IN THE SUPREME COURT OF NEW ZEALAND

SC 6/2011
[2011] NZSC 133

BETWEEN	VINCENT ROSS SIEMER Appellant
AND	MICHAEL RICHARD HERON First Respondent
AND	RUSSELL MCVEAGH Second Respondent
AND	FORCE 1 SECURITY Third Respondent
AND	SIONE TANAKI Fourth Respondent
AND	PIO SAMI Fifth Respondent

Hearing:	15 September 2011
Court:	Elias CJ, Blanchard, Tipping, McGrath and William Young JJ
Counsel:	Appellant in Person T L Clarke and S P H Elliot for First and Second Respondents A C Beck as Amicus Curiae
Judgment:	8 November 2011

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are reserved.

REASONS

Para No

ELIAS CJ, BLANCHARD, TIPPING AND McGRATH JJ

(Given by Blanchard J)

Introduction

[1] Sections 66 and 67 of the Judicature Act 1908 say when appeals to the Court of Appeal are available against decisions of the High Court in civil cases.[1] They are as follows:

> **66 Court may hear appeals from judgments and orders of the High Court**
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> The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment, decree, or order save as hereinafter mentioned, of the High Court, subject to the provisions of this Act and to such rules and orders for regulating the terms and conditions on which such appeals shall be allowed as may be made pursuant to this Act.
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> **67 Appeals against decisions of High Court on appeal**
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> (1) The decision of the High Court on appeal from an inferior court is final, unless a party, on application, obtains leave to appeal against that decision—
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> (a) to the Court of Appeal; or
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> (b) directly to the Supreme Court (in exceptional circumstances as provided for in section 14 of the Supreme Court Act 2003).
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> (2) An application under subsection (1) for leave to appeal to the Court of Appeal must be made to the High Court or, if the High Court refuses leave, to the Court of Appeal.
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> (3) An application under subsection (1) for leave to appeal directly to the Supreme Court must be made to the Supreme Court.

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[1] Section 66 has no application in a criminal proceeding: *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18 at [8]–[12]. The same is so with respect to s 67.

> (4) If leave to appeal referred to in subsection (1)(a) is obtained, the decision of the Court of Appeal on appeal from the High Court is final unless a party, on application, obtains leave to appeal against that decision to the Supreme Court.
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> (5) Subsections (1), (3), and (4) are subject to the Supreme Court Act 2003.

[2] Section 66 is a general provision which permits appeals from the High Court to the Court of Appeal as of right, subject to other provisions of the Act and to any rules of court and Orders in Council made pursuant to the Act "regulating" the terms and conditions which are to apply to the appeals. Section 66 has, however, to be read subject to the special provision in s 67 governing appeals against decisions of the High Court on appeal from an "inferior court", which require leave from the High Court or, if it refuses, from the Court of Appeal.[2]

[3] But what is the position when the decision sought to be appealed is an interlocutory decision made by the High Court in the course of an appeal against a decision by an inferior court? In such a case, what the party aggrieved by the High Court decision is wanting to appeal against is a procedural decision which the High Court has been called upon to make before it has determined the issue to which the appeal from the inferior court relates. Is the appeal against the High Court's interlocutory decision governed by s 66 or by s 67? Is there an appeal as of right under the former section, even though any appeal against the substantive decision which the High Court may eventually make on the appeal is itself appealable only with leave under s 67?

Mr Siemer's appeal

[4] Mr Siemer, who has throughout acted for himself, has claimed damages against the respondents for an alleged assault (unaccompanied by any battery) and for misfeasance in public office. It is unnecessary to discuss the merits or otherwise of his claim, upon which we express no view, noting only that the District Court

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[2] If leave is sought to appeal directly to the Supreme Court, it can be granted only by the Supreme Court: s 67(3).

Judge, Judge Joyce QC, observed that the latter claim was "almost certainly bereft of legal substance".[3]

[5] Judge Joyce heard an application for security for costs made by the respondents. He made an order requiring Mr Siemer to give security in the amount of $20,000 and stayed the proceeding until payment was made. That stay remains in place. As he was entitled to do, Mr Siemer appealed to the High Court against that decision under s 72 of the District Courts Act 1947. Section 74 of that Act provides:

> **74 Security for appeal**
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> (1) Unless granted legal aid under the Legal Services Act 2000, an appellant under section 72 may be required by the High Court Rules to give the Registrar of the High Court security for costs.
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> (2) If any security required is not given within the time required by the High Court Rules, the appellant's appeal must be treated as having been abandoned.

