepionka (and other entities associated with him). From about December 2015 to August 2021 the litigation played out in the civil jurisdiction. In April 2021 these proceedings were filed in the criminal jurisdiction.
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> [10] Mr Paterson's lawyer Mr Hayes was the sole director and shareholder of the prosecutor. The evidence relied on by the prosecution was principally a formal statement from Mr Paterson. Mr Paterson was an undischarged bankrupt and in August 2020 the High Court had made an order effectively declaring him a vexatious litigant under s 166 of the Senior Courts Act 2016 (SCA).

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5 *Harley v McDonald* [2001] UKPC 18, [2002] 1 NZLR 1.

> [11] In May 2021 this Court directed that the charging document in this proceeding be accepted for filing under s 26(2) of the CPA. The defendant responded by alerting the Court to the existence of the s 166 SCA order and submitted that given the subject matter of the prosecution was essentially the same as that involved in previous civil proceedings, the charging documents should not have been accepted for filing on the grounds of abuse of process.
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> [12] In July 2021 this Court confirmed that the decision to accept the charging document had already been made and there was no power to revisit it under s 26 of the CPA. It was left open for the Court to dismiss the charge or stay the proceeding, which is what later came to pass, because in the July 2022 decision the charge was dismissed on the grounds there was no case to answer and the proceeding was an abuse of process.
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> (Footnotes omitted)

[10] Judge Manuel went on to conclude the prosecution was seemingly brought in bad faith as part of an ongoing campaign of harassment by Mr Paterson. He utilised the criminal jurisdiction after he had been declared a vexatious litigant and was unable to use the civil jurisdiction to advance his campaign.

[11] The Judge noted that the evidence was woefully "insufficient". It was clear the prosecutor failed to take basic investigatory steps. Even if the prosecutor did not conspire with Mr Paterson to advance the campaign, there was no critical examination of the witness statement or documentation. That is my assessment also.

Costs in the District Court

[12] In her comprehensive costs judgment, Judge Manuel declared that an award of costs, above the scale was amply justified for all the reasons set out by the defendant and which do not need to be repeated here. Fundamentally there was no evidence to support any of the ingredients of the charge — which related to the defendant as mortgagee in possession of a development originally commenced by Mr Paterson, and\or entities associated with him on the banks of Tukituki River near Havelock North.

[13] In particular, Judge Manuel agreed with the defence submissions, as do I, that:

> [14] The prosecutor had filed the charging document and continued the prosecution at the behest of a bankrupt and vexatious litigant, Mr Paterson, whose animus towards Mr Lepionka had been documented in various prior judgments in the civil Courts.

> [15] There was no evidence that the prosecutor had considered the Solicitor-General's prosecution guidelines in bringing or continuing the proceedings.
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> [16] The prosecutor was fully aware of the vexatious circumstances in which the prosecution was commenced and continued. Mr Hayes, as the prosecutor's sole director and shareholder and counsel for the prosecution, was a participant in failed civil litigation on the same issues as the prosecution, in which the High Court had found.[6]
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> > [158] The repetitive nature of Mr Paterson's proceedings, most of which are collateral attacks on matters which have clearly been determined by the courts multiple times, also supports the making of a s 166 order. Any question of law in relation to the dispute about LCIL's statutory and equitable duties as mortgagee underlying the Main Judgment has been tried and resolved.
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> > [159] The usual deterrents to unmeritorious litigation (most notably, the cost) do not appear to deter Mr Paterson. He is impecunious and is unrepresented in almost all of his litigation. Although applications for strike out and security for costs are available to dismiss unmeritorious claims, I note this still causes considerable cost and inconvenience to the defendants, and uses court resources.
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> > [160] A compounding feature of this case is the intensity of proceedings brought within a limited timeframe. Rather than slowing down, if anything, the filing of claims appears to have accelerated. In addition, the grandiosity of some of the later claims is concerning.

[14] The evidence was insufficient at the commencement of the proceedings, and this ought to have been apparent to the prosecutor before the charge was laid. There was no prospect of success. Judge Manuel accepted there was no investigation of whether the defendant had committed the alleged offence and evidence that demonstrated innocence was disregarded. Also, the charge was dismissed under s 147 on the basis of substantive deficiencies, not a technicality.

