IN THE SUPREME COURT OF NEW ZEALAND SC 84/2008

**BETWEEN** **WILLIAM PATRICK JEFFRIES**

Appellant

**AND** **ATTORNEY-GENERAL**

Respondent

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| Hearing: | 7 July 2009 |
| Court: | Elias CJ<br>Blanchard J<br>Tipping J<br>McGrath J<br>Wilson J |
| Appearances: | D H O'Leary for the Appellant<br>H S Hancock and P P G W Morgan for the Respondent |

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**CIVIL APPEAL**

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**MR O'LEARY:**

Counsel's name is O'Leary, I appear for the appellant.

**ELIAS CJ:**

Thank you Mr O'Leary.

**MR HANCOCK:**

May it please the Court, I appear for the respondent with Mr Pedro Morgan.

**ELIAS CJ:**

Thank you Mr Hancock, Mr Morgan. Yes Mr O'Leary.

**MR O'LEARY:**

Counsel would seek the leave of the Court to have the appellant sitting next to him, just to have hand up papers and organise matters, if the Court grants leave for that?

**ELIAS CJ:**

We haven't ever done that before Mr O'Leary. If you are embarrassed by it perhaps he could sit behind and pass you things.

**MR O'LEARY:**

That could be an advantage. Your Honours have before you the submissions of the appellant?

**ELIAS CJ:**

Yes and we've read the submissions, thank you Mr O'Leary.

**MR O'LEARY:**

The case on appeal, the bundle of authorities and those other documents?

**ELIAS CJ:**

Yes.

**MR O'LEARY:**

Would Your Honours like me to highlight the submissions or do you want to go direct into questioning?

**ELIAS CJ:**

Highlight the submissions. We have read them.

**MR O'LEARY:**

If I could direct Your Honours attention to the first page, paragraph 4 at the bottom of the first page, the essence of the appellant's case is that the Court of Appeal's order was not properly made, notwithstanding its own prior direction to counsel in its minute of 26 September, and that's page 187 in the

case bundle. That it would not consider the second indemnity costs application of 5 September 2008. The Court of Appeal without a hearing and without warning the appellant that he was at risk of these proposed adverse findings of fact, thereby depriving him of the opportunity to adduce additional material of probative value which might have deterred the Court from making such proposed findings.

Nevertheless, in paragraphs 7 and 8 of its judgment of 20 October 2008 expressly considered that excluded second indemnity costs application and point 2, upheld the relevance of my learned friend's submissions recording the hearing Judge's finding that the appellant lacked standing in the review proceedings in justifying the costs aware it then made despite that being a matter of issue since the 13th of June 2008.

**ELIAS CJ:**

Mr O'Leary, I wonder if I can ask you to lift the microphone up a bit, it's not very loud, yes, thank you.

**MR O'LEARY:**

So that is the primal essence of the appellant's case today, that there is a failure of due process which was unfair because the appellant and counsel had received that express direction on 26 September 2008 but there was not going to be a consideration of the section indemnity costs application. There was only going to be consideration of the first conventional costs application of 27th of May 2008. Now because of that counsel surrendered or the appellant surrendered his right of reply to the allegations contained in that second indemnity costs application after asking the Court through counsel twice whether it intended to entertain that second indemnity costs application.

**ELIAS CJ:**

I know that that's how you'd prefer to characterise it. That the memorandum from the respondent was a new application but it is in form, isn't it, a response to the memorandum earlier filed by the appellant? I haven't actually looked at the form of it. What page of the case on appeal is it?

**MR O'LEARY:**

The, well this is the memorandum of counsel, 3rd September, that's 162 and the memorandum of counsel for the respondent 5 September at 170 and 171.

**ELIAS CJ:**

So it is a reply to the appellant's memorandum?

**MR O'LEARY:**

Counsel's view is that it says it is a reply but in fact it does not reply to the reply, the 3rd September memorandum of counsel that preceded it. What it does do is introduce a new application.

**TIPPING J:**

Does it not perhaps serve both purposes?

**MR O'LEARY:**

Well Sir in the submissions, the submission is made that in fact it doesn't deal at any point with the criticisms made in counsel's 3rd September memorandum. It says it's a reply but in fact what it is, is an introduction of a new application for costs.

**ELIAS CJ:**

It's the statement of position on costs of the respondent, isn't it? In response to the appellant's position in the 3 September memorandum? I mean this may just be playing with words. Perhaps what's more important is in the minute of Justice O'Regan in which he says that the application under consideration is the initial application made by the respondent, and that it's not open to the respondent to up the ante in his reply submissions, the Judge is treating the memorandum of 5 September as a reply submission.

**MR O'LEARY:**

Yes he is treating it as a reply submission but the respectful submission is made from counsel that in fact if one looks at the document it's not actually in substance a reply submission.

**BLANCHARD J:**

But I don't see how you can say that because it is addressing issues about whether costs should or should not be awarded. At the end it goes onto say, we've had another think and we now think it should be on the basis of indemnity, but the arguments that precede surely address just the question of costs which could be the original costs application or could be taken into account if the Court is minded to accept what's been called the upping of the ante. They apply to both don't they?

**MR O'LEARY:**

Well the appellant's position is that the memorandum my learned friend of the 5th September doesn't take on, doesn't reply to the substance of counsel's memorandum of 3 September.

**BLANCHARD J:**

Well whether it does or not it puts up arguments about costs.

**TIPPING J:**

It's a fairly fine line you're seeking to draw Mr O'Leary. If your client has misunderstood the compass of what was still alive, which maybe the case, that's a different matter from saying that he's failed to have natural justice.

**MR O'LEARY:**

Well if I collect Your Honour rightly the appellant's position is that it was a reasonable interpretation of the minute of Justice O'Regan that the first conventional costs application, if one may call it that, would be the only one under consideration.

**TIPPING J:**

But the question remained (a) whether there should be any costs and (b) if so, how much, did it not?

**MR O'LEARY:**

That is correct.

**TIPPING J:**

Why would the, pejorative observations if you like, in the memorandum that we're looking at, why would they be confined in some way, why were they off the table, in the light of the fact that the issue was whether and if so, how much?

