IN THE SUPREME COURT OF NEW ZEALAND

SC 84/2008
[2009] NZSC 75

	BETWEEN	WILLIAM PATRICK JEFFRIES Appellant
	AND	THE ATTORNEY-GENERAL Respondent

Hearing: 7 July 2009

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: D H O'Leary for Appellant
H S Hancock and P P G W Morgan for Respondent

Judgment: 16 July 2009

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by Elias CJ)

[1] The appellant, Mr Jeffries, seeks to overturn an award of $750 costs made against him in the Court of Appeal.[1] His real concern, however, is about some remarks made by the Court when making that award. The appellant had filed in the Court of Appeal and then withdrawn an appeal against an interlocutory determination made in the High Court denying him a Full Court for the hearing of judicial review proceedings in which he was plaintiff. Before the appeal against the interlocutory determination was withdrawn, the appellant had indicated that he would also apply to the Court of Appeal for a stay of the hearing of the judicial

[1] *Jeffries v The Attorney-General* (Court of Appeal, CA150/2008, 20 October 2008, O'Regan, Robertson and Baragwanath JJ).

review proceedings before a single Judge, which was less than a month away, to prevent his appeal being overtaken.[2] The appeal was withdrawn within a fortnight of its being filed and two days after the Court of Appeal had fixed an early date for its hearing, which would have enabled the High Court fixture to proceed if the appeal to obtain a hearing before a Full Court proved unsuccessful.

[2] The appellant withdrew the appeal because his counsel considered he was not able to prepare properly for the appeal within the five days between notice and the date fixed for hearing the appeal (or "three working days", as his counsel stressed) because of the need to continue to prepare for the High Court substantive proceedings. Counsel also considered that it was not feasible to adopt the suggestion made by the President of the Court of Appeal that the fixture could, at his option, be used to argue for an adjournment of the appeal and a stay of the judicial review proceedings in the meantime. The hearing of the substantive judicial review proceedings was due to start less than a month after the date fixed for the interlocutory appeal, with the plaintiff's written briefs due within 10 days of it.

[3] After the substantive proceedings had been disposed of in the High Court,[3] the Attorney-General, defendant in one of the judicial review proceedings and respondent in the present appeal, sought an order for costs representing "a substantial contribution" to actual costs of $4,001.30 in respect of the withdrawn interlocutory appeal. The Court of Appeal was not prepared to entertain a subsequent attempt by the respondent to seek an order for indemnity costs. The claim for indemnity costs had been made after the appellant had filed a memorandum opposing the Attorney-General's initial application for "a substantial contribution". The Court of Appeal accepted, contrary to the position taken by the appellant in his memorandum, that the respondent had been put to unnecessary work by the interlocutory appeal and that an award of costs was appropriate. These were the circumstances in which the Court made the award of $750 costs which is the subject of the present appeal.

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2 An earlier application for stay in the High Court had not formally been dismissed, but Ronald Young J had made no order "in the hope that an early fixture prior to commencement of this trial can be obtained in the Court of Appeal".

3 *Jeffries v The Attorney-General* (High Court, Wellington, CIV 2006-485-2161, 20 May 2008, Ronald Young J). An appeal to the Court of Appeal has been heard but not yet determined.

[4] In this Court, the appellant does not argue that the Court of Appeal was in error in making an award to the respondent. Given that the appellant's interlocutory appeal was withdrawn after the respondent was put to some cost in preparing to meet it, he could hardly have done so. Nor does the appellant argue that this Court should interfere with the quantum fixed. Again, he could hardly have contended that such a modest award was wrong. Rather, the appellant maintains that the Court of Appeal breached natural justice in expressing criticisms about the merits of the appellant's interlocutory appeal and the disruption it entailed to the High Court substantive proceedings. He considers that the comments in the judgment reflect badly on him. He says that he had been misled by an indication of the Court of Appeal that it would not entertain the claim for indemnity costs into thinking that matters critical of his conduct, put forward by the respondent to justify indemnity costs, were not in issue. At the hearing Mr O'Leary acknowledged that in this respect he may have failed to understand that the respondent's memorandum in response to his own was directed at his argument that no order as to costs on a contribution basis should be made, as well as in support of the respondent's own indemnity costs application. As a result of the misunderstanding, he took the view that it was unnecessary to answer the criticisms made by counsel for the respondent and had agreed that the Court of Appeal could proceed to determine costs on the papers, without the need for an oral hearing. If given an opportunity to respond, he says he would have been able to answer the criticism made on behalf of the respondent and to prevent reliance on it by the Court of Appeal in its reasons.