[15] The Judge noted the inadequacy of scale costs. However, she was satisfied, having regard to the special difficulty or complexity of this case,[7] that the payment of greater costs was desirable. She noted that orders for costs in criminal costs are relatively rare. Cases where indemnity costs are ordered, even more so. As to the quantum of costs, she concluded:

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6 *Paterson v Lepionka & Company Investments Ltd* [2020] NZHC 2184.

7 See Costs in Criminal Cases Act 1967, s 6.

> [41] In comparison to the costs awarded in most of these cases, the indemnity costs sought by the defendant are very high. Whilst the defendant was free to conduct his defence and incur costs as he saw fit, I do not consider an award of indemnity costs of $73,213.52 and disbursements of $339.92 to be just and reasonable when the steps taken and time involved before the charge was dismissed were relatively limited.
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> [42] A costs award of $35,000 is made against the prosecutor in favour of the defendant.

[16] She also concluded that costs against prosecuting counsel, Mr Hayes, were also justified. She concluded:

> [56] This was a case where a practising lawyer commenced a private prosecution on behalf of a litigant in circumstances where a civil claim based on the same facts and arguments had already been struck out as an abuse of process and where the private criminal prosecution was also found to be substantively flawed. This is as clear a case for costs against counsel as the Court is likely to see.
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> [57] I am persuaded, for the reasons submitted on behalf of the defendant, that an award of costs of $35,000 should be made jointly and severally against both the prosecutor and Mr Hayes. An order is made accordingly.

The leave application in this Court

[17] Undeterred by the substantive s147 ruling by the District Court, the prosecutor applied for leave to appeal.

[18] When the matter first came before the High Court for hearing, Brewer J raised serious concerns regarding Mr Hayes' position. He adjourned the hearing for further consideration and noted in a minute:[8]

> [4] Mr Hayes tells me that he first appeared for Mr Paterson as a McKenzie Friend in a civil case in August 2020. Mr Hayes is aware of Mr Paterson's background and the judgments which have been made against him in the civil courts. Mr Hayes accepts the allegation that he is the controller of New Zealand Commercial Law Corp Ltd and that he accepted the instructions from the complainant company and produced the charging document.
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> [5] I have pointed out to Mr Hayes that a requirement of a charging document is that the complainant states that they have reasonable cause to suspect that the charged offence has been committed by the defendant. Given that the company can only form such a reasonable suspicion through the agency of a person, I said that suppose the person was Mr Paterson or a person

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8 *New Zealand Commercial Law Corp Ltd v Lepionka & Company Investments Ltd* HC Auckland CRI-2022-404-307, 7 March 2023 (Minute of Brewer J).

> under his influence and that was know to Mr Hayes; that would be a matter of concern to the Court.
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> [6] I also drew to Mr Hayes' attention the requirement of the Solicitor-General for Officers of the Court to adhere to the Solicitor-General's Prosecution Guidelines when acting for a private prosecutor. These are matters which are canvassed in the respondent company's submissions and so, of course, Mr Hayes is aware of them.
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> [7] I said that it would be of concern to the Court if Mr Hayes had not independently satisfied himself as to the evidential sufficiency test and the public interest in bringing the prosecution test.
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> [8] I emphasised to Mr Hayes that I have no view as to whether this is an abusive prosecution, and I certainly have no view as to any part he might have played which could be said to be contrary to his duty as an Officer of the Court. I cannot have such a view. All I have done is read the District Court judgment and the submissions of counsel. I would have to hear from Mr Hayes, in particular, at length.
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> [9] My concern has been to establish that Mr Hayes has thought about these issues and understands his position. Mr Hayes has certainly understood (because it is in his submissions) that his company would be liable to pay costs in the event of the application going against his company.
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> [10] I have offered Mr Hayes time to consider his position if he wishes. Mr Hayes has said he would be grateful for time to consider his position and mentioned that it might be necessary on reflection for him to instruct somebody else to prosecute. I emphasised that any such person would be subject to the same obligations as I have outlined and that really my point is for Mr Hayes to consider whether it is appropriate for the prosecution to continue and, if so, what part he can play.