**MR O'LEARY:**

The best way to answer that is to say, where a Court is faced with an application for costs, particularly where that has been agreed to be done on the papers, there is a range of possibility of findings. At one end of the scale we have findings appropriate to contributory costs application and moving, if you like, up the scale towards the ultimate extreme, personal costs on solicitor by way of indemnity.

**ELIAS CJ:**

But aren't the same considerations relevant? As you say, or as you indicate, it's a continuum but the factors continue to be relevant and indeed, the respondent does, the memorandum of counsel for the respondent of 5 September does at least take issue with the appellant's 3 September memorandum. It says that the unsatisfactory circumstances are even more apparent from the appellant's 3 September memorandum. So, it is joining issue with the 3 September memorandum and the Court, even if it's not prepared to entertain an application for indemnity costs, is seized of costs and has before it, relevant to that, the letter by Crown counsel, the memorandum on behalf of the appellant and this memorandum on behalf of the respondent and surely, it's entitled to take into account what's put forward in that material.

**MR O'LEARY:**

It's entitled to take into account what is put forward in that material but the point is, the proportionality of the findings in relation to the application that it said it was considering and not the application that it said it was not considering.

**WILSON J:**

Mr O'Leary, wasn't what occurred here, simply a misunderstanding as to whether the Crown's no merit argument, if I can put it that way, was directed to the indemnity costs application only, as you thought, or whether it was also relevant to the contribution to costs application, as the Court of Appeal thought?

**MR O'LEARY:**

The appellant's position, to answer your question, the appellant's position was that the severity of the findings, including lack of merit and ill-considered and other epithets, were and are such as to – or are the kind of epithets that underwrite an award of indemnity costs.

**TIPPING J:**

Yes, they are normally what you would find when the making of an indemnity order. I would be prepared to agree with that but what I'm having difficulty with, is to why they were off limits. Are you saying the Court just sort of went a wee bit far, they could have said something a bit nasty but not as nasty as this?

**MR O'LEARY:**

Your Honour's correct in that sense, that there was a range of possible findings and that given that the Court had invited and counsel had agreed to the matter being dealt with on the papers which is an administrative act, thereby waiving the right of hearing –

**TIPPING J:**

I don't think it's an administrative act, it's still a judicial act.

**MR O'LEARY:**

But it's an act falling short of a hearing.

**TIPPING J:**

Well, maybe but at your client's election.

**MR O'LEARY:**

True –

**ELIAS CJ:**

After considering the memorandum of 5 September because that's correct, isn't it, that the appellant said proceed on the papers and it's a later date, isn't it?

**MR O'LEARY:**

Yes, there were two memoranda of counsel on the 9th of September and the 24th of September –

**ELIAS CJ:**

Oh yes, the 24th, yes.

**MR O'LEARY:**

– asking for clarification of the Court's position. Did it intend, was it minded to consider the second indemnity costs application? That gave rise to the minute of Justice O'Regan of 26 September, saying no we won't consider, the Court would consider the second –

**BLANCHARD J:**

Well, then you knew you weren't exposed to solicitor/client costs but surely everything else was still on the table in relation to the application for costs on a more moderate and common basis?

**MR O'LEARY:**

With respect Sir, I come back to the point that there should be a proportionality in relation to the application on the table and the findings made, impacting upon the subject of the findings.

**TIPPING J:**

Are you asking us, in effect, to edit the remarks? If they'd just written $750 on the back sheet of the application, you couldn't have complained about that for a moment. It's the remarks that you're complaining about, isn't it and you're asking this Court to edit them, to reflect what we think the appropriate portionality is, in your submission.

**MR O'LEARY:**

No, the appellant is not asking the Court to substitute its own findings. What the appellant respectfully maintains is that the findings that were made and the circumstances in which they were made, were disproportionate, asymmetrically severe.

**TIPPING J:**

What is the relief that is sought?

**MR O'LEARY:**

The relief would be the quashing of those findings.

**ELIAS CJ:**

We usually quash orders. You're not appealing effectively against the $750 costs order. You simply, you complain of natural justice in the reasons given because, you say, you didn't have an opportunity to be heard on them. Now that I look at your – because I haven't seen the full terms of your memorandum of 24 September, I see that you do link, you're wishing to make further submissions to the reliance upon one of the subsequent findings, lack of standard which, you say, is appealed and therefore contested.

**MR O'LEARY:**

That's paragraph 5, yes Your Honour.

**ELIAS CJ:**

Yes and seven.

**MR O'LEARY:**

Yes.

**ELIAS CJ:**

I can see that it may be that – I don't know whether you're saying this, that that amounts to an indication that you wish to be heard on that point, if it's going to be material.

**MR O'LEARY:**

Indeed and indeed in relation to all the allegations made, or submissions made.

**ELIAS CJ:**

Well, where's the reference to the other allegations in this memorandum? This is the only one singled out.

**TIPPING J:**

This is 24 September.

**MR O'LEARY:**

Sorry Your Honour, I was looking at 9 September.

**TIPPING J:**

This point was related to the, upping the anti really, wasn't it? Once the Court had said that the anti was not to be upped, in para 6 of this 24 September memorandum, it says, "This new and second application relies on one of the

subsequent findings, lack of standing" but surely if that second application was not going to be considered, then that issue falls away?

**ELIAS CJ:**

The problem I think being suggested is that in fact the question of standing was used to support the award of the $750 costs. I think that it maybe that it goes to the mistake point put by Justice Wilson and you make the further point in your submissions, don't you, that the application or that the appeal, the underlying appeal, had not, at the time it was made, placed in jeopardy a fixture which had been set some months before, is that…

**MR O'LEARY:**

This is the appeal against the decision to decline the full Court?

**ELIAS CJ:**

Yes because that's another reason given by the Court of Appeal for making the costs order. I understood your argument to be that finding is unfair because the appeal had been filed in December I think, hadn't it, is that right?

**MR O'LEARY:**

That's not correct. The application for a full Court had been filed on the 14th of December 2007.

