IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE

CIV-2024-441-000027
[2024] NZHC 1781

UNDER	the Judicial Review Procedure Act 2016; the NZ Bill of Rights Act 1990; and the Declaratory Judgments Act 1908
IN THE MATTER	of an application for Judicial Review of a decision of the Hastings District Council to commence fluoridating Hastings water supply
BETWEEN	FLUORIDE ACTION NETWORK (NZ) INCORPORATED First Applicant
	NZDSOS INC Second Applicant
AND	HASTINGS DISTRICT COUNCIL First Respondent
	DIRECTOR-GENERAL OF HEALTH Second Respondent
	ATTORNEY-GENERAL Third Respondent

Hearing: (On the papers)

Counsel: S J Grey for Applicants
H P Harwood and S B Hart for First Respondent
J N E Varuhas and R E R Gavey for Second and Third Respondents

Judgment: 2 July 2024

JUDGMENT OF LA HOOD J
(Costs)

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[1] On 24 May 2024, I dismissed the applicants' judicial review proceedings seeking to prevent the re-fluoridation of Hastings' urban water supply.[1]

[2] I indicated a preliminary view that the respondents are entitled to costs on a 2B basis with certification for second counsel. However, I made directions about the filing of memoranda if costs could not be agreed. As agreement has not been reached, I am required to determine costs.

Parties' positions

[3] The applicants submit that the general rule that costs should follow the event should not be applied. They rely on r 14.7(e) of the High Court Rules 2016, which provides that the Court has the discretion to refuse to make an order for costs if the "proceeding concerned a matter of public interest, and the party opposing costs acted reasonably in the conduct of the proceeding". The applicants submit this rule applies because:

(a) there is considerable public importance in access to drinking water free from contamination through fluoridation;

(b) the right to decline medical treatment is a fundamental right provided for in the New Zealand Bill of Rights Act 1990 (the Bill of Rights);

(c) the applicants have no private interest in the outcome as they are incorporated societies with a public interest purpose;

(d) access by the public to the court to determine the legality of the actions of central and local government is a constitutional right; and

(e) the issue of whether the Crown pressured a local authority to comply with an unlawful directive before the required Bill of Rights assessment was completed were novel.

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1 *Fluoride Action Network (NZ) Inc v Hastings District Council* [2024] NZHC 1313 [Substantive decision].

[4] The respondents' position is that this is not an appropriate case for the application of r 14.7(e) and costs should follow the event, for the reasons I refer to below.

Decision

[5] I accept the second and third respondents' submission that, while the applicants clearly consider they are acting in a public interest, in reality the case reflected the special interests of their members. The proceeding was effectively another vehicle for groups that oppose fluoridation to challenge the Director-General's directions to local authorities to fluoridate their water supplies and to challenge the fluoridation of water in New Zealand more generally.

[6] The Director-General's directions and the Bill of Rights consistency of water fluoridation are already subject to ongoing legal challenge, including awaiting the determination of a Full Court of the Court of Appeal.[2] As observed by Cooke J in *New Health New Zealand Inc v Wellington Water Ltd*, issues relating to justification of water fluoridation have already been raised and dismissed by the courts at all levels.[3] In addition, Parliament has explicitly endorsed water fluoridation as a public health measure.[4] Moreover, as I noted in the substantive decision, there is a long history of, and a strong democratic mandate for, water fluoridation in the Hastings District.[5]

[7] I also accept the submission that the absence of a wider public interest in the proceeding is reinforced by the applicants' failure to succeed on any of their claims, and that this case can be distinguished from cases where an award of costs has been declined on a public interest basis. For example, in *NZTSOS v Minister of Covid Response*,[6] there were strong indications that the applicants' claim was meritorious and the challenged orders were revoked soon after the High Court decision.[7] Simply

