

**IN THE SUPREME COURT OF NEW ZEALAND**

SC 28/2006

BETWEEN **AOTEAROA INTERNATIONAL LIMITED**

Appellant

AND **PAPER RECLAIM LIMITED**

Respondent

Hearing 7 August 2006

Coram Blanchard J  
Tipping J  
McGrath J

Counsel A Grant and A Sinclair for Appellant  
G J Judd QC and A G Rowe Respondent

**Via Video Conference**

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**APPLICATION BY RESPONDENT FOR LEAVE TO ADDUCE FRESH EVIDENCE**

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10.03am

Judd May it please Your Honours I appear with my learned friend Mr Rowe for Paper Reclaim in support of the application.

Blanchard J Yes Mr Judd, good morning.

Grant And Your Honour I appear with my learned junior Mrs Sinclair for Aotearoa.

Blanchard J Yes Mr Grant, good morning to you too. Well we can see you and hear you loud and clear. Yes Mr Judd.

Judd It's the first time I've done one of these Your Honours. Do we sit or stand?

Blanchard J Well it's actually the first one that I've been involved in and I don't know what the etiquette was last time. I think it's mostly been people standing but they've usually been on their own so it's been more convenient. If you feel it's easier to sit down then that's fine by us.

Judd I think it probably is easier in this environment Your Honours so I'll do that.

Blanchard J Yes, that's fine.

Judd The first point is a preliminary matter in his submissions my learned friend has incorrectly stated what I said in the Court of Appeal in relation to the effect if the new rule and I emailed to the Registrar this morning a copy of the memorandum to the Court of Appeal in which I set out how I saw the position arising from the new rule and I understand my learned friend has emailed an objection to Your Honours receiving it but I apprehend that his objection doesn't apply to the first two paragraphs of that memorandum which is all that I am interested in the Court looking at so it may be that Your Honours could hear from him on that point just to confirm what my understanding is and then

Blanchard J Well speaking for myself I've read it anyway but if you're only proposing to address at the moment the first two paragraphs there's certainly nothing objectionable in there, I don't say it's right, but it's not objectionable, so we'll certainly receive that portion of the memorandum.

Judd Thank you Your Honours. Well this morning as I understand it from the email indicating that this hearing was going to take place, all we are concerned about is whether or not the fact that my client has not appealed the Court of Appeal's decision to refuse in that Court to receive the evidence prevents this Court from hearing the application made to this Court, so that's what I understand I have to address this morning and my written submissions were directed to that although of necessity that a background so that Your Honours understand the context before I got to the specific issue at about para.21 I think it was. I think Your Honours will of course have read the submissions so what I would like to do first is simply to address my learned friend's submissions and then turn specifically to my own positive submissions as to why not appealing the Court of Appeal's decision is no impediment. My learned friend outlines what he says are fundamental flaws is my argument and the first so-called fundamental flaw is that it's inconsistent with the submissions which Paper Reclaim made to the Court of Appeal. Now even if it was inconsistent with my submissions to the Court of Appeal that couldn't have any bearing in what after all

is pure question of law for this Court. But in point of fact my learned friend is wrong. What I am submitting is not inconsistent with what I submitted in the Court of Appeal and Your Honours can see that from the first two paragraphs of that memorandum, and Your Honours will note that I actually relied on *Papps v Mahon* to define the nature of the discretion as I do in this Court. The second fundamental flaw, well I should say perhaps just moving on that at the time that I prepared that memorandum for the Court of Appeal my thinking in relation to the new rule and the nature of the discretion was embryonic, it's obviously developed since then and that development is reflected in the submissions which I've made in the application itself and in my written submissions. But the evolution in my submission has absolutely nothing to do with what is the correct position of law which is the matter that this Court will need to address. Now the second alleged fundamental flaw is inconsistency with Paper Reclaim's application to this Court and once again in my submission it would be irrelevant even if it were correct, but it's not. This Court has in my submission an unfettered discretion but it is still a discretion. This Court has to be persuaded to exercise the discretion in favour of granting the application. Factors such as cogency and credibility will obviously be factors which the Court will take into account in the exercise of its discretion. The third alleged fundamental flaw is that the Court of Appeal was well aware of the fact that the law had been changed and my learned friend quotes from his memorandum to the Court but unfortunately overlooks having a look at mine which is the one that Your Honours have got and addresses the impact of the change in those two paragraphs. The fourth alleged fundamental flaw is that I allegedly agreed that rule 45 was to be interpreted by reference to the three principles and my learned friend is referring to what the Court of Appeal said but unfortunately the Court of Appeal in making that statement has overlooked the submissions which I made as recorded in that memorandum. In any event what the Court of Appeal said in relation to what I did or did not accept is irrelevant to the decision which this Court will need to make as to the effect of the change in the law. The fifth alleged fundamental flaw is that the applicant is seeking to argue a proposition which is the opposite of what it argued in the Court of Appeal and that once again is incorrect and it is also irrelevant for reasons that I've given in relation to the earlier alleged fundamental flaws. The sixth alleged fundamental flaw is that textbook writers have been caught by surprise and in my submissions it is difficult to see how that can be a reason for this Court to interpret the rule differently to the way it should be interpreted. The seventh alleged fundamental flaw is that if rule 45 were intended to affect such a fundamental transformation, it is reasonable to assume that the Rules Committee would have informed the profession. I'm obviously not party to the thinking of the Rules Committee, however in my submission the rule can't be read differently because the Rules Committee did not inform the profession or even if the change was inadvertent, the fact of the matter is that there has been a fundamental change. The Eighth alleged fundamental flaw is

Blanchard J I suspect that if there was a change it was inadvertent. I think Justice Chambers was on the Rules Committee at the time and of course the two sets of rules were being changed in conjunction with one another and there were discussions about what was being changed and what wasn't. Now this point simply never surfaced.

Judd No, well be that as it may Your Honour the rule is as it is and

Blanchard J Yes, no I appreciate that point and it really I don't think will impact on any decision that it may have been something that occurred inadvertently. But if you're able to point to precedent elsewhere where the change has been made presumably deliberately and that it's made a difference, that would be a significant factor in your favour.

Judd Yes well it seemed to me that what had probably happened Your Honour was that the Supreme Court had formulated its rules which included the

Blanchard J Well they were formulated by the Rules Committee.

Judd In any event

Blanchard J The sequence was that the Rules Committee with suggestions from the Supreme Court formulated the rules and then the Court of Appeal picked up some changes that had been made that were appropriate for the Court of Appeal and the Rules Committee did that exercise as well.