[6] The High Court Rules contain the following provisions:

> **20.13 Security for appeal**
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> (1) This rule applies to an appeal other than an appeal for which the appellant has been granted legal aid under the Legal Services Act 2000.[4]
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> (2) The Judge must fix security for costs at the case management conference relating to the appeal, unless the Judge considers that in the interests of justice no security is required.
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> ...
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> (4) Security must be paid to the Registrar at the registry of the court no later than 10 working days after the case management conference, unless the Judge otherwise directs.
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> (5) Except in the case of an appeal under the District Courts Act 1947 (where non-compliance with the security order results in a deemed abandonment of the appeal under section 74), if the security is not paid within the time specified under subclause (4), the respondent may apply for an order dismissing the appeal.
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> ...

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3 *Siemer v Heron* DC Auckland CIV-2008-004-0479, 4 December 2008 at [8].

4 There was no grant of legal aid for the appeal.

[7] When allocating a fixture for the appeal the High Court ordered Mr Siemer to pay $800 by way of security for costs on the appeal.[5] The order required that the $800 be paid by 1 May 2009. It said that unless Mr Siemer paid that security by that date the appeal would be "treated as abandoned and dismissed".

[8] Mr Siemer then filed a memorandum in the High Court asking it to reconsider the order for security. By Minute of 30 March 2009, Venning J declined to do so, observing that there was nothing extraordinary about the "unless" order which "simply clarifies the statutory provision contained in s 74 of the District Courts Act 1947 that if security is not paid the appeal will be dismissed".[6]

[9] Mr Siemer again attempted by means of a memorandum filed in the Court to have the Judge change his mind. Venning J declined to revoke the order for payment of security for the appeal, but did extend the period for payment of the $800 to 29 May 2009, again expressly saying that the appeal would be treated as abandoned and dismissed without further call unless the security was paid by that date.[7]

[10] For a third time, Mr Siemer sought in a memorandum to the Court to have the Judge review his order. In another Minute on 2 June 2009, the Judge once more refused to do so. He noted that Mr Siemer had failed to pay the security, that his order had taken effect on 29 May, and he confirmed that "by the operation of that order", which gave effect to s 74 of the District Courts Act, the appeal from the District Court was dismissed.[8]

[11] On 19 June 2009 Mr Siemer filed in the High Court an application for leave to appeal to the Court of Appeal against the High Court's order for payment of security for costs. Venning J gave judgment on 29 March 2010.[9] He expressed the view that the order requiring payment of security was not a decision for the purposes of s 67 but indicated that, if it had been, he would have declined leave.[10] He briefly

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5 *Siemer v Heron* HC Auckland CIV-2008-404-8058, 27 March 2009 (Minute of Venning J).
6 *Siemer v Heron* HC Auckland CIV-2008-404-8058, 30 March 2009 (Minute of Venning J) at [8].
7 *Siemer v Heron* HC Auckland CIV-2008-404-8058, 8 May 2009 (Minute of Venning J).
8 *Siemer v Heron* HC Auckland CIV-2008-404-8058, 2 June 2009 (Minute of Venning J) at [9]. Although throughout the Judge referred to both abandonment and dismissal, it is clear that he viewed the latter as simply a consequence of the former.
9 *Siemer v Heron* HC Auckland CIV-2008-404-8058, 29 March 2010.
10 At [12], [30].

considered the possibility that the order was appealable under s 66. He said that on a literal reading of that section the order was one to which the section would apply, but that, as the Court of Appeal had confirmed, interlocutory decisions or orders going only to the conduct or management of a trial, or in this case an appeal, were not appealable.[11] The order for security was in that category. Venning J concluded that there was no right of appeal under s 66 and dismissed Mr Siemer's application.