[5] Accepting, without deciding, that it would be proper to allow an appeal to correct reasons which may reflect criticism of a party who has had no effective opportunity to answer the criticism, we do not consider that there is occasion for doing so in the present case. The reasons given by the Court of Appeal in support of its judgment on costs were not as critical of the appellant as he suggests. To the extent that they are critical of the course the interlocutory appeal took, they were an appropriate response to the appellant's contention that no costs order should be made. The reasons given by the Court of Appeal could not have been answered by further information of the sort the appellant raised in this Court. They were directed at matters of criticism raised by the respondent relating to the substantive judicial review proceedings but were not relied on by the Court of Appeal in determining

costs. The reasons given by the Court of Appeal for making the modest award of costs were that it accepted that the respondent had been put to additional and unnecessary work. Even though the appeal had been filed and withdrawn within a short period of time, the background of urgency dictated by the pending fixture meant that it had been necessary for the respondent to prepare promptly to meet the appeal, if he wished to retain the fixture. Such preparation was inevitably disruptive of preparation for the High Court proceedings.

[6] The appellant's concerns with the reasons of the Court of Appeal in our view stem from a mistaken view of its meaning. The sting complained of by the appellant is that the Court of Appeal treated the filing of the appeal as irresponsible and disruptive because it imperilled a trial date that had been set six months out and was imminent. In support of this suggestion, counsel for the respondent had referred to the fact that the appellant had been found to lack standing in the substantive proceedings against the Attorney-General in the High Court. Judgment in those proceedings had been delivered before costs for the abandoned interlocutory appeal had been sought by the respondent. In the letter in which the respondent had first sought a "substantial contribution" to costs, the respondent had not referred to this point and had simply drawn to the "particular" attention of the Court the fact that "the appellant's appeal and stay application were withdrawn within a week of being filed".

[7] It is not clear that counsel for the respondent had intended to suggest that the interlocutory appeal had been irresponsibly filed in order to disrupt the High Court substantive hearing. We accept no such inference could properly be drawn. The appellant seems to have held a firm view that the substantive claim contained novel and difficult points that warranted a Full Court determination. Such a view was doubtless held for reasons that seemed sufficient to the appellant and his counsel. The application for a Full Court hearing was made on 14 December 2007, soon after the substantive judicial review proceedings had been set down for hearing before Ronald Young J beginning on 5 May 2008. It was therefore made five months before the scheduled hearing was to begin. The application for Full Court was opposed by the respondent. A further memorandum in reply by the appellant was filed on 21 December, bringing to a close the submissions put forward by

counsel on the application. Ronald Young J's decision declining the application for a Full Court was not delivered until 7 March 2008. Counsel were not notified of the decision for nearly two weeks. The interlocutory appeal was filed on 28 March. On 3 April counsel for the appellant filed a memorandum in the High Court seeking stay of the substantive hearing pending determination of the appeal and suggesting that a provisional reservation of hearing days in the High Court should be made for September or October 2008. This sequence does not suggest irresponsibility in the filing of the appeal. The opportunity for appeal, given the date of delivery of the interlocutory judgment and the delay in notifying counsel, simply ran up against the fixture.

[8] The important point is, however, that the Court of Appeal did not adopt the respondent's criticisms. Although the judgment recites the submissions put forward by counsel for the respondent, it does so in rehearsing the background for the decision it makes and the position of the parties. The reasons which dispose of the appeal are brief. Read as a whole, they are not capable of bearing a suggestion of tactical manoeuvring such as would be irresponsible in counsel, although they reject the suggestion put forward by counsel for the appellant that the filing and withdrawal of the appeal was not "causative" of the respondent's wasted costs. In full, the dispositive reasons of the Court of Appeal are:

> [10] We agree with counsel for the Attorney-General that the appeal was misguided and without merit. Given that it placed in jeopardy a fixture which had been set some months before in the High Court, counsel for the appellant should have anticipated that this Court would seek to deal with the appeal urgently so as not to prejudice that fixture. We do not accept that counsel for the appellant had any reason to feel "caught out" by the allocation of an urgent fixture. The attempt to "stay" the High Court hearing was disruptive of the High Court process and suffered from the same lack of merit as the appeal itself. This obviously caused considerable extra unnecessary work for counsel for the Attorney-General for which an award of costs is appropriate.
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> [11] We do not propose to analyse in detail the component of the costs of $4,000 said to have been incurred by Crown Law in relation to the appeal and the application for stay. Certainly the figure seems high but the application we are dealing with is for an award of costs which amounts to a fair contribution, and we are satisfied that an award of $750 is appropriate in all the circumstances. That reflects the inconvenience caused by what were ill-considered and misguided actions on the part of the appellant and provides a degree of compensation to the Attorney-General for the unnecessary work which his counsel had to undertake.