[19] When the matter came before me, Mr Hayes confirmed that he had considered his position, that he was still instructed to proceed with the leave application and that he felt able to present arguments to me. It soon emerged that the application was doomed. I noted:[9]

> [6] It became clear in the course of focussed submissions and discussion that there was no evidence before the Court that created any obligation, in the particular circumstances here, for the respondent to "account" to 47 Fairfax Road Property Limited, the complainant. Nor was there any evidence establishing that, in the general sense, there was any money in respect of which to account to the complainant. …

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9 *New Zealand Commercial Law Corp Ltd v Lepionka & Company Investments Ltd* HC Auckland CRI-2022-404-307, 15 May 2023 (Minute of Becroft J).

[20] In my view, 'cutting to the chase' as it were, there was a wholesale lack of evidence regarding the actus reus. Moreover, the mens rea ingredient could not even arise. There were no 'errors of law' in that fundamental respect and the s 147 ruling was inevitable and could not be impeached.

[21] I adjourned the matter briefly for counsel to discuss the matter between themselves. At that point Mr Hayes effectively abandoned the leave application and, by consent, the application was dismissed with costs reserved.

[22] I noted that it would "seem fair to observe" that the respondent would be entitled to some costs. Quantum seems to be the issue for resolution.

[23] I also added:[10]

> [7] I leave to one side any considered decision as to whether the prosecution was in any event plainly abusive or was blatantly against, and contrary to, the interests of justice. There is no need for any final decision in respect of that argument but I recognise its force.

Law on costs on appeal

[24] The short answer is that costs are justified in this Court on the appeal. But the legal principles which apply are different from those applying after trial in the District Court.

[25] Section 8 of the CCCA is the starting point. It provides:

> **8 Costs on appeals**
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> (1) Where any appeal is made pursuant to any provision of Part 6 of the Criminal Procedure Act 2011 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.
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> (2) No defendant or convicted defendant shall be granted costs under this section by reason only of the fact that his appeal has been successful.
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> (3) No defendant or convicted defendant shall be refused costs under this section by reason only of the fact that the appeal was reasonably brought and continued by another party to the proceedings.
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> (4) No Judge, Justice, or Community Magistrate is liable to costs just because an appeal is filed against a determination by that judicial officer.

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[10] Minute of Becroft J, above n 9.

> (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.
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> (6) If the court which determines an appeal is of opinion that the appeal involves a difficult or important point of law it may order that the costs of any party to the proceedings shall be paid by any other party to the proceedings irrespective of the result of the appeal.

[26] The appeal here is brought under s 296 of the Criminal Procedure Act, which is in Part 6 of that Act. Section 8 of the CCCA accordingly applies. Costs may be awarded under the CCCA on applications, as here, for leave to appeal.[11] Section (8)(1) creates a very wide discretion because the court is entitled to make such order as to costs "as it thinks fit."

[27] As the authors of *The Law of Costs in New Zealand* comment: [12]

> Unlike the provisions relating to trial, success is not an express jurisdictional pre-requisite to an award of costs. But, like the trial provisions, success is a neutral factor when determining costs, as is the fact that an appeal was reasonably brought and continued by another party.

[28] A key point to make is that in respect of a criminal appeal, the Court is not required to have regard to the seven factors listed at s 5(2)(a)–(g) which must be considered in assessing costs after trial. By parity of reasoning, in some cases those factors may be considerations as to any appeal costs, but their possible relevance is entirely for the appellate court. Essentially, the test is much broader, and apparently less fettered than the test which applies after trial.

[29] The learned authors of *The Law of Costs in New Zealand* also observe:

> Where the court determining the appeal considers that the appeal includes any frivolous or vexatious matter, it may, irrespective of the result of the appeal, order that the whole or part of the costs of the appeal are to be paid by the party that raised the frivolous or vexatious matter. In such a case the court is not confined to the scale or the discretion in s 13(3) when awarding costs. If the appeal raises a difficult or important matter of law then the court may

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11 *Underhill v R* [2014] NZCA 228; see also sch 1 to the Costs in Criminal Cases Regulations 1987, which in pt 1, sub-pt C, specifically includes an application for leave to appeal, under the heading "Appeals".