[12] Then followed an unsuccessful application by Mr Siemer for recall of that judgment and finally he applied to the Court of Appeal for leave to appeal. In a judgment given on 14 December 2010, that Court declined leave.[12] It said that it assumed that there was no automatic right of appeal against the security for costs order in the High Court, but that there was a right to appeal by leave.[13] It did not consider that leave should be granted. There was nothing to suggest that the appeal to the High Court from the District Court could not proceed because of Mr Siemer's financial circumstances. He was bankrupt, but the Court observed that the fact of bankruptcy did not prevent income up to a certain level being earned, and the sum of $800 was less than the sum that can be left available to a bankrupt. The Court said that there was no evidence before it as to Mr Siemer's financial circumstances, apart from the fact of his bankruptcy.[14]

Sections 66 and 67

[13] This Court has had the benefit, which the Courts below did not, of a helpful analysis from an amicus, Mr Beck, appointed by this Court to put forward legal arguments supporting the appellant.

[14] It was rightly not suggested to us that s 67 can have any application to the appeal from the High Court. It can operate only in relation to a substantive determination of an appeal from a District Court.[15] It has no application to any interlocutory decision made by the High Court in the course of an appeal. Such a

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11 At [31].
12 *Siemer v Heron* [2010] NZCA 610 per Glazebrook, Arnold and Harrison JJ.
13 At [14].
14 At [17]–[18].
15 *Murphy v Murphy* [1989] 1 NZLR 204 (CA) at 208 per Bisson J.

decision is therefore capable of appeal, if at all, only under s 66. The general question that arises is whether an appeal against an interlocutory determination is available under that section as of right or only in certain circumstances, as a line of Court of Appeal authorities has concluded. A second question is whether the scheme of ss 66 and 67 contemplates an appeal from an interlocutory decision of the High Court in the context of an appeal from a lower Court.

[15] It is appropriate to notice the language of s 66 before referring to some authorities. The Court of Appeal is now established under Part 2 of the Judicature Act.[16] The Court is not declared to be a court of general jurisdiction, as the High Court is by virtue of s 16 of the Judicature Act. Its jurisdiction must be conferred by an enactment. Recognising that, s 66 commences by conferring jurisdiction in relation to civil appeals in apparently very broad terms:

> The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment, decree, or order save as hereinafter mentioned, of the High Court ...

Then follows the foreshadowed qualification, that this jurisdiction and power is:

> ... subject to the provisions of this Act and to such rules and orders for regulating the terms and conditions on which such appeal shall be allowed as may be made pursuant to this Act.

[16] No distinction is expressly made in s 66 as between proceedings commenced in the High Court and those which come to the High Court on appeal. The researches of counsel and our own researches have not discovered any enactment, other than s 67, which makes such a distinction.

[17] The Act does contain a provision restricting appeals against interlocutory decisions in respect of a proceeding entered on the commercial list.[17] There is also no right to appeal against a High Court decision on a review of a decision made in chambers by an Associate Judge unless leave is given by that Court or the Court of Appeal.[18] Noticeably, however, s 66 is said by s 26P(3) to apply to "any appeal"

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16 The present s 66 first appeared as s 15 of the Court of Appeal Act 1882.

17 Section 24G. An agreement of the parties may also preclude any appeal in such a proceeding: s 24E.

18 Section 26P(1AA).

against an Associate Judge's order or decision that was not made in chambers.[19] That mirrors the apparent breadth of s 66.

[18] Although there is provision in s 66 itself for the making of rules and orders regulating appeals under that section, and there is a general power to make rules in s 51C, no rules illuminating the present issues currently exist. That may perhaps be because of the emergence of the case law of the Court of Appeal to which we now turn.

The Court of Appeal cases

[19] The Court of Appeal's general approach has involved a reading down of the language of s 66 but, it must be said, the Court has struggled to articulate a consistent approach.

[20] *Re Alwinco Products Ltd*[20] involved an attempt to appeal against a High Court ruling that respondent creditors were entitled to proceed with a winding up petition because the appellant debtor company had not made a tender which amounted to payment. The Court of Appeal concluded that this ruling was not a "judgment, decree, or order", but merely a step in the hearing of argument on the petition. It had achieved no final disposal of what was before the High Court.[21] The Court of Appeal referred to the "policy of this Court" against an interpretation of its jurisdiction which effected an extension to rulings given in the running course of an application such as a petition to wind up. It said that a ruling on a question of law not necessarily decisive of the issue before the Court "should not be seen in such circumstances as conferring a right of appeal".[22] The Court referred to the undesirability of a sequence of appeals in a piece of litigation which could clog up the administration of justice and cause objectionable delay and frustration to litigants.

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19 Section 26P(2) and (3).
20 *Re Alwinco Products Ltd* [1985] 1 NZLR 710 (CA).
21 At 713.
22 At 714.