Judd I had assumed from the chronological sequence that the Court of Appeal Rules had picked up the new rules of the Supreme Court.

Blanchard J Yes well that is correct.

Judd But one of the points that Your Honour has raised I think is picked up by consideration of my learned friend's eighth alleged fundamental flaw. His inference is that the change in the wording of the rules flow from a change in the wording of the equivalent law in England and it sounds from what Your Honour has said is that may not be the case but

Blanchard J I've no idea whether it was or not.

Judd But in any event my learned friend has helpfully located a decision of the English Court of Appeal which does say something about the new English rule and he has annexed it to his submissions and what is said I think is helpful, what is said by Lord Justice Hale delivering the judgment of the Court of Appeal with which the other Judges agree at page 2325 at (e) Lord Justice Hale says "the position governing

Blanchard J It's Lady Justice Hale.

Judd Oh, she says “the position governing applications to adduce fresh evidence on appeal is now governed by CPR Rule 52.112”. “The Court will not consider evidence which was not before the Court below unless it is given permission for it to be used. It is no longer necessary to show special grounds. Discretion must also be exercised in accordance with the overriding objective of doing justice’ and then there’s this quotation from Lord Justice Morrett “In my view the principles reflected in the rules in *Ladd and Marshall* remain relevant to any application for permission to rely on any further evidence not as rules but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the Court below”. And if Your Honours look at para.1 of my memorandum to the Court of Appeal I think you will see that what I submitted to the Court of Appeal is in line with what Lord Justice Morrett said there. The Court is exercising a discretion and in doing so it has to exercise it in an informed and judicial way. It will take into account a variety of factors and factors which were the rules for special grounds will be factors but they will not be rules and at the end of the day having looked at various factors like that the Court needs to stand back and decide what is required in the interest of justice. Now that finishes with my learned friend’s eight alleged fundamental flaws, but while the nature of the discretion vested in the Court must be relevant to the question whether this Court is able to consider the application for leave when there has been no appeal from the Court of Appeal’s decision that that Court would not receive the evidence. The alleged fundamental flaws do not address the question which this Court has set down for hearing this morning, namely whether the application can be brought in the absence of any challenge to the Court of Appeal’s ruling that the evidence should not be admitted on the appeal to that Court. Now after the fundamental flaws my learned friend in para.2.1 makes a submission which has absolutely no bearing on the issue before the Court this morning. I simply observe in passing that it is a strange type of reasoning which criticises a litigant for accepting a Court’s decision which is what the current stance of Paper Reclaim represents in relation to the point my learned friend makes. In para.3.1 my learned friend makes a submission, makes an assertion that Paper Reclaim ought not to be able to pursue the application to admit the same evidence when the order of the Court of Appeal refusing leave to do so is in full force and effect. But he doesn’t say why and so without some why that submission is of no assistance to the Court at all in my submission.

Tipping J Mr Judd isn’t the ‘why’ simply that while that order remains in effect there is an issue estoppel between the parties which can only be got rid of by vacating that order on appeal.

Judd In my submission no, for the reasons which I gave in my written submissions so I’ll come to that in just a moment after I’ve finished dealing with my learned friends if that suits Your Honours.

Blanchard J It seems to me Mr Judd that the rule in this Court enabling the reception of fresh evidence is intended to enable the Court to consider an application to receive evidence that was not before the Court of Appeal and had not been tendered to the Court of Appeal and properly rejected and that if you wanted to appeal, and if you're wanting to apply in relation to evidence which has been rejected by the Court of Appeal you've got to go the appeal route, you can't come by way of an application here.

Judd Well there has to be some reason why that should be so. Justice Tipping has put forward estoppel as the reason. In my submission that could

Tipping J It's not the only reason in my view but

Blanchard J There's a question of abuse as well.

Tipping J Yes.

Blanchard J I see it rather more in terms of abuse than estoppel.

Judd Well obviously I haven't addressed the question of abuse in my submissions because that wasn't raised in the notice of opposition but

Blanchard J Well it's a collateral attack on the ruling by the Court of Appeal.

Judd Well in my submission that is not correct because the purpose for which the evidence is thought to be admitted in this Court is a different purpose and it arises directly from the fact that this Court has given Aotearoa leave to appeal on costs issue.

Tipping J Mr Judd a point that's troubling me at the moment is simply this that if the new evidence is let in, in this Court that implies that the Court of Appeal should have let it in but we don't have the views of the Court of Appeal on the case on the premise that the evidence is in, so we're in effect required to deal with the matter de novo on the basis of the new evidence. I mean that's the reason why one would be inclined to insist that if a challenge is to be made it is to be made by appeal so that if the appeal were allowed the matter would be remitted to the Court of Appeal to deal with on the basis that the new evidence should have been let in. No this Court trying to weave the new evidence into the reasoning of the Court of Appeal.

Judd Well that would be so if my client were challenging the Court of Appeal's finding that there was a contract, but there's nothing to go back to the Court of Appeal about in relation to, or in connection with the reason for the application to this Court because it only arises in connection with the costs appeal where of course it is my learned friend's client who is challenging the decision of the Court of Appeal which my client obviously supports, so it's not a question of sending

the matter back to the Court of Appeal to decide something because the Court of Appeal has already decided in my client's favour. I don't want anything more from the Court of Appeal but what I do want is for this Court to consider that new evidence in relation to my learned friend's appeal against the Court of Appeal's decision on costs.

Tipping J Well if we think the new evidence should have been in shouldn't the costs matter go back to the Court of Appeal to be determined de novo on the basis of the new evidence having been included? Therefore it's an appeal, it's an appeal in substance. You're seeking now to take advantage aren't you of the, or Mr Grant is seeking to take advantage of the Court of Appeal's decision or to challenge it and you want to resist that challenge on the basis of this new evidence.

Judd No, no that's not correct Your Honour. The position is

Tipping J Well it's you that wants the new evidence in isn't it?

Judd Yes, yes, but

Tipping J And your purpose is to say that once you get the new evidence in the Court of Appeal's decision on costs will be shown to be the more valid, isn't that the position?

Judd That's correct Your Honour.

Tipping J Yes, I just wanted to make sure I understood the purpose of the new evidence which is to help your client sustain the decision of the Court of Appeal on costs.

Judd That's right, exactly.

McGrath J And having got it in was it your intention to ask us to decide the question of costs Mr Judd?