**ELIAS CJ:**

I see and when had the appeal been?

**MR O'LEARY:**

The decision was relayed to counsel on the 18th of March 2008.

**ELIAS CJ:**

Oh yes, I see and then?

**MR O'LEARY:**

Then 10 days later on the 28th of March 2008 the appellant filed his notice of appeal.

**TIPPING J:**

Why was there such a long interval from the filing to the disposition of the application for a full Court?

**MR O'LEARY:**

Indeed.

**TIPPING J:**

Was there, is there a reason or was it just the ordinary processes of the Court because it came very late in the day, the decision, apropos of the fixture.

**MR O'LEARY:**

It did indeed. I can't, I don't know why.

**TIPPING J:**

Was it not pursued vigorously if you like?

**MR O'LEARY:**

Well counsel had many matters to attend to in the period 2008.

**TIPPING J:**

I'm not endeavouring to be critical, I'm just saying, I'm just trying to, because normally my experience would be something like that would be heard within, put in a normal banco list and heard next week.

**MR O'LEARY:**

Well the application –

**TIPPING J:**

Or the following week.

**MR O'LEARY:**

The application for a full Court, both the underlying judicial review proceedings, was made on 14 December 2007 to the Executive Judge following the lead of Justice Heath.

**ELIAS CJ:**

We're concerned with the appeals, so really the date that's relevant is the filing of an appeal in March and you say, well that's when the decision was given.

**TIPPING J:**

They couldn't have filed it earlier because the thing was, sort of, sitting there waiting for a decision.

**MR O'LEARY:**

Well the application wasn't determined until 7 March and wasn't relayed to counsel until the 18th and the appeal went in on the 28th.

**TIPPING J:**

You mean it took them a fortnight to tell you what had happened, after it had happened?

**MR O'LEARY:**

Yes well 11 days. There was a failure to follow up a change in email address. It's dealt with in the submissions.

**ELIAS CJ:**

On the point in the decision at page 191, here the Court says we don't accept that counsel for the appellant have any reason to feel caught out. That suggestion of course was made in the memorandum for counsel for the respondent but was it something that you'd put forward in your memorandum of 3 September? What did you say on that point in the memorandum of 3 September?

**MR O'LEARY:**

May I refresh my memory, there are so many memoranda if I could just read.

**ELIAS CJ:**

Well that's why I was asking you because it's quite long and I couldn't…

**MR O'LEARY:**

I'm just reading 3rd of September. Well the answer to your question Your Honour is probably –

**ELIAS CJ:**

Twenty one is it? Just the indication that it was impossible to get ready for –

**MR O'LEARY:**

Yes, that summarises probably paragraphs 12, 13,14, 15.

**ELIAS CJ:**

Yes because the circumstances of the costs order are slightly unusual in the sense that you filed your appeal and you withdrew it, you say, before anyone really had to do very much work in preparing for it. So the question of whether that was, well what the effect of that filing of the appeal was really an issue that the Court had to consider in deciding whether to order costs. It wasn't a case where costs was necessarily indicated or even usually indicated because it was a very short period of time?

**MR O'LEARY:**

Indeed it was a short period of time between 28 March and 10 April.

**TIPPING J:**

Could we just pursue this standing point because it seemed as though perhaps there might be something that you could say about that. I'm looking at page 185 of the case and I'm looking at your paragraph 6 and 7 there, from which I understand you to argue that they relied on something that in the light

of those two paragraphs you were entitled to regard as off the table i.e. this standing point?

**MR O'LEARY:**

Correct.

**TIPPING J:**

Right. Now in their judgment, where did they rely on it and to what sort of effect?

**MR O'LEARY:**

If Your Honours go to paragraph 8 of the judgment, on page 190 of the bundle. The argument being made here, or the argument that the appellant makes to counsel, is that they are considering here the second indemnity costs application in paragraphs 7 and 8 and they are repeating, the Court of Appeal is repeating the statements of my learned friend.

**TIPPING J:**

Well that's just narrating counsel's argument. Now can it be inferred from paragraph 10 that the Court in effect adopted those arguments? We agree with counsel that the appeal was misguided and without merit. I suppose that is a proposition you can advance that necessarily includes the standing point.

**MR O'LEARY:**

It's a strong definite statement we agree the appeal was misguided and without merit.

**TIPPING J:**

But that's the conceptual sequence that you rely on, that you were entitled to have it off the table, regard it as off the table.

**MR O'LEARY:**

Correct.

**TIPPING J:**

And here it's on the table?

**MR O'LEARY:**

It's on the table.

**TIPPING J:**

Right, thank you. I understand now.

**BLANCHARD J:**

I'm not sure that that's a fair interpretation of paragraph 10. It seems to me that 8 and 9 are simply a narrative of what has gone on before in the submissions that were made before but there's no reference in paragraph 10 quite significantly to the lack of standing question. It seems to be primarily based on the lack of merit and the circumstances in which the appeal was launched.

**ELIAS CJ:**

It seems really to be a reference back to paragraph 7 and the argument advanced there.

**TIPPING J:**

Indeed the expression "without merit" is the precise language, third line at paragraph 7.

**MR O'LEARY:**

In the second line of paragraph 7 the language used, well it's insubstantial and without merit. If we go to paragraph 10 the statement at the beginning is that the appeal was misguided and without merit.

**BLANCHARD J:**

But isn't the misguided explained in the next few sentences? The business about placing a fixture in jeopardy? That's what's misguided. I don't think it's

got anything to do with some original lack of standing, assuming that there was such.

**MR O'LEARY:**

Well counsel respectfully disagrees and discerns there's a pyramid of inferences here based upon the preceding paragraphs which do make specific reference to the issue of standing.

**TIPPING J:**

The appeal per se may not have been misguided but the comment seems to be that the appellant should have been ready for an urgent fixture because of the jeopardy to the fixture. That seems to be the line of thought which seeks perfectly fair comment frankly. If you're going to appeal against an order which is, and the appeal jeopardises the fixture, surely you can't turn around and say oh dear, oh dear, I can't accept an urgent fixture?