[21] The next decision was in *Murphy v Murphy*,[23] where there had been an appeal from the Family Court to the High Court, which had rejected an application for the re-hearing of evidence and the adducing of further evidence. In the Court of Appeal, Richardson and Somers JJ were of the view that the ruling made by the High Court Judge was not a judgment, decree or order. Richardson J said that it would be extraordinary if, while an appeal to the Court of Appeal on the issues arising on the substantive appeal might be brought only with leave, an appeal on an incident of the hearing itself could be brought as of right. The better view was that "any matters ancillary to the hearing of the appeal in the High Court, and whether dealt with in a separate ruling or on the determination of the appeal, may be taken into account on consideration of the application for leave to appeal under s 67" and were not subject to separate appeal.[24] Somers J agreed. Bisson J characterised the decision of the High Court as an interlocutory judgment but agreed that it was implicit from the provision for appeals with leave under s 67 that there was no jurisdiction and power for the Court of Appeal to hear and determine an appeal from an interlocutory judgment made in the course of hearing an appeal from the District Court.[25]

[22] *Murphy* was followed without comment in *Yovich v Whangarei District Council*,[26] where the High Court had, during trial, refused leave for cross-examination of some deponents and for the admission of certain documents.

[23] The next case was *Winstone Pulp International Ltd v Attorney-General*,[27] which actually involved s 24G rather than s 66, but is notable for the articulation by Richardson P on behalf of the Court of three categories of interlocutory rulings:[28]

(a) those that determine or affect the rights or liabilities which are in issue, that is the merits;

(b) those that decide the shape of the substantive proceedings; and

(c) those ancillary but important rulings on times and procedures.

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23 *Murphy v Murphy* [1989] 1 NZLR 204 (CA).
24 At 206.
25 At 209.
26 *Yovich v Whangarei District Council* [1999] 2 NZLR 63 (CA).
27 *Winstone Pulp International Ltd v Attorney-General* (1999) 13 PRNZ 593 (CA).
28 At [18].

Richardson P considered that only "exceptional" cases affecting rights and liabilities would give the Court jurisdiction to entertain the appeal.[29]

[24] A few days later the same panel of Court of Appeal Judges[30] gave judgment in *Association of Dispensing Opticians of New Zealand Inc v Opticians Board.*[31] Richardson P expanded upon what had been said in *Winstone*:

> [34] Clearly s 66 could not be intended to confer jurisdiction to appeal every decision made by the High Court in relation to the proceeding and before delivery of the substantive judgment. As noted in *Winstone* at para [19] there are numerous rulings which are simply procedural or administrative, not affecting rights or liabilities as such and where the rights immediately in issue will remain for substantive determination. Such rulings may be made in the pretrial case management process or at trial. Next, rulings on matters of evidence and the scope of the hearing arise broadly in two ways: as a pretrial determination of the shape of the hearing and as decisions in the course of the hearing. Decisions in that second situation in the course of the hearing could not sensibly for policy and practical reasons have been intended to be subject to instant appeal before the completion of the hearing. Equally, interlocutory applications which, as pretrial determinations as to pleadings, discovery, evidence and the like, may substantially affect the shape of the hearing, are separate from the trial process and fit squarely and comfortably within s 66.
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> [35] The real difficulty is to resolve in a principled way how to determine what decisions or rulings are sensibly intended to come within the description of judgment, decree or order for the purposes of s 66 and so where and how to draw the line.
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> [36] We are inclined to the view that the broad classification of "decision" suggested in *Winstone* reflecting as it does similar considerations of the scheme and object of the relevant provisions and underlying policy and sound practice may be a helpful starting point. In that regard rulings made either in the course of the hearing of the proceeding (using that term in a broad sense, including for example an adjournment application), or as part of the trial conduct or management process would not ordinarily be susceptible to interlocutory appeal. On the other hand rulings which have some substantive effect on rights and liabilities in issue would be. Obviously the boundary lines will not be cut and dried and, as seen in *Winstone*, particular cases may fall into an exceptional category but that classification may be helpful at least as a matter of general approach.

[25] *Dispensing Opticians* concerned applications for leave to file affidavits, cross-examine deponents and for orders requiring the respondents to produce documents. It came to the Court of Appeal in the form of a respondent's application

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29 At [19].