Judd No, I simply want the appeal against the Court of Appeal's decision to be rejected. Just if I can perhaps just outline the sequence of events. Justice Nicholson in the High Court awarded indemnity costs in favour of Mr Grant's client. The Court of Appeal said that was wrong and said that they would decide the question of costs and they had a timetable for submissions on costs. My learned friend filed a memorandum and said his client was going to seek leave to appeal to this Court and asked for the timetable to be suspended. I agreed with that as it was obviously the sensible thing to do – the timetable was suspended. So the current position is that if Aotearoa's appeal to this Court on costs is denied then the cost issue will simply go back to the Court of Appeal to be determined on the basis that it indicated the costs should be determined - a basis with which I agree.

- McGrath J Yes, if however the position is reached that we let in your new evidence and we come to consider Mr Grant's appeal on that basis essentially looking at the matter afresh because there's new material before us, you're still wanting the appeal to be rejected, but what's the basis on which you're asking us to consider it, how far do we go in that?
- Judd All you would say Your Honours is this I would hope. We think that if there was any doubt about the Court of Appeal's reasons for finding that indemnity costs was not appropriate those reasons are dispelled by the further evidence which we have received in this Court.
- McGrath J So you're wanting us though in effect to reach a decision on the question as long as we're of the view that the new evidence affirms the approach the Court of Appeal took.
- Judd Yes, well if the new evidence were received undoubtedly would do that
- McGrath J Now what say we think there's a real issue because Mr Grant's submissions take us to that point despite new evidence coming it? Do you think that we should go on to decide the question of whether or not there should be indemnity costs or should we be sending that back to the Court of Appeal to look at with your new evidence on board if we've got to that point?
- Judd Well it's hypothetical really at this stage Your Honour but I would think it's more likely than not that if Mr Grant persuaded you that the Court of Appeal was wrong to overturn Justice Nicholson's decision to award indemnity costs despite the further evidence which this Court had received then it would simply restore the order for indemnity costs.
- McGrath J Yes, that's the point I was wanting to see where you stood on and I understand that now thank you.
- Judd And I just want to emphasise that it is very important from my client's point of view because the effective reason for Justice Nicholson's decision to award indemnity is his view that my client's directors committed perjury and really if there is evidence which would indicate, and this is getting into the merits rather than the real issue that we're dealing with this morning, but just so that Your Honours understand, if there were evidence which showed that Justice Nicholson couldn't possibly come to that conclusion, because actually the evidence which had been put forward by Mr Grant's client in the High Court was wrong, which is what this new evidence shows, then it would be a grave miscarriage of justice for my clients to remain branded as perjurers when there is evidence there to show that they're not. So that's the reason, that's the underlying motivation for the application to admit the new evidence. Now if I can

Tipping J Mr Judd just before you move on if you managed to hold the Court of Appeal's decision on costs without the new evidence, that would be your primary position I take it. You don't need the new evidence because the Court of Appeal's decision is justified on the evidence before it, but you simply want this new evidence in in case the Court of Appeal's decision is looking wobbly. I'm just wondering whether we need to get to this new evidence point unless you are prime facie vulnerable in our view on the evidence that's actually before the Court. Your only needing this new evidence on a precautionary basis aren't you?

Judd That's right Your Honour and I think I've said somewhere that it would actually probably be appropriate for the Court not to make a decision on whether or not to admit the new evidence until the appeal was being heard and it was fully apprised of all the factual material.

Tipping J I'm not saying that this avoids the preliminary point. This doesn't avoid the preliminary point as to whether you can seek new evidence in front of us, the same evidence as the Court of Appeal has rejected, but I'm just looking forward from that point.

Judd The Court of Appeal records in its judgment that it took them I think two days to hear the application for new evidence and the major reason why that was so is that before they could really deal with the application to admit the new evidence they had to fully understand the facts and of course the facts are pretty complicated so I wouldn't apprehend that in the event that I'm able to advance the application that Your Honours would probably think it appropriate to proceed in the manner in which Justice Tipping has just mentioned. Now

McGrath J Are you saying that we'd have to proceed in the same way as the Court of Appeal did in essentially you delivering the full and factual context of the appeal in order for the application for new evidence to be properly understood?

Judd I submit that that's the only practicable way of doing it except that in this case because the factual matters arise because my learned friend's client is appealing rather than me, it would be he who would be opening it up in the first instance rather than me.

Tipping J My point was slightly different. My point was that if you hold the cost decision on the material presently before the Court you don't need the new evidence and therefore the question whether you should have the new evidence in by whatever method doesn't necessarily arise until we are seized if you like of whether you are going to win the costs issue anyway.

Judd Yes I

- Tipping J There's no point in having two days worth of argument surely in consideration of evidence if you're going to hold the decision of the Court of Appeal on costs anyway. I don't know whether it will or not, but that just seems like a complete waste of time.
- Judd I agree with that Your Honour, it's just a matter of how as a matter of practice and procedure Your Honours deal with it. You might I suppose hear the argument without the new evidence but say that you'll consider the new evidence application if there is a preliminary finding that the Court of Appeal may have been wrong, but I submit really that's a matter for the Court which is hearing the appeal to decide at the time as to exactly how it deals with it. Now perhaps I can just say I'm glad we've had this discussion opened up by Your Honours because I think it really answers the point made by Justice Blanchard about abuse. I think that Your Honours will see from the issues which are going to have to be considered that in the circumstances of this case it couldn't be an abuse for this application to be made, so I come back to
- Blanchard J I should warn you that I'm not necessarily convinced by that.
- Tipping J It's the way you seek to get the evidence in that's the crunch point for the moment - whether by de novo application or by appeal from the Court of Appeal. It's the former that arguably is an abuse, that you're bypassing the appeal rules by simply trying to get it in the same, the very same evidence in de novo in this Court, that's the abuse if there is one, the bypassing of the appeal rules that you could only get it before us if the Court of Appeal has erred in its discretion and it's a matter of grave public or general public importance.
- Judd Well can I say this Your Honour that if in fact the appeal route were adopted then it would become necessary for the Supreme Court to get into all the factual material for the purpose of deciding whether or not the Court of Appeal was right or wrong in the decision which it made, because the Court of Appeal in making its decision to refuse to admit the evidence did as I explained a moment ago get into all of the evidence relating to the question of whether or not the contract was made at the meeting between November 1984 and 31 March 1985.
- Blanchard J Well that would depend upon whether the leave application was actually heard in advance of the main hearing. It would be possible simply to park it once it's made, then go to the main hearing and if the Court came to the conclusion that there was something in Mr Grant's appeal on costs and that it was necessary at that point to look at the question of the new evidence, the leave hearing could be collapsed into the main hearing.
- Judd The leave to appeal