**MR O'LEARY:**

Well the question is the urgency of the fixture.

**TIPPING J:**

Well maybe but it seems to me, I'll put it to you bluntly, that I think what the Court of Appeal says there seems pretty fair to me. Otherwise you are playing with the system or it can be inferred.

**MR O'LEARY:**

Well the appellant's position is that he put in the application for a full Court some five months –

**TIPPING J:**

Never mind that. You get the order, you don't like it, you appeal. Surely anyone ought to be anticipating an urgent fixture? Because the Court of Appeal would be very mindful that it was it's responsibility to avoid a fixture being put off if it reasonably could be avoided. That's basic Primer 1 stuff as far as I'm concerned Mr O'Leary.

**ELIAS CJ:**

There seem to be two reasons that the Court gives. The first is the one that simply saying the word ready wasn't an explanation that could be accepted against the background of your appeal but they also do say that the appeal was, this is the appeal against the refusal of a full Court, was misguided and without merit and they repeat that in the penultimate sentence at the end of that paragraph saying that the attempt to stay the High Court hearing "suffered from the same lack of merit as the appeal itself". So there are two reasons. The lack of merit in the appeal and also the fact that having filed the appeal you didn't follow through on it for reasons which the Court of Appeal say are not really acceptable against the background.

**MR O'LEARY:**

May I ask Your Honour just to, that's a long statement which –

**ELIAS CJ:**

Well I'm saying that there are two prongs to what the Court has said here. It has said and I'm agreeing with the point I think you're making here, that one of the planks is that they are saying that the appeal, that is the appeal against the refusal to order a full Court, was misguided and without merit and you take issue with that.

**MR O'LEARY:**

Correct.

**ELIAS CJ:**

They also say that it also prejudiced the fixture and having filed the appeal it really isn't credible for you not to follow through on it simply because the Court provides an urgent fixture in circumstances where the High Court is about to hear the substantive case.

**MR O'LEARY:**

Well it's important to remember that the Court on the 8th of April set down the fixture for the 14th, three working days notice. Now counsel having to –

**ELIAS CJ:**

This isn't a very big issue. This is who hears it. One Judge or two Judges.

**MR O'LEARY:**

Your Honour I think we're talking about the timing of the appeal.

**ELIAS CJ:**

Yes.

**MR O'LEARY:**

Well there might have been time after the 24th of April when counsel had to file, get his submissions in for the two review applications being heard on 5 May.

**TIPPING J:**

But with great respect, surely the compass of the appeal, as of the original application, was very narrow. Was it supported by evidence, the application, or was it just a formal application, that is the application for a full Court?

**MR O'LEARY:**

That was supported by evidence because it went in after the evidence had been supplied.

**TIPPING J:**

Right so the compass of the case if you like was very small. Issue timing and a bit of evidence. Principles no doubt fairly well understood. I would have thought it would have taken about half an hour to get ready for something like that. They would have no doubt required some written, a brief skeleton for an urgent hearing but nothing elaborate.

**MR O'LEARY:**

Maybe –

**TIPPING J:**

With great respect I find it impossible to accept that your client was sort of outmanoeuvred by this urgency and was entitled to decline the urgent fixture or say well if I can't have a bit more time I'll withdraw. I have to put that to you directly because I think you may have a bit of a point about them saying that the appeal itself was misguided and without merit.

**ELIAS CJ:**

But they're referring there to the appeal against the refusal of a full Court and aren't they entitled to make that determination, aren't they entitled to draw the inference that if you didn't follow through on it, it was misguided and without merit. Or aren't they entitled to look at the memorandum you've put in and the memorandum in reply and say, well we can't see why it was so important to get a full Court in this case and therefore the appeal was misguided and without merit.

**MR O'LEARY:**

Well the Court of Appeal did not have the benefit of the submissions that had been made in memoranda back in December, 14 December and 21st December, explaining why a full Court was desirable for the two sets of judicial review proceedings, one involving the Privacy Commissioner, and there was a comprehensive explanation in that as to why a full Court, just two judicial minds, would have been preferable and was desirable.

**BLANCHARD J:**

So those memoranda already existed?

**MR O'LEARY:**

They existed in the High Court.

**BLANCHARD J:**

Well why couldn't you simply have accepted the fixture in the Court of Appeal and argued from those memoranda?

**MR O'LEARY:**

Well counsel rightly or wrongly took the view that having to assemble a case on appeal, having to right submissions immediately, which was required by the Court of Appeal, when he is also simultaneously in the midst of preparing submissions for the underlying judicial review proceedings, that's two sets of submissions, could not be accomplished at three working days notice.

**BLANCHARD J:**

Well they really directed the same thing. You'd be having to demonstrate that the case was of sufficient significance and sufficiently arguable that a full Court should have been assembled. There's no different issues there.

**MR O'LEARY:**

Sorry Sir, different from what?

**BLANCHARD J:**

From what's going to be argued in the High Court.

**MR O'LEARY:**

Well with – I don't agree that there's an identicality of issue. The desirability of having two or more Judges determine these judicial review applications is distinct in terms of issue from the issues raised.

**BLANCHARD J:**

Surely you have to address the compass of what it was that was going to be argued in the High Court in order that the Court of Appeal could understand why it was important to have two Judges?

**ELIAS CJ:**

That would have been, however, if the appeal had gone ahead, that would have been the issue. Looking at your memorandum it seems to me that you're putting forward two reasons why costs shouldn't be awarded, this is the –

**MR O'LEARY:**

Is this the 3rd September?

**ELIAS CJ:**

This is the 3rd September one. It's not terribly easy to follow but you say first that it's specious for the respondent to say that the respondent has incurred much in the way of costs of preparation for the appeal because there were only a few days between filing the appeal and your not following through on it. Secondly, you say that you didn't follow through, and therefore an inference as to the appeal having been a bit of a flick, that didn't have merit wouldn't be warranted, because you couldn't get ready for the appeal, and you put forward an explanation as to why you've withdrawn the appeal. Now, the Court of Appeal says as to the second, we don't accept that you shouldn't have been in a position to go ahead on that, and it clearly does accept that the respondent had some preparation entailed, and that an award, a modest award of costs, was warranted.