30 Richardson P, Gault and Thomas JJ.

31 *Association of Dispensing Opticians of New Zealand Inc v Opticians Board* [2000] 1 NZLR 158 (CA).

to strike out an appeal against the ruling of the High Court. The Court refused to strike out the appeal for want of jurisdiction because the three interlocutory applications had been made during preparation for trial and the case would not be ready for hearing until they were determined.[32]

[26] In *A S McLachlan Ltd v MEL Network Ltd*[33] the Court heard and determined an appeal against an order for security for costs without questioning its jurisdiction to do so. Then in *Simes v Tennant*[34] the Court treated a High Court decision extending the time prescribed for appealing against a District Court judgment as appealable because it was said to be not just an interlocutory step but a precursor to the bringing of the appeal to the High Court. It said that the concern expressed in *Murphy* did not arise in the case before it.[35]

[27] *Bevan-Smith v Reed Publishing (NZ) Ltd*[36] was, like the *Winstone* case, about whether there could be an appeal against the High Court's decision on an adjournment. In *Winstone* the Court had said that other than in exceptional cases, an adjournment decision was simply procedural or administrative, not affecting rights or liabilities as such. The Court in *Bevan-Smith* expressed reservations about the approach taken in *Winstone* and in *Dispensing Opticians*, saying that it was uncomfortable with the notion that a jurisdictional question "should turn on open-textured test." It was prepared to act on the basis that it had jurisdiction to entertain the appeal if the result of the decision or decisions challenged was that the appellant's rights to a proper evaluation of his or her case were irretrievably compromised.[37]

[28] In *Attorney-General v W*,[38] which concerned the admissibility of evidence and a refusal of interim name suppression of a witness, the Court referred to the statement in *Dispensing Opticians* that rulings made either in the course of the hearing of the proceeding or as part of the trial conduct or management process

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32 At [38].
33 *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).
34 *Simes v Tennant* (2005) 17 PRNZ 684 (CA).
35 At [46].
36 *Bevan-Smith v Reed Publishing (NZ) Ltd* (2006) 18 PRNZ 310 (CA).
37 At [26].
38 *Attorney-General v W* (2007) 18 PRNZ 673 (CA).

would not *ordinarily* be susceptible to interlocutory appeal. It did not understand the earlier Court to have been saying that there was no jurisdiction to entertain appeals in these categories. To the contrary, the inclusion of the word "ordinarily" implied that, in exceptional circumstances, the Court would hear such appeals. To do so it must have the necessary jurisdiction.[39]

[29] Finally, there is *Attorney-General v Howard*,[40] which followed *Dispensing Opticians* in saying that, in order to be appealable, an interlocutory ruling had to have some substantive effect on rights and liabilities.[41] It is also notable for a statement that an argument that there is a right of appeal under s 66 for matters considered for the first time in the High Court was contrary to *Murphy*.[42]

An appeal as of right under s 66

[30] The Court of Appeal is a very busy Court. It is understandable that it should wish to avoid being burdened with multiple and possibly unnecessary appeals arising from one piece of litigation. The Court has no doubt been troubled by the broad language ("judgment, decree or order") of s 66 and the absence of any rules or orders controlling when and how interlocutory appeals may be brought. So it has endeavoured to provide its own solution by reading down the words of the section. The Court's attempt to put interlocutory decisions into various classes has not, however, led to a stable jurisprudence.

[31] We consider that the Court should not have embarked on this exercise and should instead have accepted that s 66 does give an appeal as of right against interlocutory decisions of all kinds made in the High Court unless the Judicature Act itself or a rule or order made pursuant to the Act creates a restriction. The words "any judgment, decree or order" must be held to mean what they say. The statutory language does not support any other interpretation.

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39 At [9]–[10].
40 *Attorney-General v Howard* [2010] NZCA 58, [2011] 1 NZLR 58.
41 At [66].
42 At [73].