- Blanchard J Yes, we quite often deal, we have already in our limited experience collapsed leave hearings into a main hearing where it's convenient to do so.
- Tipping J It would only be if Mr Grant appears to be getting some traction on his appeal on costs that we would need to go into the further evidence but the key point for me at the moment is that if we allow you to do what you want to do Mr Judd, everyone instead of appealing from the Court of Appeal's refusal to let in further evidence, will apply de novo to this Court provided they've got some viable appeal vehicle afoot, because by that means the tight rules about appealing from the Court of Appeal will immediately be bypassed.
- Judd No with respect Your Honour they won't because the position here is that it is the respondent to Aotearoa's appeal which is seeking to have this evidence in.
- Blanchard J I can't see that making any difference at all.
- Judd Well it does
- Blanchard J What we're actually suggesting to you is a means by which your position can be preserved. You seem singularly reluctant to accept it.
- Judd Well if Your Honours are suggesting to me that an application for leave to appeal, which of course I have made as an alternative application at the end of my submissions, could be reserved for determination
- Blanchard J If necessary.
- Judd If necessary, well I'm actually happy with that outcome, that doesn't cause me a problem. All I'm concerned about is that the ability to ask Your Honours to hear this evidence should it be necessary is preserved and in opposing the
- Blanchard J We may need to take a short break at some point to discuss that amongst ourselves but my sense of my brothers is that we probably could see a means of doing that but we do have this concern that Justice Tipping has articulated and that I have attempted to articulate as well about the way in which you're doing it at the moment.
- Judd Well I wonder whether Your Honours that the way through this then might be to adjourn the application believed to admit evidence.
- Blanchard J No, we want to dispose of this question. It's an important question of principle for the Court. You seem singularly reluctant to bring an application for leave to appeal.
- Judd I'm not reluctant Your Honour, I have

Tipping J Are you prepared to withdraw your de novo application and rest solely on your application for leave to appeal against the Court of Appeal's refusal to admit this further evidence? That's the crunch. If you are, so be it, if you're not we must rule on the de novo application as to whether it should be permitted.

Judd No I'm not prepared to withdraw the application Your Honours

Tipping J I'm not inviting you to I'm just wanting to clear the air.

Blanchard J Very well, we'll give you a ruling on that in due course.

Judd First of all to finish up on abuse, abuse is something which unfortunately because I didn't realise it was going to be raised I'm not in a position to address in the detailed manner in which I would otherwise address it, but essentially it concerns a careful consideration of all the facts and in my submission the facts in relation to this matter, the way it has arisen, the fact that I am supporting the Court of Appeal's decision on the costs issue indicate that in the circumstances of this case it can't be said to be an abuse. There will be some cases where it might be if, let's assume that my clients had decided to seek leave to appeal, the primary factual finding made by the Court of Appeal that a contract was made and instead of also seeking leave to appeal the Court of Appeal's decision not to admit the new evidence, they simply applied de novo in this Court, then I would accept that would be an abuse. But that is not what is happening. What is happening here is that Aotearoa has challenged the Court of Appeal's decision on the costs matter, I, on behalf of my client opposed the application for leave to appeal and indicated in the submissions in support of that opposition that if leave was granted it would be necessary to make this application for leave to adduce the evidence here, so I would submit in the circumstances of this case there is no abuse and that my client could be prevented from making this application only if there is an estoppel and I address the estoppel issue commencing at para.16 of written submissions and the first point I make in para.18 is that the Court of Appeal didn't rule that the evidence was inadmissible, which is what is asserting in the notice of opposition but the Court of Appeal in the exercise of its discretion declined to grant leave for the evidence to be admitted and if each of the Courts has an original discretion then the effect of the argument advanced in the notice of opposition is that a decision by the lower Court in the hierarchy about how it would exercise its discretion will be seen as fettering the ability of the higher Court in the hierarchy from exercising the original discretion which the rule in this Court gives to it. Now in the notice of opposition it was asserted by Aotearoa that there was an issue estoppel, in my submission that's misconceived, the issue estoppel doctrine as I explain in para.19 is one which in some circumstances may prevent a party from re-litigating some issue decided as part of the Court of Appeal's decision but Aotearoa is not

relying on the Court of Appeal's determination of some particular issue but it's relying on the decision itself and I make the point in the last sentence of para.19 that the decision itself could give rise to a type of cause of action estoppel were it not for the fact that the Court of Appeal was exercising its own discretion, not this Court's discretion. And then in para.20 I've referred to the Court of Appeal's decision in the *Joseph Lynch* case about the way in which issue estoppel quoting from the decision "The question is rather whether in the circumstances it is reasonable to regard the earlier decision as a final determination of the issue which one of the parties now wishes to raise". It is my submission that it cannot be reasonable to regard the Court of Appeal's decision not to exercise its discretion adversely to PRL as a final determination of the issue which PRL now wishes to raise because the issue is a different one.

Tipping J      Isn't the issue in the end whether it is just between these parties to let in the new evidence? The Court of Appeal has said no. You're asking us to say yes.

Judd             I'm asking Your Honours to say yes for the particular purposes of the costs appeal.

Tipping J      I don't know that it matters does it for what purpose the evidence is to be admitted? The issue estoppel focuses on what the issue is that has been determined between the parties and here the Court of Appeal determined the issue of the appropriateness or justness of letting in further evidence. You now want us to say that while there's an extant judgment of the Court of Appeal saying it's unjust, no appeal from it, we will ignore that and say it is just.

Judd             Well the Court of Appeal didn't actually say that it was not just to allow the evidence in, because what the Court of Appeal did was mistakenly to proceed as if the old rule was still the rule and we had rules rather than relevant considerations

Tipping J      That is to say that the Court of Appeal misdirected itself, which is an appeal point, but let's assume for the moment that we confine it to what the issue is. We're talking about issue estoppel?

Judd             Yes.

Tipping J      The issue is that justice or otherwise of letting in the new evidence isn't it?

Judd             No, that would be an allergist to cause of action estoppel. Let me give an example of an issue

Tipping J      Evidence is not a cause of action, it's an issue. I wrote the *Lynch* judgment by the way as you probably know Mr Judd so I am tolerably familiar with that case which really depended on an interlocutory

aspect as I recall it, whereas here we have a final adjudication of the Court of Appeal saying we're not going to let this evidence in. Leave aside whether they have misdirected themselves, that's another issue. While that order stands how can we say that it is just. The issue is whether the Court of Appeal was wrong.