12 David Bullock and Tim Mullins *The Law of Costs in New Zealand* (Lexis Nexis, Wellington, 2022) at [10.8] (footnote omitted).

> award costs to any party against any other party irrespective of the result of the appeal.
>
> (Footnotes omitted)

Are costs justified on this appeal?

[30] The leave application was destined to failure from the outset. Mr Hayes could not point to any fundamental error in the District Court decision dismissing the charges under s 147. Indeed, the lack of evidence to establish any essential ingredient very quickly emerged in argument before me. I agree with Mr Keown in his very full and helpful submissions, which I uphold in principle, that the leave application, like the prosecution itself, was "manifestly unarguable and should never have been brought".

[31] So as to be clear, those evidential deficiencies, as particularised by the respondent/defendant, which I accept included:

(a) There was no evidence of any mortgage or subsequent encumbrance held by the complainant trust (let alone an instrument that would give rise to any special relationship or obligation to account).

(b) There was no actual evidence that the complainant trust had paid any amount toward the purchase price of the land, which could give rise to any special relationship or obligation to account.

(c) There was no evidence of any surplus of property to which (if a special relationship or accounting obligation existed) the complainant could have been entitled.

(d) The evidence included documents signed by Mr Paterson that represented that no mortgage existed. Those documents have cited several court decisions, including in a decision of Associate Judge Bell that was discussed at the hearing which Mr Hayes participated and on which Doogue J commented in her judgment.[13]

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[13] See *Lepionka & Company Investments Ltd v Naldapat Ltd* [2019] NZHC 1646 at [45], discussed in *Paterson v Lepionka & Company Investments Ltd*, above n 6, at [123(c)] and [143]–[146].

(e) In a judgment dated 3 August 2021,[14] well before the leave application, the Court of Appeal had already rejected the very argument that formed the basis of the private prosecution and leave application.

[32] Mr Hayes took on board these points very quickly. It was a responsible decision for him to consent to the leave application being dismissed.

[33] Mr Keown also submits, and I agree, that "despite numerous warnings as the hopelessness of this private prosecution and the costs consequences that would follow, the leave application continued until it was inevitably dismissed."[15]

[34] I accept the submission by the prosecutor that there must be good grounds for making an award of costs on appeal. In this case, those grounds are what might be called "spectacularly good". This becomes clear when all the background factors I have previously set out are considered.

[35] In particular, it ought to have been obvious after the District Court dismissal of the charge that essential matters of proof were missing. A review of the evidence at that stage should have confirmed that. It is not as if there was new or better evidence that had emerged or could emerge.

[36] Like Judge Manuel, although in a different context and with different legal provisions applying, I too am of the view that an award of costs is amply justified.

Should the scale costs be exceeded?

[37] Section 8 gives a wide discretion to grant costs as this Court thinks fit. But that discretion is expressed as being subject to any regulations made under the CCCA. Here, the Costs in Criminal Cases Regulations apply. Clause 3 of those Regulations specifies that the maximum scales that may be paid under the CCCA are those set out in sch 1. As I understand it, although Counsel made no submission on this point, the

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14 *Paterson v Lepionka & Company Investments Limited* [2021] NZCA 364.

15 As to the "warnings" mentioned byMr Keown, he lists 10 of them, at [4] of his submissions, all of which I accept.

maximum costs according to sch, pt 1, sub-pt C would be $226 for each half day, plus disbursements.

[38] However, cl 3 of the Regulations is expressed to be subject to s 13(3) of the CCCA. That subsection provides:

> (3) Where any maximum scale of costs is prescribed by regulation, the court may nevertheless make an order for the payment of costs in excess of that scale if it is satisfied that, having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs is desirable.

[39] I am quite satisfied that s 13(3) is engaged and that costs in excess of the scale is desirable having regard to the special difficulty, complexity or importance of this case. Those words should be interpreted widely. The words "difficulty" and "complexity" are applicable. In this case, the charge laid under s 220(1)(4) of the Crimes Act 1961 — carrying with it a maximum penalty of imprisonment not exceeding seven years — in its own terms is both complicated and difficult. This is because of the allegations that the defendant became a mortgagee in possession of property allegedly required to account as mortgagee for that possession.