[32] It is not for this Court to say whether this position should be modified by the legislature or whether regulating rules or orders should be made (noting, however, that the power to make rules or orders would not appear to extend to any outright prohibition of an appeal).[43] If there are any undesirable consequences of this interpretation, the Court of Appeal should be able to mitigate them. Although the Court, in our view, must under s 66 receive all interlocutory appeals, it may in its discretion decline to hear them in advance of trial (or the substantive hearing of an appeal from the District Court) if it considers that they may be overtaken by the trial (or hearing) or that the appellant is unlikely to be prejudiced by such a postponement.[44] It is in this connection to be borne in mind that it has long been the case that upon a substantive appeal, interlocutory rulings can be reviewed if they remain material. In *Paper Reclaim* this Court observed that there is an established practice that it is not generally necessary to appeal against an interlocutory order made during the course of the proceedings until after the substantive decision in the proceedings has been delivered.[45] Unnecessary or vexatious appeals can also be discouraged by appropriate awards of costs to the respondents.

[33] But where an interlocutory decision which is the subject of an appeal would be dispositive of the case either in law or as a practical matter, the Court of Appeal would ordinarily proceed to hear and determine it before the substantive issue is addressed by the High Court, just as in practice it has done in the past, as the cases referred to at [20]–[29] demonstrate.

[34] One reason given for denying appeals under s 66 in relation to interlocutory decisions made in the course of an appeal has been that to allow them as of right would be inconsistent with the leave requirement in s 67, which applies when the

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[43] The existence of the express leave requirement in s 67 suggests that "regulating" in s 66 does not extend to requiring leave for appeals.

[44] In *Attorney-General v W*, where the trial was already underway when the interlocutory appeals were brought, the Court of Appeal said that it was possible that evidence whose admission was in issue might not be accepted by the Judge as it might prove not to be material or the appellant might succeed in any event: at [12]. The Court also pointed to the practical difficulty and disruption if it were to proceed to hear the appeals: at [15]. It reserved leave to apply for an urgent hearing if subsequent developments in the trial justified that course or if the High Court refused to extend interim name suppression: at [18]–[19].

[45] *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1 at [14], citing *Crowley v Glissan* (1905) 2 CLR 402 and *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 483.

High Court disposes of the appeal to it by allowing or dismissing the appeal. That asserted inconsistency is, again, a matter for the attention of Parliament, but it does not provide good reason for limiting the operation of s 66 in relation to such interlocutory decisions. The evident policy of s 67 is that when a litigant has had one appeal already against a decision made below the level of the High Court, there should be no second appeal without a screening process. An interlocutory decision made by the High Court in the course of a first appeal is, however, an original decision. If the aggrieved litigant is denied the ability to appeal it, he or she has not had any appeal on the point. The situation therefore differs from that pertaining after a substantive decision on the appeal. Indeed, without an ability to appeal, the litigant's substantive appeal may be defeated without even being heard by the High Court. Whether, even so, a leave provision should also apply to such appeals is a matter for legislative consideration.

Did Mr Siemer validly bring an appeal?

[35] A right of appeal therefore did exist for Mr Siemer against Venning J's security for costs order provided that he brought that appeal within time – that is, before s 74(2) of the District Courts Act operated to deem his underlying appeal to the High Court to be abandoned. Unfortunately for him he did not do so, with the result that, as the appeal in which the order was made no longer existed, there was nothing left about which to appeal to the Court of Appeal.

[36] Section 74 provides that an appellant not granted legal aid may be required by the High Court Rules to give the Registrar of the High Court security for costs and that, if any security required is not given within the time limited by the rules, the appeal "must be treated as having been abandoned". Obviously once it is abandoned, there can be no appeal to the Court of Appeal.

[37] Rule 20.13 of the High Court Rules makes provision for the fixing of security for costs. It requires a High Court judge to fix security at a case management conference relating to the appeal, unless the judge considers that in the interests of justice no security is required. Venning J fixed security in the sum of $800 at such a conference attended by Mr Siemer, as appears from his Minute of 27 March 2009

and again from the Minute of 2 June which records that the initial order was made in Mr Siemer's presence. Rule 20.13(4) provides that the security fixed must be paid to the Registrar no later than 10 working days after the conference, "unless the Judge otherwise directs" and subr (5) makes it plain that in the case of an appeal under the District Courts Act non-compliance with the order for payment will result in a deemed abandonment.

[38] The Judge exercised his power to make a direction about the time for payment and on several occasions extended the time fixed. But eventually, when Mr Siemer had not paid the sum ordered by the extended time of 29 May 2009, he refused to revisit the (amended) order. The consequence was that the appeal to the High Court had, under s 74(2), to be treated as abandoned at the end of 29 May.