Judd The first point Your Honour is that the Court of Appeal's decision not to admit the evidence was an interlocutory decision and the decision not to admit the evidence was the decision on this interlocutory application. Now in the course of making that decision, the Court of Appeal considered certain issues. For example it considered whether the evidence was fresh, it held, and this was the primary reason I think why the Court of Appeal didn't receive the evidence, it held that it was not fresh. Now I would accept that that is an issue which has been decided between the parties and when this Court comes to exercise its discretion it might have to proceed unless applying *Joseph Lynch* principles and decides it doesn't have to. It might have to proceed on the basis that there is an estoppel in relation to freshness and that would be a factor, the fact that the evidence is not fresh although this Court would make up its own mind about that anyway, would be a factor which is taken into account in deciding whether or not the discretion is to be exercised. But in my submission the fact that the Court of Appeal made findings on issues of that sort can't amount to an estoppel which prevents this Court from exercising the jurisdiction which the law says it has.

Tipping J I don't think the law contemplates a situation like this Mr Judd. I agree with my brother Blanchard that it is designed to speak of evidence that is fresh in the sense of new in this Court. The idea that it's an ability to as it were second guess the Courts below when the evidence is the same as that which they've refused to admit, I don't think will have crossed the mind of the draftsman of the rule.

Judd Well let's assume that my client had applied for leave to appeal from the Court of Appeal's decision not to admit the evidence, if that appeal was allowed consequence would be that this Court would say that the Court of Appeal should have heard the evidence. If that happened then the matter would have to go back to the Court of Appeal for the Court of Appeal to re-examine whatever it had found, taking into account the new evidence. Now that wouldn't be of any assistance whatsoever to my client which is not wanting the Court of Appeal to make any change at all in its costs decision so what my client would want even if there was an appeal on the Court of Appeal's decision would still be a decision by this Court to receive the new evidence and to take it into account in determining the costs appeal, so even if this Court gave leave to appeal the Court of Appeal's decision refusing the new evidence, it would still need to grant this application to be able to receive the evidence itself. Just because the, I think I've made my point.

- Tipping J You mean you'd need both a successful appeal and an order for admission in this Court is that your point?
- Judd Yes, that's my point Your Honour, otherwise you'd simply have to send it back to the Court of Appeal but what's the point of that because they'd already given my clients the decision that we think is the right one. Now I think that's probably exhausted all that I'm able to say in support of the argument that's before the Court this morning. The only thing I could do is to say something about the alternative application for leave but if the view of Your Honours is that any such application would be better left until later, it would probably be wasting time for me to do that this morning.
- Blanchard J The fact that it hasn't been mentioned is the lateness of that application but for myself and subject to hearing Mr Grant on the subject, it would seem to me that you have flagged it from a fairly early stage and that lateness shouldn't be held against you.
- Judd Obviously that's my submission Your Honour.
- McGrath J Just looking forward Mr Judd that if you are able to argue on the merits of your application, would you intend to take issue with the Court of Appeal's findings on freshness as well as cogency, I'm just not quite sure what you were saying a few minutes on that, or did I gather you might be accepting the freshness point?
- Judd Well to be perfectly honest Your Honour I haven't really thought very much about the merits of the application but I think probably what I would be saying is that applying the *Joseph Lynch* principle there shouldn't be an estoppel in relation to that finding and we'd probably want to argue in relation to at least some aspects of the evidence that they do deserve the description of being fresh.
- McGrath J Thank you.
- Blanchard J Yes thank you Mr Judd. Now we'll hear from Mr Grant as soon as we can see him. Now we can see him.
- Grant Your Honours I'm going to be quite short. There are clear rules for appealing and this is a very strange procedure trying to circumvent the appellate process. I submit my friend does have to appeal, or he should have appealed in time and he has to show that the Court of Appeal erred in the exercise of its discretion then in relation to that you've got the sub-issues of whether the evidence was not fresh as Justice Harrison said in the High Court and the Court of Appeal said. He's bound to dispute the Court of Appeal's ruling on relevance and he then has to show that there's sufficient public importance and commercial significance to justify an appeal and if he's able to have your Court determine under Rule 40 that the evidence can be received, he circumvents the process completely. The suggestion that your Court

would be fettered in some way if you don't allow it in is in my submission quite unreasonable. Where the Court of Appeal has ruled having heard at length the background to the case, seen what the affidavits have to say, that the evidence could have been got well before the trial and that it wasn't relevant to the case, it would just make the whole process of the rules irrelevant and I agree, it is an abusive process. I put that in notice of opposition originally but I didn't develop it more in my submissions because I submit that it's just so obvious that where you have an order you don't like and you have a rule which says you can appeal it if you don't like it and that you refuse to appeal and then go to the Court above which have the precise same wording and say 'I don't have to worry about an appeal you can ignore the order of the Court of Appeal. In my submission it's just nonsensical. Sorry to use such blunt language but it just makes nonsense of the rule. Your Honours there are other points but that's the heart of it.

McGrath J Mr Grant can I just ask you this. At what stage was the application to admit new evidence dismissed? Presumably was it dismissed at the mid-hearing in the Court of Appeal?

Grant The case began on the Monday morning as I recall. The application was made first thing. It said that it would only take half an hour or so. The Court of Appeal decided to hear it at that point. It ran on for the day as the submissions went on right into the fullness of the case and by about lunchtime on the second on Tuesday the Court of Appeal said it had to be brought to an end. It was brought to an end by the end of Tuesday with the Court saying 'we will refuse, we are refusing your application and we will give our reasons later' and Justice Chambers did that as part of the decision months later.

McGrath J Yes, now are you saying that the appeal against that should have been brought within the required period following the 19 July?

Grant I see an element of unfairness almost in that if my friend didn't know what the appeals would be. What I'd say is that he's known for two months

Blanchard J I think there is probably a short answer to that. It's an interlocutory point and you can not appeal an interlocutory point and then bring it up later, in fact the jurisprudence encourages that sort of point to be left for the substantive appeal and dealt with then.

Tipping J Because you don't know whether it's going to be material.