[9] Costs in general follow the event. The discontinuance of an appeal presumptively entitles the respondent to costs for wasted effort. There is in general little occasion to consider the justification for the filing of the appeal or the conduct of the parties unless the Court is being asked to reflect these sorts of merits in an award that is out of the ordinary. That is the case where one of the parties seeks indemnity costs or costs above the usual rate or tariff. It may also be the case where the appellant resists any award of costs. Then some consideration of how the parties have conducted the proceedings in which costs are sought may be necessary.

[10] In the present case, the respondent's original application for costs drew attention to the facts that the appeal had been filed and withdrawn within a fortnight and came at a time when the respondent was preparing for the imminent substantive hearing. It advised that the respondent had immediately prepared documents in relation to the interlocutory appeal and the associated argument for stay. It was in respect of that preparation that the respondent sought a contribution towards his wasted costs. The appellant for his part filed a memorandum opposing the making of any order for costs. He maintained that the filing and withdrawing of the appeal was not "causative" of costs being incurred by the respondent, because it was the Court that had set the matter down urgently, not the appellant. Although the memorandum also described the claim for costs as "untenable", that seems principally to have been on the basis that the appellant found it hard to accept that in the period between bringing the appeal and its discontinuance the respondent could have incurred the claimed costs. This basis for opposition was hardly promising, given the substantiation provided by counsel for the Attorney-General. In any event, the Court of Appeal necessarily had to deal with the principal contention of the appellant in opposing costs that he had no option but to withdraw the appeal because of the limited notice he was given of the hearing.

[11] The Court of Appeal was undoubtedly correct to reject this suggested basis for denying the respondent a contribution towards costs wasted by the withdrawn appeal. As it said, counsel should have anticipated that the Court would attempt to hear the matter on an urgent basis, to prevent the disruption to the fixture should the appeal be unsuccessful. If counsel was not prepared to accept an early fixture, the filing of the appeal could rightly be described as "misguided". The Court's reference

to the appeal being "without merit" must be seen in the context of the argument it was dealing with. We do not think it is properly to be read as a determination that the interlocutory appeal, if pursued, would necessarily have been found to have no merit. The appeal was described as "misguided and without merit" because it was withdrawn on a basis that should have been anticipated before it was filed. As a result, the respondent was put to extra unnecessary work, in circumstances where the respondent could not have delayed preparing for the interlocutory appeal if he wanted to preserve the trial. It was for those reasons, that an award of costs was held to be appropriate. They are reasons unaffected by the respondent's references in the indemnity costs memorandum to the disposition of the substantive judicial review proceedings, which are currently the subject of appeal. But they were references not adopted by the Court of Appeal.

[12] Nor are the reasons of the Court of Appeal affected by the matters of rejoinder to the respondent's indemnity costs application that were traversed by counsel for the appellant in support of the appeal in this Court. All matters the Court of Appeal considered in reaching its decision had been addressed by counsel for the appellant in response to the initial letter of the respondent seeking a contribution to costs. The appellant must have expected the Court of Appeal in determining costs on the papers to express a view on the submission he had made that the respondent's wasted costs were caused, not by the appeal itself, but by the Court of Appeal in setting it down for urgent hearing. Rejection of that argument would necessarily entail the view that the wasted costs were attributable to the filing of the appeal in circumstances where the appellant was not prepared to accept an urgent fixture. No question of denial of natural justice in the circumstances is shown. The conclusion reached by the Court of Appeal is one with which we are in complete agreement. In circumstances where the appellant was not prepared to accept an urgent fixture, the appeal was properly described as "misguided and without merit". No adequate basis was therefore put forward by the appellant upon which it would have been appropriate to deny the respondent a contribution towards costs in the usual way. Importantly, the contribution awarded was not of a size to suggest more significant criticism of the conduct of the appellant than was entailed in rejecting his own submission that costs were not appropriate. We would add only that conclusions by a court that arguments addressed to it or steps in proceedings are

"without merit" or "misconceived" import no necessary adverse reflection upon the competence or motivation of counsel or the parties.

[13] These reasons are sufficient to dispose of the appeal, which is dismissed.

Solicitors:
Duncan Cotterill, Wellington for Appellant
Crown Law Office, Wellington for Respondent