[40] As is seen in the submissions that were presented to the District Court, the task of establishing what exactly were the ingredients of the charge in these circumstances was challenging. This was even more so given the long civil procedural history in this matter, which predated the misguided decision to lay the charge. Neither counsel disputed the applicability of s 13(3).

[41] While this cannot be the overriding justification for costs above the scale, I must observe that the $226 scale costs provided for here must be considered derisory. In fact, in the current economic climate, they border on the farcical. I add my voice to the many others who have emphasised that the scale costs, dating back to 1967, are so hopelessly out of date as to be virtually irrelevant. There have been continuing calls for prompt remedial attention. The authors of *The Law of Costs in New Zealand* put it well:[16]

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[16] David Bullock and Tim Mullins, above n 12, at [10.10].

> … the state of the costs schedule in the Regulations is manifestly and inexcusably inadequate, and is another symptom of the unacceptable treatment of the funding of criminal cases in New Zealand more generally.

[42] Another statutory basis for costs above the scale in this case is found in s 8(5) of the CCCA. That provides that if this Court is of the opinion that the appeal includes any frivolous or vexatious matter, the Court can, if it thinks fit, order that the whole or part of any party's costs be paid by the party raising the matter. Here, it can be persuasively argued that the whole matter — the whole leave application — is vexatious. Courts must be robust. Where inferences are properly and plainly available the court should not shrink from making them. Here, the overwhelming inference is the attempts to continue this prosecution, no doubt on instructions from the complainant — effectively Mr Paterson — are motivated by Mr Paterson's hostile animus to Mr Lepionka and what has been called his ongoing campaign of harassment against him. That would surely satisfy the vexatious test. However, given my findings in respect of s 13(3), I do not rely on s 8(5); although it would appear to be another justification for exceeding scale costs.

[43] As to quantum, full indemnity costs are not justified for several reasons:

(a) Most of the preparation and work demonstrating the futility of the charge had already been done in the District Court. There should be no suggestion of any double counting. The schedule of the respondent's actual costs refers to initial research and preparation of submissions in opposition to the application. As I say, much of this can be reasonably assumed to be a repeat of that which was before the District Court.

(b) I have no details as to hourly rates and detailed costs. Also, I am not satisfied that a junior, or second counsel was justified for this case.

(c) There is something in the submissions for the prosecutor that the court should not uphold a "gold plated defence."

(d) There should be some parity with the costs ordered in the District Court which, I am informed, are not the subject of appeal. This is particularly as the work and time required in the District Court would have been greater than that required here.

(e) Finally, the prosecution, through Mr Hayes did accept the futility of the application quite soon into the hearing and consented to the application's dismissal. While I accept that most of the respondent's work (and costs) were completed by then, I cannot ignore this apparent change of heart.

[44] For these reasons, I temper the quantum of costs in this case and restrict it to what appear to be the necessary appearances in the High Court together with preparing and filing documentation. I deduct from the respondent's schedule of actual costs the first two items (which would largely relate to work already done for the s 147 hearing in the District Court) leaving a sum of $28,469.50. I make a further deduction from those costs on the basis that a second defence counsel was unnecessary. A final figure of $22,000 is appropriate.

[45] I, therefore, order costs against the prosecution — the applicant in this Court — in the sum of $22,000 plus the particularised disbursements that total $1,683.61 (exclusive of GST).[17]

Costs against Mr Hayes personally?

[46] The first thing to observe is that while Judge Manuel made a costs award against Mr Hayes personally, I accept that this is not, of course, an appeal of Judge Manuel's costs' decision. Accordingly, I must consider the issue afresh in the circumstances of this case.

[47] For what it is worth Judge Manuel concluded that this is as clear a case for costs against counsel as perhaps a court is likely to see.

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[17] For clarity I note that this disbursements total does not include the disbursements claimed for the items that are deducted at [44] above.

[48] I also accept that such orders ought to be rare.