**MR O'LEARY:**

Well, in response, the issue for the appellant and counsel was the urgency of the fixture. The fixture had three working days' notice.

**ELIAS CJ:**

But why are you putting that forward? You put forward the urgency as the explanation for why you've withdrawn the appeal, and that must be because you are resisting the inference that the appeal itself had no merit. I mean, it's a bit odd to file an appeal and then withdraw it.

**MR O'LEARY:**

Well, the rules, rule 38 of this Court of Appeal, civil rules, that asks the registrar to consult with the parties. Allocate after consultation must allocate a fixture. That is the –

**ELIAS CJ:**

That's not before us, as to whether the Court of Appeal, there's no issue as to whether the Court of Appeal was wrong to set the thing down. We're only concerned with this question of costs, and the reasons they have given. You've said the respondent shouldn't get costs, one, because there was really no preparation that he had to do in the time, and secondly, because no adverse inference should be drawn as to the merits of your appeal, because you couldn't pursue it, because you didn't have time to prepare for it.

**MR O'LEARY:**

Not for a fixture on the 14th.

**ELIAS CJ:**

Yes, all right, well, the Court is saying, well, we don't accept that point. You should have been in a position to be ready to argue the appeal, against the background of the fixture. And they clearly accept that some costs have been incurred by the respondent, and that therefore, in the usual course where an appeal is abandoned, it's appropriate to make a modest award of costs. The appeal, your submissions seem to have proceeded on the basis that the Court of Appeal was pre-judging an appeal yet to be heard in deciding that the appeal lacked merit. But it's not talking about the substance of appeal. It's only talking about the appeal against the refusal to order a full Court. That's all it's dealing with. So these issues of standing and so on are irrelevant.

**MR O'LEARY:**

Well, the appellant's case is by referring to the matter of standing, because it was referred to by opposing counsel, it was not irrelevant to their considerations.

**ELIAS CJ:**

Well, they don't say that they're relying on that. And their reasons, when one analyses them against the submissions that you have put up, make perfect sense, as being concerned with the appeal with which they are concerned, the appeal against the refusal of a full Court.

**MR O'LEARY:**

May I just turn to the –

**ELIAS CJ:**

As does the modest amount of the costs awarded.

**MR O'LEARY:**

Well, the costs award certainly is modest. But, as has been made in submissions, it seems not to arise out of an analysis of the actual likely costs incurred by my learned friend. In fact in its judgment the Court says we're not going to analyse what Mr Hancock can fairly claim.

**ELIAS CJ:**

Where does it say that?

**MR O'LEARY:**

If you turn to the judgment, paragraph 11.

**ELIAS CJ:**

Oh, "We do not propose to analyse in detail the components."

**BLANCHARD J:**

But Mr Hancock had given details of the work that behind the scenes Crown Law had done up to the point when it discovered that the appeal was not going to go ahead and on an application of this kind surely the Court of Appeal doesn't have to get into a minute analysis of it. It plucks a figure out of the air, as one of my brothers said earlier on. If they'd simply written $750 on

the file nobody could or would have complained. The $750 figure seems to me to be perfectly fair.

**MR O'LEARY:**

Well counsel's response to that Sir is that given that it was on us to decide what amounted to what it calls a fair contribution in paragraph 11, it is odd that it did not engage in some sort of analysis, noting as counsel did that what it really boiled down to was the drafting of three unfiled documents between the 8th and 10th of April.

**TIPPING J:**

Well we're not here to debate quantum are we?

**MR O'LEARY:**

No we're not here to debate quantum. But my point is that, leading on from the comments of Your Honours, that what we don't seem to have here is analysis of what is a fair contribution.

**ELIAS CJ:**

Well that is about quantum that you're now seeking to engage us on. It's just that really Mr O'Leary I would have had some sympathy if the Court of Appeal had rather peremptorily expressed a view on the underlying merits of your client's case in this. But it seems to me that it's reasons read perfectly satisfactorily as being a criticism of course of what they say was your misguided appeal against the refusal of the full Court but that seems to be a view that was open to them to express.

**MR O'LEARY:**

But why is it, if I may ask a question, why is it misguided to appeal a decision that is given without reasons?

**ELIAS CJ:**

It's not. It's not misguided.

**MR O'LEARY:**

Why is that misguided.

**ELIAS CJ:**

It's not misguided. It's misguided to file an appeal and then not follow through on it because that puts the other party to inconvenience and expense and that's why the award of costs was made. I think the criticisms that you see are really not as condign as all as you have suggested.

**MR O'LEARY:**

I think the finding of disruptive of the High Court process is quite severe.

**ELIAS CJ:**

Risking disruption. Risk losing the High Court fixture. It's the – and of course it did if you weren't prepared to accept the urgent fixture if you had succeeded in having had the fixture put off.

**MR O'LEARY:**

Or withdrawing the appeal because of the urgency of the fixture. There was no disruption.

**ELIAS CJ:**

There was the disruption before your – well, I'm sorry. I'm talking about now the inconvenience to the respondent. There was no disruption because you withdrew your appeal but that isn't what he's saying here. He's really answering the point you make that you couldn't be expected to have been ready to argue the appeal and therefore no adverse inference as to your seriousness in pursuing the appeal should be drawn. The Court's rejected that. They've said, you should have been prepared to go ahead on this point and you should have expected an urgent fixture.

**WILSON J:**

Mr O'Leary, there may well have been points that you could have made on the matters where the Court of Appeal was critical. I frankly cannot understand why you don't pursue a mistake argument.

**MR O'LEARY:**

That there was a mistake of fact?

**WILSON J:**

No, a mistake in terms of a misunderstanding, as between you and the Court of Appeal as to what was an issue.

**MR O'LEARY:**

The appellant's position is not that he mistook what the Court of Appeal said in its minute of 26 September 2008. It was clear what it said in its minute of 26 September.

