IN THE SUPREME COURT OF NEW ZEALAND

SC 7/2009
[2009] NZSC 68

BETWEEN	KIMBERLY BIRKENFELD Applicant
AND	ANTHONY BRUCE KENDALL First Respondent
AND	YACHTING NEW ZEALAND INCORPORATED Second Respondent

Court: Elias CJ, McGrath and Wilson JJ

Counsel: Applicant in Person
N S Gedye for First Respondent
N A Beadle for Second Respondent

Judgment: 1 July 2009

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with costs of $2500 to the respondents jointly.

REASONS

[1] This application for leave to appeal arises from injuries suffered by Ms Birkenfeld in Greece in 2002 when her windsurfer and Yachting New Zealand's inflatable boat collided shortly before the start of a pre-Olympic race. The applicant brought proceedings against the respondents in New Zealand. In earlier proceedings the Court of Appeal decided that the liability of the respondents was limited under the scheme for limitation in the Maritime Transport Act 1994 and made a declaration

to that effect.[1] An application for leave to appeal to this Court against that judgment was refused.

[2] The matter returned to the High Court where, the full amount of the limitation liability having been tendered, the Court ordered that the proceeding be stayed. The applicant appealed, contending that she was entitled to go to trial to determine whether the collision was due to negligence. The Court of Appeal dismissed the appeal and the applicant now seeks leave to appeal to this Court in order to argue the following grounds:

(i) the Court of Appeal failed to determine issues Ms Birkenfeld had raised in the hearing and in particular her submission that Yachting New Zealand was a "sham defendant";

(ii) the Court of Appeal failed to give reasons. This ground is related to the first ground of appeal;

(iii) the Court of Appeal denied Ms Birkenfeld equal access to justice, making no allowance for her disability.

[3] We have considered the written submissions of the parties and are satisfied that it is not necessary for us to have an oral hearing in order to determine the application for leave to appeal.

[4] The question in the present litigation is whether the effect of the statutory limitation provision, as determined in the earlier litigation, was such that the proceeding should be stayed. All Judges of the Court of Appeal answered that question in the affirmative. Two Judges considered the possibility of the proceeding continuing as one seeking only a declaration of liability in negligence, but concluded that the policy of the statute precluded such a course. The third Judge simply decided the determination of the earlier proceeding made the High Court's decision to stay the current determination inevitable.

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1 [2009] 1 NZLR 499.

[5] For reasons we can state shortly, we are satisfied that the grounds of appeal proposed by the applicant do not meet the requirements of s 13 of the Supreme Court Act 2004 that it is necessary in the interests of justice for this Court to hear and determine the proposed appeal.

[6] It was unnecessary for the Court of Appeal to decide if Yachting New Zealand was a "sham defendant" once it had decided to uphold the High Court's order staying the proceeding. The reasoning of members of the Court provided alternative bases for dismissing the appeal against the stay, either of which would have been sufficient for a proper determination upholding the High Court judgment. In those circumstances no arguable issues are raised in the first two grounds of the proposed appeal.

[7] The third ground reiterates the applicant's complaint concerning the Court of Appeal's initial refusal to make available a transcript of its hearing. Following the application for leave to appeal to this Court we made an order that she should receive a transcript of those proceedings so that she could better understand the line of argument that emerged at the hearing which was addressed in the judgment. In preparing her submissions to this Court the applicant has been able to refer to the transcript. We see nothing in the complaint that the copy she received was not a certified copy. In the end the applicant has not been able to point us to any argument she was unable to raise during the Court of Appeal's hearing. Nor are we persuaded that the hearing in the Court of Appeal was unfair to her. In those circumstances the interests of justice do not require a further appeal to determine if she should have received the transcript, or been assured she would receive it, at the hearing.

[8] The applicant has recently filed a further application which is critical of what she calls "inadmissible evidence" in the respondents' submissions and indicated that she wishes to submit a formal response. We are satisfied that there is no reason for us to delay delivery of this judgment.

[9] For the reasons we have given we refuse leave to appeal.

Solicitors:
Beca and Co, Auckland for First Respondent
DLA Phillips Fox, Auckland for Second Respondent