Grant Well I understand that's why I had some reservations about that but what I do say is this that my friend has known for a couple of months now, I think it's the 2 June that there is the appeal on costs and there's been a deliberate decision not to appeal or to apply

- Blanchard J Well I think to be fair Mr Judd has been flagging the fact that if it were necessary to bring an appeal he would want to apply for leave to appeal this point.
- Grant Well he did that in his submission Your Honour yes, but he hasn't appealed, he's just letting it sit. My client's also concerned about the delays. As I put in my submissions this case has been running on for years and something like this as I put in my submission, needs to be dealt with. The rules are clear that where it's known now that my friend doesn't like the decision and there's an appellate process he should follow the appellate process.
- Tipping J He didn't know that he was going to need this evidence until you cross-appealed on costs.
- Grant Which was an original appeal Sir
- Tipping J That's surely the nub of the matter Mr Grant that a **11.05.27 ??** must be marked from that point and if you accept that, that's fine, I think you're absolutely right.
- Grant Yes well leave was given to Aotearoa to appear on the 2 June and this is where my particular concern is, you gave leave on the 2 June for Aotearoa to appeal on costs and I contend that to have a delay of more than two months beyond that date is unreasonable.
- Blanchard J Well Mr Judd did signal in his submissions of the 23 May that if we gave Aotearoa leave to appeal Paper Reclaim would seek leave to adduce the evidence in this Court, so the question of the standing of the evidence has been flagged from reasonably early on in the piece.
- Grant Your Honour that's quite correct, he said that in June.
- Blanchard J Let us assume we don't agree with Mr Judd's procedural argument today, should he be disadvantaged by the fact that he is, if you'll forgive me for saying so, confused about the procedure, particularly at the early stages of the development of the jurisprudence in this Court? I mean you can't really say you're taken by surprise.
- Grant Your Honour I know that he made the comment on the 23 May and that's why I raised it because I wanted this dealt with in some appropriate way rather than to have the uncertainty of it being raised later on. What I say though is that he put in his submissions in May, you ruled on the 2 June that the appeal would be allowed. In my submission to assume that he would be able to get that evidence in under your Rule 40 and not have to go through the process of applying for leave and jump the hurdles which he had to do to show that the Court erred in the exercise of its discretion and so on is unrealistic.

- Tipping J If you can't defeat him on the merits of the application for leave to appeal from the evidence ruling then I would have thought it would be wrong to deny him on the time Mr Grant. I think your case on the merits might be somewhat stronger than your case on time. But we aren't actually formally disposing of that at the moment so that's just as it were a sort of observations in passing. There's no way I think in light of what Mr Judd asked for that we would embark upon the substance of the application for leave and the extension of time unless and until it became necessary but what we are doing is ruling on this question of whether or not he can make a de novo application without appeal.
- Grant Yes, and on that issue I've made my submissions. On the second I would understand that you may think that if you rule against him on his submission that he can get the evidence under Rule 40 without an appeal and that if he wishes to seek leave to appeal then the fact that he's out of time and under the rules is not to be held against him.
- Blanchard J If we were to decide that the appropriate procedure for Mr Judd was to bring an application for leave to appeal against the Court of Appeal's ruling, and we were minded to allow that to be done despite the lapse of time would you be content for the outcome of that application to be deferred for the listing of the appeal proper and for the Court to consider whether it needed to revert to the leave application in light of how matters played out on your costs appeal rather than split things into two bits and have what might be quite an extended hearing on the application for leave to admit the evidence, meanwhile the substantive appeal simply being held over, which might mean that it doesn't get heard until next year?
- Grant Your Honour I would be most reluctant for you to adopt that course.
- Blanchard J Which course?
- Grant For allowing the appeal to be held over pending the outcome of the main appeals. And application for leave if it was to be made can be directed to be filed very promptly and the submissions can be made within the next few weeks and it could be dealt with
- Blanchard J It couldn't be dealt with before October at the earliest.
- Grant Your Honour it was my understanding that so far as the appeals were concerned it was difficult for you to convene a Court until the last week of December and if that was problematic it was going to be February anyway. This was for the appeals with the five Judge Court. I think this was due to Justice Anderson's difficulties because he was on the Court of Appeal and you had to get another Judge.

- Blanchard J Yes I think we have another Judge. I think Justice Henry would be available and it's possible Justice Gault would be available from October on.
- Grant Well if it's not until October to resolve this issue I would much prefer to have it dealt with in October and have it resolved for once and for all.
- Blanchard J And in any event I guess if we were deciding on the leave application and the admissibility of the evidence we would probably do so with this panel of Judges rather than five Judges.
- Grant Well that's what I envisage would happen
- Blanchard J But we still have the difficulty that because the Court's in recess in September we won't have people available.
- Tipping J Would your client not be happy with the idea of collapsing the leave application into the main hearing and dealing with it only if your client gets traction on the costs appeal because that is the reality of the matter and I would have thought the sooner we get to the substance of the matter with this cost thing obviously being an important subsidiary issue, but not the heart of the case, the soon as we get a substantive fixture and when the Court is appraised of the whole matter maybe we'll be in a better position anyway to determine the justice of the fresh evidence? You'll at least then get clear rulings on the main points and then the only risk is that the cost thing might be a trailer. I would have thought that would be better from your client's point of view Mr Grant, but it's not me that's running the case.
- Grant Yes, Your Honour this case has had a history of delays with strange things popping out of the woodwork all the time and partly for that reason I wish to have this dealt with, and I'm sure my client would prefer to have this application dealt with as a discrete application in accordance with your Court's procedures, and the fact that it may take till October to do that is not a problem.
- Tipping J Even if that delay is the substantive hearing?
- Grant Even if it does, although as I say, yes, the answer's yes.
- Blanchard J It will certainly delay the substantive hearing into next year because even if we're able to hear the leave application in October, which should be possible, by the time we have the judgment out and then the fixture date is being allocated, it will be next year for the fixture.
- Grant I had assumed that in relation to a leave application it would be dealt with in the same way as the leave applications in this case where the parties file the application and submissions and it's dealt with either on

the papers or with a hearing, a short hearing, not that that would be some lengthy hearing, but am I wrong in that?

Blanchard J Well you envisaging that, surely if we're going to hear a full-scale leave application on the question of the evidence, at some point there is going to have to be in the opportunity of the cross-examination of the deponents to the evidence.

Grant I anticipated the procedure would be this. My firm would file an application for leave to appeal the Court's decision not to allow the evidence to be received that he would file his notice of application which wouldn't have to show why it was if he contends that the evidence appears not to be fresh. If he disputes that finding if it is said to be cogent or so firch or relevant the Court of Appeal said that he'd have to show why within his, I forget the 10 pages of whatever it is that we're allowed under the procedure, I would file my notice of opposition and we'd file our respective submissions and you would rule on that.