**TIPPING J:**

Well, there was a misunderstanding on your argument somewhere, as to what was on the table, putting it colloquially because your client feels that these remarks should not have been made because they were off the table, the issues behind them, were off the table. That's, as I understand it, the essence of your case –

**MR O'LEARY:**

Well, that's correct.

**TIPPING J:**

Well, if you say that you don't want to rely on questions of mistake, well that's fine. It seems to me that that really represents the best it can be put from your client's point of view. As a result of a genuine mistake, he didn't rejoin to things. That if he'd realised that they were on the table, he would have rejoined.

**MR O'LEARY:**

That is the appellant's argument. That if he had realised that he would be exposed to this kind of impeaching finding, he would have and wanted to reply. Maybe we're saying the same thing from a different point of view, that that's the point, he's saying, had I known of the findings that did eventuate, or the Court was mindful to make, I would have wished to have explained, to have brought forward evidence –

**TIPPING J:**

The argument that's against you, is putting it very bluntly, that he should have realised and it's his own fault. I mean, that seems to me, with respect and I'm not making any assessment of it, I'm just saying to you that that seems to be the compass of it, in reality.

**MR O'LEARY:**

Counsel's submission on that would be that when a Court has isolated one of two applications for consideration, in this case the contribution to costs application, when it has said, when it has invited counsel to agree to the matter being done on the papers and not by way of a hearing, if it is then minded to make reputation damaging findings, that it is a matter of fairness for it to warn counsel and appellant –

**BLANCHARD J:**

I think it's putting it a bit high to say that it's reputation damaging findings. They are adverse findings, they are criticisms but they're not damaging of anybody's reputation.

**MR O'LEARY:**

I think for a barrister, to be disrupted –

**BLANCHARD J:**

Oh, come on.

**MR O'LEARY:**

– of the High Court process –

**BLANCHARD J:**

Come on Mr O'Leary.

**ELIAS CJ:**

They don't say that, they don't say that it's disruptive of the High Court process.

**McGRATH J:**

It was the application for stay, I think, that they thought was disruptive with the High Court process. The application to stay the High Court proceeding continuing.

**MR O'LEARY:**

It's in paragraph 10, the attempt to stay the High Court hearing.

**ELIAS CJ:**

Yes.

**MR McGRATH:**

That's all they were saying because that was leaving the High Court in a position, where having allocated a fixture, it was going to be uncertain as to whether or not it could proceed while the appeal remained pending.

**TIPPING J:**

I think what you've said Mr O'Leary, encapsulates the best you can put it, namely but in the light of the circumstances your client should have been given an express warning and invited to rejoin. That seems to me about as high as you can reasonably put it. Again, don't misunderstand me, I'm just trying to articulate the argument, I'm not expressing a view.

**WILSON J:**

Can I put the proposition that I think I put to you earlier and invite you to reconsider your position on it. That proposition is, that what occurred here, was a misunderstanding as to whether the Crown's no merit argument was directed to the indemnity costs application only, as you thought, or did it also extend to the contribution to costs application, as the Court of Appeal considered?

**MR O'LEARY:**

It would be the former because the appellant's view is that these findings, ill considered, misguided, disruptive, are serious findings for a professional.

**WILSON J:**

Could you tell me whether or not you accept the proposition that I put to you, that there was a misunderstanding in the terms that I sought to articulate? I really don't, I don't see any prejudice to your position in accepting –

**MR O'LEARY:**

No, no, I accept, to answer your question, yes, there was such a misunderstanding.

**TIPPING J:**

Without wanting to prolong this unreasonably Mr O'Leary, I'm a little puzzled as to our jurisdiction, or our powers here. The idea of quashing, if you like, a discreet finding along the way to a decision made in a Court like the Court of Appeal, by this Court, strikes me as something that if it were meritorious, if you like, that you'd taken us to the point where you had some merit, is there any basis on which you can rely for such an order? In other words, our order is not directed to the order for costs, it's directed to certain remarks made in the judgment, is it, or memorandum, in effect a judgment, judgment, yes.

**MR O'LEARY:**

Well, it is open to the Court, from the reading of the case law, it is open to the Court to strike out, remove, certain passages, remarks. It's certainly open to the High Court.

**TIPPING J:**

Well, there is mention of a decision of mine in the papers which involved the Mäori Land Court, I think, from memory, did it?

**MR O'LEARY:**

That's *O'Regan v Lousich*.

**TIPPING J:**

Yes but that's a rather different situation. That was the inherent jurisdiction of the High Court controlling the work of a lower, or an inferior and I don't mean that in a pejorative sense, body. Here, we have a role that is entirely statutory and obviously, it carries with it certain inherent power but I just don't think you've articulated any basis for doing it, even if it was justified otherwise.

**MR O'LEARY:**

This Court has the powers of the, if my understanding of the Court of Appeal's Civil Rules is correct, has the powers of the Court of Appeal.

**ELIAS CJ:**

We could quash the reasons and substitute an award of costs of $750. Is that what you're saying?

**MR O'LEARY:**

Yes, that would be possible.

**ELIAS CJ:**

Don't you have to convince us that the Court of Appeal was wrong? Even if you are advancing a natural justice point, we would have to be careful that it

couldn't have made any difference, a sort of *John v Reece* approach but I'm not sure that we couldn't be satisfied that the Court of Appeal was entirely right.

**MR O'LEARY:**

Counsel comes back to the burden of the appellant's submissions. Counsel took the criticisms that were made as relating to and being appropriate for the second indemnity costs application which the Court had said it was not going to consider.

**ELIAS CJ:**

Before that, you had joined issue on some of these points, in terms of the first application which was for a substantial contribution to costs, saying that you had not been able to follow through on the appeal because of the shortness of the time for preparation. So that was a matter you had invited the Court to take into account in making its costs order. And it's saying that it doesn't accept that. That you should have been prepared to do that.

**MR O'LEARY:**

The difference between counsel and the appellant in the Court of Appeal on that point is simply the length of time. That three working days' notice was simply too soon, and that's what's said in the memoranda.