[39] In argument in this Court Mr Siemer pointed to that fact that by 29 May he had sought a variation of the order. He seemed to believe that this required the Judge to treat his appeal as remaining on foot, which of course it would not do. In electing to make such an application, he took the risk that the Judge would refuse to extend the order and that the appeal might be deemed abandoned in the meantime. Indeed, it seems that once s 74(2) had operated at the end of 29 May, the Judge had no power to resurrect the appeal by a retrospective extension of time or variation or cancellation of his order.[46] If that is so, in view of Mr Siemer's failure to pay the security by 1 May 2009 – the time originally fixed by Venning J – the Judge's purported extension to 29 May in his Minute of 8 May was ineffective to keep the appeal on foot after 1 May.

[40] A related problem, which also does not arise in this case, should be mentioned. It is whether the bringing of an appeal under s 66 before any abandonment occurs may have the effect of suspending the operation of s 74(2). The argument in favour of the view that it does, which seems to receive some support

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[46] In *Hermans v Hermans* [1961] NZLR 390 (CA) at 393 the Court said that once an appeal is deemed to be abandoned there is nothing before the Court which can be amended or otherwise dealt with. See, however, the contrary view taken in *Graham v Mills* (2005) 18 PRNZ 157 (HC) at [21]–[26] per Heath J, that the reference in s 74(2) to "the time required by the High Court Rules" incorporates not only the rule about giving security for an appeal (now r 20.13) but also the rule which gives a general power to extend time (now r 1.19), which is exercisable "although the application for extension is not made until after the expiration of the time appointed or fixed".

from the Court of Appeal decision in *Yeatts v Ruapekapeka Sawmill Co Ltd*,[47] would be that an appeal brought in time might otherwise be rendered nugatory. Against this is the obvious inconsistency with the language of s 74(2) and the undesirability of the appeal operating in effect as a stay. It is relevant also that, at the same time as the appeal is brought, the intending appellant could make an application to the High Court asking it immediately to make an order, in exercise of its power under r 20.13, extending the time for payment until the Court of Appeal has had the opportunity of considering the appeal.

[41] Because s 74(2) had operated to deem the appeal abandoned, it is of no moment that the High Court and the Court of Appeal afterwards proceeded to consider Mr Siemer's successive leave applications. They could never have availed him.

[42] Before leaving this matter we should clarify one other point. In form, the Court of Appeal's order in its judgment of 14 December 2010 was a refusal of leave to appeal. No right of appeal to this Court exists against a refusal of leave by the Court of Appeal because of s 7(b) of the Supreme Court Act 2003:

> **7 Appeals against decisions of Court of Appeal in civil proceedings**
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> The Supreme Court can hear and determine an appeal by a party to a civil proceeding in the Court of Appeal against any decision made in the proceeding, unless—
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> ...
>
> (b) the decision is a refusal to give leave or special leave to appeal to the Court of Appeal.

That does not, however, prevent this Court from hearing an appeal concerning whether an appeal lies as of right, without leave, to the Court of Appeal. If the Court of Appeal has, as in this case, erroneously concluded that leave was required, that must be capable of correction by this Court. The form of the Court of Appeal's order cannot preclude this.

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[47] *Yeatts v Ruapekapeka Sawmill Co Ltd* [1958] NZLR 739 (CA) at 743.

Result

[43] The appeal is dismissed. An award of costs against Mr Siemer may be pointless but we reserve leave to the respondents to apply.

WILLIAM YOUNG J

[44] I differ from the other members of the Court on the question whether there ever was a right of appeal in relation to the order for security for costs. On this point, I prefer the approach taken in *Murphy v Murphy*[48] and the other Court of Appeal cases to the like effect.

[45] I see this aspect of the case as controlled by s 67 of the Judicature Act 1908. An appeal against a substantive determination by the High Court is only by leave. But the majority conclude that there is an unrestricted right of appeal from any other judgment given in the course of dealing with such an appeal. They reach this result by interpreting s 66 first and broadly, then giving s 67 a particularly literal interpretation. In effect, s 67 is treated as a carve-out from the generality of s 66 with its effect limited to the type of decisions in respect of which leave to appeal is provided – that is, substantive determinations. I see this as inappropriately atomistic. I prefer an interpretation based on reading both sections together in light of their legislative history and, in this way, giving effect to what I think is the evident parliamentary intention.