Blanchard J We're going to have to be taken through all the evidence in considerable detail as well as the, I'll call it new evidence. It may be that at that stage there wouldn't be cross-examination but we're certainly going to have to get into in some detail in order to determine its cogency. It seems to me an awfully expensive route to be going when it may not be necessary.

Grant Your Honours my client is out of the camera sitting in the background and I'm able to take some more instructions but it's helpful to have an understanding of the process because I had assumed that with the advantage of the judgment, both of Justice Nicholson and the Court of Appeal, that you wouldn't need to be taken further through the evidence, that if leave is sought to appeal the Court's determination that the evidence ought not be received because it could really have been got before and so forth that the issue there is could it have been got before. I mean the affidavits and soforth are all before the Court. There were three documents and the Court ruled in paras.130 on of the Court of Appeal's decision that those documents were readily available to Paper Reclaim and in one instance they actually had the document. They didn't appreciate its significance. But I would not see why you would have to go into days of evidence of being taken through transcripts and briefs of evidence for that. The issue estoppel would be presumably and Justice Tipping expressed in some thoughts on what the issue was, but it's whether the Court gave the right test for determining under Rule 45 whether the evidence should be received

Blanchard J And whether it was plainly wrong in the exercise of its discretion.

Grant Yes, yes

- Tipping J The estoppel point is I think a more confined point but don't let's go down there.
- Blanchard J We're discussing the appeal question here. We have to be satisfied that the Appeal Court was not plainly wrong.
- Tipping J On the question of whether leave should be granted to appeal from that ruling which wouldn't really attract an estoppel issue at all. That is exactly the test, yes. Whether they misdirected themselves in law or were plainly wrong in the exercise of the discretion and it's got to be a point of some general public importance too.
- Grant So I envisage my friend would file a notice of application in which he would say why it is they got it plainly wrong or whatever and if he managed to jump those hurdles he'd have to explain why, it's a matter of general public importance and your other criteria and it's only at that point that if you jump back that you'll need to get into the evidence. You don't need to get into the evidence.
- Blanchard J Well do we decide whether the Court's plainly wrong without getting into the evidence?
- Grant Well the Court of Appeal judgment, para.130, there are no pages here, page numbers I mean
- Blanchard J Yes.
- Grant So Your Honours I'll just take you quickly through this. 'Mr Judd appreciated the established guidelines set out in *Rae* and over the page the first requirement the evidence is fresh etc and it said that the evidence now sought to be adduced could not with reasonable diligence have been obtained because of the failure to discover three documents'. Then the Court in 131 says 'We're quite satisfied that there was no failure on Aotearoa's part in respect of discovery of the documents. The first two can be considered together, and he goes into the detailed reasons that Paper Reclaim was well aware of the Scancarrier litigation. One of their directors had given evidence for Aotearoa in the litigation. Mr Cash said on oath that he didn't consider it likely that the file had any relevance to the Paper Reclaim litigation, an opinion apparently shared by Messrs O'Rourke and Taylor and they are the two directors of Paper Reclaim. In any event the file from the Scancarriers' litigation was always available for inspection. Paper Reclaim had ample opportunity to request discovery of any document had it considered litigation relevant; it didn't do so'. Then it goes to the next document which is an 'instrument by way of security. It's clear from evidence given by Mark Wells who is Paper Reclaim's solicitor that he received instructions to make enquiries about the baler. It is obvious what must have prompted them'. And then over the next page there is that paragraph that deals with the date when the baler was sold. Paragraph 133 'Mr Wells caused a search to be made of the

Companies Office file. A copy of the very security which Paper Reclaim now says Aotearoa failed to discover was obtained. But none of Mr Well's legal team saw it as being of significance, in part because the baler was described as a 'fully automatic hydraulic press. No one apparently realised that press is another name for a baler even though Aotearoa's financial statements for the year showed only one item – a 'press' – as having been sold that year. Clearly it must have been that item to which Mr Cash was referring when he said that the accounts helped him pinpoint when the baler had been sold and hence when the joint venture agreement had been made'. And at 134 'We don't see the fact that the instrument's non-discovery is an error on Aotearoa's part in any event. Paper Reclaim had the document. The fact that its legal team didn't recognise its significance is beside the point. Further, at no time did Paper Reclaim seek information about the baler by correspondence, request for discovery, interrogatories or any other procedure. All the new evidence except for Mr Wells's affidavit which the Court admitted, was available at the time of trial had Paper Reclaim sought to adduce it. Paper Reclaim was well aware, at the latest in November 2001 that Aotearoa was claiming that a term of the joint venture agreement was that Aotearoa would cease to bale waste paper etc. The trial didn't begin till 7 May 2002 and didn't conclude until 10 June of the following year. Paper Reclaim had ample opportunity to explore the fate of the baler if it saw the relevance. The second requirement is that the new evidence must be cogent and likely to have an important influence although it need not be decisive. We are clear that Paper Reclaim hasn't established this criterion either. For the reasons we have already given, we don't see it as decisive whether the agreement was made at the agreement meeting nor do we see that term 1 as being of any particular significance. The meeting may well have taken place as Mr Cash asserted and as found by Justice Nicholson. But even if Mr Cash is muddled about the timing or has run together two or more meetings, we are satisfied that a clear understanding developed that Aotearoa was the exclusive export agent of paper Reclaims. The alternative propounded in the witness box by Messrs O'Rourke and Taylor just can't stand with the evidence viewed as a whole for the reasons we have given. Therefore even if Mr Cash's evidence as to the fate of the baler is wrong that is not decisive. There is a third criterion; it must be credible, although it need not be incontrovertible. We don't need to consider that criteria for these reasons

Blanchard J But surely even hearing it set out succinctly like that, it's clear that we're going to have to get into quite a body of evidence in order to see whether we think that this ruling was correct or not. After all it took a day and a half we're told in the Court of Appeal. I imagine it can be shortened a bit from that but it's still a reasonably substantial hearing.

Tipping J I think you're hoping Mr Grant that the matter would be cut off at an earlier stage in that whether they should have the opportunity to try, that is to say that leave should be granted to them to appeal, if it's not

then of course the larger exercise my brother is contemplating might not arise if they can't even get over the first hurdle of getting leave. Am I right in thinking that's your essential point?

Grant Yes.

Blanchard J The problem however is that leave has been granted on the costs question. If this evidence does appear to be germane to the determination of that question, in other words what costs were properly awarded or not, then it seems to me we're going to have to go into it at the leave stage.