**WILSON J:**

I suggest, Mr O'Leary, that if by working days you're meaning something other than seven days a week, that's not really a good argument for counsel to put up. Surely, if necessary, in a case of urgency like this, you'd work every day for as long as was required.

**MR O'LEARY:**

Well, counsel was working every day for as long as required, on the two sets of substantive submissions that had to be in by the 24th of April. It was a realistic assessment. There's no game going on here.

**TIPPING J:**

Well, the other one should have been put aside, while this more urgent thing, they were both urgent, but this was clearly more urgent. I mean, that's the life of the Bar. And if you can't do it yourself, you get someone else to do it.

**MR O'LEARY:**

Well, rightly or wrongly, Counsel took the view that such was the, such was the pressure that he and the appellant were under in relation to this matter that the sensible course is simply to discontinue the appeal.

**TIPPING J:**

Well, fair enough. That may have been the sensible course. But it doesn't immunise you against costs.

**MR O'LEARY:**

No, no, it's not, no –

**TIPPING J:**

We're getting distracted, I think, from the main issue, which is whether –

**MR O'LEARY:**

It doesn't immunise against costs, and that hasn't been the appellant's position. But the appellant's position is that it may well immunise, or the whole history of the matter, may well immunise the appellant against severe findings of the type that –

**TIPPING J:**

Yes, understood, understood.

**MR O'LEARY:**

That counsel maintains occurred here.

**McGRATH J:**

I think one difficulty, Mr O'Leary, is that in your memorandum of 24th of September, you appear to indicate that provided the new indemnity costs application is not to be considered by the Court of Appeal, then the matter can go ahead on the papers as they stand. Now, as I understand it, your position is that you thought, in simply asking for assurance that the Court would not look at the indemnity costs application, that other aspects of this document, which was also a reply to your submissions on the application for an ordinary award of costs would not be considered. But there's nothing in it, really, that signals that you wish that to be the case.

**MR O'LEARY:**

If I collect, Your Honour, in summary what you're saying, there's nothing in it that signals that the Court, that counsel understood the Court was only going to consider –

**McGRATH J:**

There's nothing in your document of 24 September that indicates a concern over anything other than exposure to award of indemnity costs. You don't indicate any concern in this document about other aspects of the submission that the Crown made, which was also in reply to your earlier submission.

**MR O'LEARY:**

Well, Sir, I think implicit in concern about an award of indemnity costs is concern about the findings that would support such an award, because they would necessarily have to occur to support such an award.

**McGRATH J:**

You didn't signal in this document that you wanted to be heard, if there were going to be findings in relation to the merit of the appeal against refusal of full Court.

**MR O'LEARY:**

Well, maybe that is an oversight of counsel. But the concern is that indemnity, that the claim for indemnity costs, if considered, would be supported by findings appropriate to an indemnity costs award, as counsel submits they were. Maybe it could have been expressed more precisely, but counsel finds it difficult to imagine an award of indemnity costs that's not supported by findings of a nature that support indemnity costs awards. They would justify it.

**McGRATH J:**

Well, I think that gets us back to just how serious these criticisms were from which I think you've heard from the Bench that in our experience these don't seem to be particularly serious criticisms the way that you seem to have interpreted them.

**MR O'LEARY:**

Well Sir I respectfully disagree with that view. I think these are, or counsel does consider these are serious criticisms in terms of the new Law Practitioners and Conveyancers Act there is a category of conduct, unsatisfactory conduct, lower than misconduct, but counsel does not consider it possible that these findings could possibly be the basis for such a claim, unsatisfactory conduct by counsel during the course of litigation when his obligation is to –

**ELIAS CJ:**

But it doesn't, there's nothing in this about counsel have behaved in an unsatisfactory way. There's simply an indication that the appeal was misguided, the appeal against the refusal of the full Court was misguided. I must say I've had plenty of occasions when I've been counsel and filed appeals that the Appellate Courts have seemed to think were misguided.

**MR O'LEARY:**

I think the particular word to which the appellant took exception amongst the epithets used was the word "disruptive".

**ELIAS CJ:**

Well that was about the consequence of applying for stay if you weren't prepared to go ahead with the fixture that had been granted in the Court of Appeal but still wishes to pursue your appeal.

**MR O'LEARY:**

So I collect from Your Honour that you think it's a very limited, the criticism is limited by those facts?

**ELIAS CJ:**

Yes. I had been concerned that there were implicit criticisms of the underlying litigation but I am now of the view, reading this, that it's clearly confined to the circumstances of the appeal against the refusal of the full Court and the rejection, admittedly the rejection of the appellant's contention that he couldn't follow through on that appeal because he didn't have time to prepare for it. That's all it really amounts to.

**BLANCHARD J:**

The stay would surely have interfered with the progress of the High Court proceeding. That's all the word disruptive is saying.

**MR O'LEARY:**

This is the –

**BLANCHARD J:**

It's not particularly pejorative.

**MR O'LEARY:**

Yes. I mean there is a matter of fact here. This was a proposed stay application in the Court of Appeal. It wasn't ever filed.

**BLANCHARD J:**

Well all right, they could have used the words "would have been" but to say "was disruptive" is essentially saying the same thing.

**McGRATH J:**

When you say proposed it was an application for a stay, let's face it.

**MR O'LEARY:**

Yes but it wasn't an application that was ever filed. There was no application for stay made in the Court of Appeal. There was a proposal to do so that never eventuated.

**TIPPING J:**

And you were given the opportunity to apply for a stay by the President if, as a substitute if you like for the adjournment of the fixture, weren't you, or something like that, I seem to have read?

**MR O'LEARY:**

Yes there was an application for adjournment of the fixture and the President on the telephone conference on the 10th of April gave the counsel the choice, as he puts I think directly, of the appeal being heard on the Monday the 14th of the stay but made it clear that the stay application would have to argue the merits of the appeal. That's in his minute of –

**BLANCHARD J:**

It's significant. The Court of Appeal puts the word "stay" in inverted commas indicating that it's not literally meaning "stay". I think far too much is being read into this. It's not nearly as serious as is being suggested and comes nowhere near the kind of criticism that could lead to any Law Society proceeding.