[49] In this case, the respondent is of the view that under s 8 the very wide discretion for the court to grant such costs as it thinks fit includes the power to order costs against a prosecutor personally. Counsel's submissions do not appear to consider an alternative statutory basis to do so — under s 7(2)(b) of the CCCA Act. That provision provides that where a court is of the opinion that any person has acted negligently, or in bad faith, in bringing or conducting a prosecution, it may direct that the defendant's costs shall be paid personally by that person — where they were not acting on behalf of a Government department, Office of the Crown, local authority or public body etc.

[50] Section 7 of the CCCA would appear to provide a narrower basis than s 8 for an order against a prosecutor personally. However, in this case there is no need for me to resolve that potential issue, because as I will explain, s7(2)(b) applies.

[51] A further basis relied upon by the prosecutor is what is called the rule in *Harley v McDonald.*[18] Mr Keown submits that the Court can also order counsel to pay costs as part of its inherent jurisdiction to control counsel. It is said this jurisdiction operates independently of the CCCA.

[52] In *Harley v McDonald,* the Privy Council held:[19]

> … [A] duty rests on officers of the Court to achieve and maintain appropriate levels of competence and care and that, if he is in serious dereliction of such duty, the officer is properly amenable to the costs jurisdiction of the Court. But care must be taken not to assume that just because it appears to the Court that the case was hopeless there was a failure by the barrister or solicitor to achieve the appropriate level of competence and care. As Sir Thomas Bingham MR said in *Ridehalgh v Horsefield* [1994] CH 205, 234C-E:
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> > "Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is … for the judge and not the lawyers to judge it.

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18 *Harley v McDonald*, above n 5.
19 At [57].

> It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. … It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it."

[53] Mr Keown submits that the Court of Appeal has cited *Harley v McDonald* as authority for the court's inherent jurisdiction to control counsel, including by way of costs order.

[54] I am invited by the respondent/defendant to conclude that:

(a) there was bad faith by Mr Hayes himself in bringing the prosecution;

(b) Mr Hayes was in breach of the Solicitor-General guidelines and professional obligations owed by lawyers;

(c) the leave application was frivolous and vexatious;

(d) the rule in *Harley v McDonald* applies; and

(e) the CCCA provisions apply (without the respondent specifying exactly which — but presumably ss 8 and 7(3).

[55] On most of these matters I decline to make a ruling. They would have significant implications for a lawyer's career. I have not heard enough from the parties, particularly from Mr Hayes, to justify findings of bad faith and breach of professional obligations. As Brewer J observed in his minute, before he drew adverse conclusions against Mr Hayes, "[he] would have to hear from Mr Hayes, in particular, at length". I have not had the opportunity to do that.

[56] While Mr Hayes must come perilously close to falling within the definition of bad faith given the whole history of this case, it is possible that he was not acting in concert with Mr Paterson and that he was acting honestly and faithfully on Mr Paterson's instructions.

[57] This is sometimes a fine line to identify. But on the evidence available to me, I simply cannot say that he has crossed it.

[58] However, in my clear view, Mr Hayes has acted negligently by bringing the application for leave to appeal. Section 7(3) is satisfied. The application could not succeed given that all the essential ingredients of the charge were never provable. Judge Manuel had made this clear. Mr Hayes ought to have known this. He should have reviewed the position and concluded there was no possible future in this private prosecution. And he should have also concluded that Mr Paterson was seeking continuation of the prosecution solely in a desire to harass the defendant — which Mr Hayes should have declined to further participate in. In my view that is what a reasonable and competent prosecutor would have done. Mr Hayes informed the Court at the hearing that he was simply acting on instructions from Mr Paterson, but he should have declined to take the matter further. Indeed, he very quickly accepted this, and quickly "threw in the towel" during the hearing.

[59] A costs order against Mr Hayes is also justified, if a further basis is needed, in the exercise of the Courts wide discretion under s 8(1).

[60] In my view, Mr Hayes did come to his senses during the hearing. Albeit at the eleventh hour, he acted responsibly in abandoning the leave application. By that time, of course, most of the costs incurred by the defendant in the leave application had been incurred. But as an acknowledgement of his belated but responsible approach, I am prepared to reduce by 25 per cent his personal liability for costs. Accordingly, Mr Hayes will be jointly and severally liable for costs totalling $16,500 plus disbursements of $1,683.61 (excluding GST).

[61] There are orders accordingly.

Becroft J