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2 The appeal from the November 2023 High Court decision in *New Health New Zealand v Director-General of Health* [2023] NZHC 3138 is set down to be heard in June 2025.
3 *New Health New Zealand Inc v Wellington Water Ltd* [2022] NZHC 2389 at [28].
4 Health Act 1956, pt 5A and sch 1AA.
5 Substantive decision, above n 1, at [47] and [49].
6 *NZTSOS v Minister of Covid Response* [2024] NZCA 74.
7 At [102].

raising a Bill of Rights argument that is ultimately unsuccessful is insufficient to displace the ordinary rule that costs follow the event.[8]

[8] The framing of the applicants' case in its pleadings, evidence and submissions was unsatisfactory and reinforces that their claim was about advancing the special interests of its member rather than the wider public interest. The applicants' evidence addressed the merits of fluoridation generally rather than the issues raised by the proceeding. The statement of claim did not plead any error of law by the first respondent (the Council) but rather sought broad declarations and an order preventing the Council from recommencing fluoridation. The applicants' written submissions did not address grounds for judicial review but instead relied on the test for granting an interim injunction. The submissions also addressed the merits of fluoridation generally. I accept the submission that the framing of the case in this way put the respondents in the unsatisfactory position of having to predict, and prepare to respond to, the range of ways in which the claim might be argued.

[9] It is also relevant that the consequence of declining to award costs to the Council (or reducing those costs) will be an increased burden on the ratepayers of the Hastings District.

[10] It follows that the applicants have not persuaded me that I should depart from my preliminary view that costs should follow the event.[9]

Two sets of costs

[11] The second and third respondents only claim one set of costs between them as their interests are common and they were represented by the same counsel. However, I accept the respondents' submission that it is appropriate to order that the respondents separately meet the costs of the first respondent, and the second and third respondents.

[12] I accept the submission that r 14.15 is not engaged because the respondents could not have joined in their defence. The Director-General and the Council have

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8 See for example *Free To Be Church Trust v Minister for COVID-19 Response* [2024] NZCA 81 at [142].

9 In accordance with r 14.2(1)(a) of the High Court Rules 2016.

different functions under pt 5A of the Health Act 1956. The Council was the only party able to provide evidence and submissions about its response to the direction to recommence fluoridation. The applicants challenged the legality of the Director-General not proactively granting a general extension to local authorities and made factual arguments that only the Director-General and the third respondent could address, such as the status of extension requests made by local authorities to the Director-General. The respondents' respective evidence and legal submissions were complementary rather than repetitive.

[13] It follows, that I reject the submission that the applicants should not pay costs to the second and third respondents. Counsel submits that the second and third respondents "asked to join the proceedings" and there were "no direct allegations against the second and third respondents". I disagree. The applicants engaged with the second and third respondents prior to filing the proceeding. The Director-General and Attorney-General were joined by consent. The proceeding directly engaged the second and third respondents' interests, including the status and effect of the remedies ordered against the Director-General in the *New Health* litigation,[10] the Director-General's power to direct local authorities to fluoridate, the legal effect of those directions and Bill of Rights issues in respect of the legislative scheme and water fluoridation generally.

Conclusion

[14] Overall, I consider that the respondents' conduct in defending the application and co-operating to have it heard urgently was reasonable and responsible and their respective costs should be met on a 2B basis.

[15] I also consider that the unsatisfactory framing and wide-ranging nature of the applicants' claim and the urgency with which it was brought to hearing justify allowance for second counsel.

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[10] *New Health New Zealand Inc v Director-General of Health* [2024] NZHC 196 [Relief judgment].

[16] I therefore order that the applicants are to pay:

(a) The first respondent's costs and disbursements, with certification for second counsel, on a 2B basis in accordance with annexure A to the first respondent's memorandum dated 10 June 2024 in the sum of $20,470.40.

(b) The second and third respondents' costs on a 2B basis, with certification for second counsel, in accordance with the schedule to their memorandum dated 10 June 2024 in the sum of $20,566.05.

La Hood J

Solicitors:
S J Grey, Nelson for Applicants
Simpson Grierson, Wellington for First Respondent
Crown Law Office, Wellington for Second and Third Respondents