**MR O'LEARY:**

Well counsel has examined the new Act and the new Ethical Society Rules and it seems to counsel that if one takes a wider view of the words "disruptive of the High Court process", that could amount to unsatisfactory conduct, as it is now defined in section 12 –

**BLANCHARD J:**

Well it needs to be read in context. There's a far too great a degree of sensitivity being exhibited here in my view.

**MR O'LEARY:**

Well counsel's response to that is this, as Your Honour Justice Tipping pointed out in the O'Regan v Lousich case it's important to consider the authority of the Court or Tribunal making the impugned findings as well as the status of the position of the person who's the subject of the impugned findings. Now these are findings of the Court of Appeal not, with all due respect, the Mäori Land Court. It's a higher status of tribunal. The wording which Sir Tipene objected to in the *O'Regan v Lousich* case was simply the word, if I recall correctly, overbearing in manner. Now Your Honour held in that case that the Judge had not been fair in terms of natural justice.

**TIPPING J:**

That is a wholly different situation I think you have to rely on it for matters of principle if it demonstrates any not for a factual analogy.

**MR O'LEARY:**

But I was endeavouring to respond to –

**TIPPING J:**

I know you were but I'm not giving you any comfort that I would accept what I said there is really of any help to your client here on the facts.

**ELIAS CJ:**

Well I am sympathetic to the idea that Courts should take care. What they say can wound. If this was really wounding I would be concerned. But I must say I'm with Justice Blanchard, it's simply an indication that this Court thought that the appeal was misguided and it says why. You may accept, you may not accept, it's not very wounding. It's their assessment of why costs were in order.

**TIPPING J:**

I think what they're saying, or trying to say in the first line of paragraph 10, is that in the event the appeal was misguided and without merit because it was withdrawn. But anyway I don't think we can really elaborate on this much further. It's a matter of assessment as to whether it was justified, this comment, and if so or if not what can be done about it.

**MR O'LEARY:**

Well Sir if I may respond just to that briefly. Counsel still has difficulty with the notion that an appeal that hasn't been heard against a reasons decision is misguided and without merit because it's withdrawn.

**TIPPING J:**

All right, well, we are not here to sort of conduct a class in linguistics. It's not perhaps stated in the way that in retrospect a perfect articulation might have been.

**ELIAS CJ:**

Well you've said it yourself too. That you weren't able to go ahead with this appeal with the short notice because you were scrambling to get ready for the substantive High Court matter.

**MR O'LEARY:**

To a judicial review application.

**ELIAS CJ:**

Yes and so too were counsel for the respondent put in that position. That is why the Court is saying all this is misguided. You didn't pursue it but everyone had to drop things and rush around and therefore they made an order of $750 costs.

**MR O'LEARY:**

Yes the – factually doesn't take issue with what Your Honour has said. The appellant's position, rightly or wrongly in light of what Your Honours have said

today, was that while those facts are true, if these findings, if these epithets were going to be used, it was not unduly sensitive of him to find them damaging in a professional sense and for that reason he should at least have been warned. Given a chance to respond about why the appeal might have been well guided, well considered and he's saying, all I wanted was a chance to explain. That might not have been an explanation that worked but I think the point is it's an opportunity that should have been afforded.

**McGRATH J:**

Mr O'Leary can I just clarify this matter. I'm looking at perhaps to help you, if you put at page 164, which is your memorandum of the early September, looking at paragraph 9, am I correct in understanding that paragraph to indicate that after you appealed against the refusal of a full Court, a few days later you applied for a stay of the High Court substantive proceedings?

**MR O'LEARY:**

That is to the High Court?

**McGRATH J:**

Yes.

**MR O'LEARY:**

And the Judge didn't determine that application.

**McGRATH J:**

That is the Act that I think the Court of Appeal is referring to in its judgment in paragraph 10 at page 191, isn't it?

**MR O'LEARY:**

Well it's ambiguous as to what it's referring to.

**ELIAS CJ:**

Well what else could it be referring to?

**MR O'LEARY:**

Well the proposed application for stay to the Court of Appeal. So we have an application for stay to the High Court that isn't determined followed by a proposed application for stay to the Court of Appeal that's never filed.

**ELIAS CJ:**

And which would have been consequential on a successful adjournment of the hearing, would it? Well you only needed the stay if you weren't going to accept –

**MR O'LEARY:**

Yes.

**ELIAS CJ:**

– the fixture?

**MR O'LEARY:**

Yes the stay of the substantive review proceedings.

**TIPPING J:**

You wouldn't have got a stay anyway because the Court would have done it's best to hear it, the Court of Appeal that is, to have heard the matter before the substantive fixture. I think we're getting ourselves into a complete blind alley here. I mean it really comes down to whether you should have been given warning that they had in mind to make these findings and/or whether the findings were justified.

**MR O'LEARY:**

Well I would agree with that assessment Sir and the appellant's position would be that yes and yes or yes and no. Yes there should –

**TIPPING J:**

Or no and yes.

**MR O'LEARY:**

Or no and yes. Yes there should have been some sort of indication that these damaging findings might be made, but there wasn't.

**ELIAS CJ:**

Well does that really get to the end of your submissions?

**MR O'LEARY:**

Well I think the conversation has covered all aspects of the submissions really so counsel has no more at this stage but would like the right to respond to the submissions of my learned friend.

**COURT ADJOURNS: 11.18 AM**

**COURT RESUMES: 11.37 AM**

**ELIAS CJ:**

Yes Mr Hancock, you've heard the discussion. Is there anything that you wish to assist us with?

**MR HANCOCK:**

No Your Honour. I think that the submission I followed through the exchanges and the basic points I think which have emerged from the Bench are touched on pretty well in the submission and I'm really in the position if I can assist the Court on any particular matter but I think the discussion has been quite thorough on the points I'd be generally raising.

**ELIAS CJ:**

Yes we've read your submission of course and I'll just ask my colleagues if they have any questions? No? All right. Thank you Mr Hancock. All right, well we will reserve our decision in this matter. Thank you counsel.

**COURT ADJOURNS: 11.38 AM**