

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA854/2025
[2026] NZCA 161**

BETWEEN MARCUS KHAL (also known as
 MOHAMMED AYUB and
 MOHAMMED AYUB KHALIL)
 Appellant

AND KATHRYN MARGARET SHIRLEY
 Respondent

Court: Campbell, Dunningham and Andrew JJ

Counsel: S R Carey for Appellant
 D M Connor and K M Muller for Respondent

Judgment: 6 May 2026 at 11.00 am
(On the papers)

JUDGMENT OF THE COURT

The appellant is to pay costs of \$4,541 to the respondent.

REASONS OF THE COURT

(Given by Campbell J)

[1] On 27 February 2026, we declined Mr Khal’s application for a stay of enforcement of orders made by the High Court and reserved costs on the application pending receipt of memoranda on costs.¹ Those memoranda have now been filed. This judgment determines costs.

¹ *Khal v Shirley* [2026] NZCA 43 at [41]–[42].

[2] Mr Khal is legally aided. This means that under s 45(1) of the Legal Services Act 2011, his liability for costs must not exceed an amount (if any) that is reasonable for him to pay having regard to all the circumstances, including the means of both parties and their conduct in connection with the dispute. Further, under s 45(2), no order for costs may be made against him unless the court is satisfied that there are exceptional circumstances.

[3] The respondent, Ms Shirley, says there are exceptional circumstances justifying an award of costs against Mr Khal and that a reasonable amount for him to be ordered to pay is \$4,541. Mr Khal says an award of costs is not justified under s 45(2) and that, in any event, it would not be reasonable under s 45(1) for him to be ordered to pay any costs, given his financial circumstances.

[4] This Court has said, in relation to the immediate predecessor of s 45(2) (s 40(2) of the Legal Services Act 2000), that for circumstances to qualify as exceptional they must be “quite out of the ordinary”.² In determining whether there are exceptional circumstances, s 45(3) provides that the court may take into account, among other things, whether the legally aided person unreasonably pursued one or more issues on which they failed. Exceptional circumstances have been found where the legally aided person pursued a claim or argument that was completely unmeritorious.³

[5] In declining Mr Khal’s application for a stay, we said there were four factors that weighed “heavily” against the grant of a stay.⁴ The primary factor was that there was “a complete absence of merit” in his appeal.⁵ Mr Carey, counsel for Mr Khal, submits that whether it was unreasonable of Mr Khal to advance the arguments that he did can only properly be assessed after his appeal has been determined. That may usually be the appropriate course, but not when the Court has already, as we did, made

² *Laverty v Para Franchising Ltd* [2006] 1 NZLR 650 (CA) at [31], quoting *Awa v Independent News Auckland Ltd* [1996] 2 NZLR 184 (HC) at 186.

³ See, for example, *Southern Cross Building Society v Disputes Tribunal at Alexandra* (2003) 16 PRNZ 1042 (HC) at [11].

⁴ *Khal v Shirley*, above n 1, at [31].

⁵ At [32].

such an assessment. We therefore consider the stay application itself was without any merit and thus that there are exceptional circumstances justifying an award of costs.

[6] As noted, Ms Shirley seeks costs of \$4,541. Mr Khal did not raise any issue with that amount, other than under s 45(1). Leaving s 45(1) aside for the moment, we allow for items 9 and 11 in sch 2 to the Court of Appeal (Civil) Rules 2005. We consider a comparatively large amount of time was reasonable for those steps, given the detail that had to be covered in Ms Shirley's opposition and submissions, so band B applies. At the daily rate of \$2,390, this produces \$4,541.⁶

[7] As to s 45(1), Mr Carey submits no order as to costs would be reasonable as Mr Khal meets the threshold to obtain legal aid, he has no assets of any material value and his sole source of income is a benefit of \$320 a week. The limited evidence about Mr Khal's financial position suggests, however, that he does have assets of material value. He was able to pay \$217,000 to his solicitor, for example. No explanation has been provided as to the source of those funds. Further, s 45(1) requires us also to consider Ms Shirley's means and the conduct of both parties in relation to the dispute. Ms Shirley is in straitened financial circumstances. This dispute has exacerbated her situation. In our earlier judgment we described Mr Khal's initial argument during the dispute that gave rise to the decision under appeal as "hopeless" and noted he did not pursue it on appeal or in his stay application.⁷ So, Mr Khal has pursued a succession of hopeless arguments.

[8] Having regard to all these circumstances, we consider it is reasonable for Mr Khal to pay costs of \$4,541 to Ms Shirley.

Result

[9] The appellant is to pay costs of \$4,541 to the respondent.

Solicitors:
Castle/Brown, Auckland for Respondent

⁶ We record that Ms Shirley got to this figure by a different calculation.

⁷ At [32].