Grant Well Your Honour if I just take one of those criteria

Blanchard J Can I just interrupt Mr Grant, it's not as if we would be hearing this application in isolation, it's heard against a background of leave having been granted to you. That it seems to me alters the exercise of the discretion somewhat.

Grant Well in my submission very little or not at all these rules for allowing fresh evidence in are well established and here as I put in my submissions, the liability trial isn't yet concluded and we're almost six years on and this is a case where the Court has held, Justice Harrison held that these people had the opportunity to get the evidence and they didn't. The rules upon which allow evidence in are quite plain, that you have to bring your best evidence at a trial and you can't just wait around if you don't like the results go off and as this company did instruct an inquiry agent to spend ages going around trawling through witnesses trying to find something which it could unsettle the case by and having trawled months and months after Justice Nicholson's decision through evidence and witnesses and file it then said oh there's a whole lot of new evidence here that would have affected the outcome and filed this procedure for fraud and so on and this is highly germane to an appeal the fact that my client has been given leave to appeal a decision on costs doesn't mean that the rules relating to the reception of new evidence are to be overridden or ignored and in my submission you are quite able in respect of an application my friend makes for leave to appeal this aspect of the decision for him to specify in what way he says that the Court when it ruled in those paragraphs that the evidence should not be adduced and for you to hear him. Now having he received that application and having received the submissions in writing on it you'd think that it can't be dealt with as simply as that then it may need to be revisited.

Blanchard J Alright, well you're clearly expressing your preference that it should be dealt with in two bites, presuming we get to this point and that there should be a leave application, a consideration on the papers if necessary, and it might well be necessary, an oral hearing of the leave application and you're content that that might have to be something

that the Court could not do until October with the consequent delay on the main hearing?

Grant Yes I am Sir, I do have some difficulty, I'm away in September for some time so when in October?

Blanchard J Well it would be impossible for us to hear it before October. We simply wouldn't have the personnel.

Grant Well if a convenient timetable can be agreed upon.

Blanchard J Yes. Would it be convenient for you if we took the morning adjournment and then any further submissions you wanted to make you could make after morning tea and then we'll hear Mr Judd's response.

Grant Yes it would Sir.

Blanchard J Yes.

Adjourned 11.30am  
Resumed 11.50am

Blanchard J Now Mr Grant.

Grant Your Honour I'm grateful for that time to consider the course which you proposed. I think if there's a prospect of an application for leave to appeal the cost decision, getting into all the evidence, and of the delay then a better course maybe, if I can call it piking it, and I have a form of wording here if I may just read it broadly that if the Supreme Court on the hearing of the appeal considers that Aotearoa is in Justice Tipping's words 'making some traction' with its appeal on costs, the appeal on costs would be adjourned for Paper Reclaim to file an application for leave to appeal the decision of the Court of Appeal and it would not be prejudiced in doing so by the late filing of that application. That is a course which we would consider favourably.

Blanchard J So we would organise a fixture for the hearing of the appeal, deal with the other, I think it's two questions, embark on the costs question and then if we felt that Aotearoa was making traction at that point we would consider whether we should adjourn that part of the hearing in order to consider the application for leave to appeal in relation to the Court of Appeal's ruling on the evidence.

Grant Correct.

Blanchard J Alright, thank you Mr Grant that's very helpful.

Grant Is there anything else that Your Honours would wish to hear me on?

Blanchard J No thank you.

Grant Thank you.

Blanchard J But we'll need to hear from Mr Judd in response.

Judd Yes well Your Honours I agree with my learned friend's proposition with this addition for the reasons I explained earlier the application for leave to adduce the further evidence would also have to be heard at the time of the application for leave to appeal because otherwise I couldn't get the evidence before the Supreme Court. And the problem which exists at the moment if Your Honours find against me is that I'm not able to advance the application for leave to adduce the further evidence because there is no appeal against the Court of Appeal's decision. That problem gets overcome if there is an application for leave to appear and that application is granted, so then both applications would be heard together but only in the event that Aotearoa was making traction on the cost issue.

Tipping J Mr Judd if we were to allow your application for leave to appeal against the Court of Appeal's declining to take in the further evidence and the appeal substantively succeeded then it's only a question of whether we deal with it or send it back to the Court of Appeal isn't it? You could then make an oral application for us to deal with it. If you want us to deal with it you would have to take the evidence in otherwise we would send it back to the Court of Appeal and that would be an issue of how that point would be determined in the light of how it had all worked out. I don't see how you need to keep your present application alive for that purpose, other than perhaps out of an abundance of caution.

Judd The short answer is that so long as the evidence is before Your Honours I don't care how it gets there so it's just really the right procedural route and I don't want to, well I guess it is an abundance of caution, I don't want to be in a position where the appeal is allowed but the evidence is not before the Supreme Court to enable it to be taken into account. That's all I'm concerned about.

Blanchard J There wouldn't be much point in allowing the appeal in those circumstances so I don't think there's likely to be a difficulty but I understand your caution.

Judd That's all I want to say in reply Your Honours.

Grant Your Honour may I be heard on that.

Blanchard J Yes certainly.

Grant I'm not sure that I understand my friend but as I understand it he's saying that he wishes to have his application, it will be under Rule 45 of the Court of Appeal Rules together with all of the evidence before you at the hearing of the substantive appeals. That's not what I envisaged. I envisaged that the appeals would be heard and if during the course of the hearing Your Honours consider that Aotearoa's getting some success or traction initially with its appeal on costs, that that costs appeal would then be adjourned and at that point there would be a file of an application for leave for appeal the cost decision so that you're not troubled with all of that at that stage. One of the benefits of this process is that it will help Aotearoa to get on with the rest of the litigation once we've got the determination on, if I can call it the main appeal, which is the length of notice for example. The fact that the cost appeal has been stood over for a while won't prejudice the parties getting on trying to assess the level of damages there.

Tipping J I didn't understand Mr Judd to be saying anything contrary to that Mr Grant. I think all he was saying was he didn't want to be left high and dry and having had a wonderful win about the Court of Appeal on evidence and then not being able to get the evidence referred to in the Supreme Court, so I don't think there's a problem between you on that. It doesn't effect the sequence that you've just outlined.

Grant Okay, well that's fine.

Blanchard J We are going to reserve our decision in this matter. We'll issue a judgment as soon as we possibly can.

Grant As Your Honours please.

Adjourned 12.01pm