[46] Sections 66 and 67 of the Judicature Act are set out as they now stand in the reasons prepared by Blanchard J. In its present form s 67 is now encrusted with amendments, and I think it better to start with the sections in the form as enacted in 1908; this because the language then used was simpler. I see no good reason for not adopting this approach as it could not rationally be suggested that the subsequent amendments were intended to confer rights of appeal not provided for by the 1908 Act.

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[48] *Murphy v Murphy* [1989] 1 NZLR 204 (CA), referred to in the reasons prepared by Blanchard J at [21].

[47] Sections 66 and 67 as first enacted provided:

> **66 Court may hear appeals from judgments and orders of the Supreme Court**
>
> The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment, decree, or order, save as hereinafter mentioned, of the Supreme Court, subject to the provisions of this Act and to such rules and orders for regulating the terms and conditions on which such appeals shall be allowed as may be made pursuant to this Act.
>
> **67 No appeal on appeals from inferior Courts without leave**
>
> The determination of the Supreme Court on appeals from inferior Courts shall be final unless leave to appeal from the same to the Court of Appeal is given.

Read together in this way they may be thought to contemplate two separate appeal regimes, the first in relation to judgments given by the Supreme Court (now the High Court) in its original jurisdiction provided for by s 66; and the second in respect of the exercise of the Supreme Court's appellate jurisdiction in relation to inferior courts provided for by s 67. The "hereinafter mentioned" is obviously a reference to s 67. Given the marginal note to s 67 ("No appeal on appeals from inferior Courts without leave"), it is implausible to attribute to the legislature the intention to confer general appeal rights in relation to interlocutory judgments in such cases.

[48] Let us assume that s 67 had simply provided, "[t]he determination of the Supreme Court on appeals from inferior Courts shall be final". This is not a fanciful example. Initially, judgments of the Supreme Court in the exercise of its appellate jurisdiction in relation to District Courts[49] were final.[50] This was to preclude resort to the Privy Council. In declaring such judgments to be final, the legislature was obviously not contemplating appeals to the Privy Council from interlocutory decisions in such cases. Interestingly, there still are some rights of appeal to the High Court where the decision of that Court is declared to be final.[51] Where the legislature has declared the decision of the High Court to be final, it cannot have

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49 Not the District Courts as currently constituted but rather those established by the District Courts Act 1858.

50 See s 102 of the District Courts Act 1858.

51 For instance, Broadcasting Act 1989, s 19 and Tuberculosis Act 1948, s 17(2). The same approach was taken to appeals against a number of orders or decisions in the, now repealed, Immigration Act 1987, see ss 21(7), 81(5) and 117(6). See also Human Rights Commission Act 1977, s 64 (also repealed).

simultaneously intended to provide for appeals as of right to the Court of Appeal against interlocutory decisions given in the course of dealing with such appeals. This suggests that the leave jurisdiction provided for in s 67 should be treated as the only exception to the finality of decisions given by the High Court in the course of dealing with appeals.

[49] This approach is consistent with that of the Privy Council in *De Morgan v Director-General of Social Welfare*.[52] In issue was whether the Privy Council had jurisdiction to entertain an appeal from the Court of Appeal given under s 67. That section did not explicitly state that the judgment of the Court of Appeal was final. Section 68, however, which provided for a leap-frog appeal to the Court of Appeal from judgments of inferior courts, made the judgments of the Court of Appeal under that section final. The right of appeal under s 68 was subject to obtaining a certificate from the judge of the inferior court that in his or her opinion the proposed appeal raised "some question of law of considerable difficulty or great importance". The Privy Council based its judgment in part on "common sense", as it could see no logic in judgments under s 67 not being final when judgments under s 68 were final. This "common sense" approach is applicable by analogy here, a fortiori, because there can be no logic in giving a general right of appeal in relation to interlocutory decisions when an appeal against a substantive decision is only by leave. The Privy Council judgment was also based on its construction of s 67:[53]

> In their Lordships' view the correct construction of the sections is as follows. Under s 67 the decision of the High Court is "final". To this finality there is one limited exception ie an appeal with leave to the Court of Appeal.

[50] I note that very much the same interpretation of s 67 had earlier been proffered by Blair J in *Moon v Kent Bakeries Ltd (No 2)*[54] when he observed:[55]

> It is assumed by the unsuccessful party that, because leave to appeal to the Court of Appeal was granted, s 67 means that the unsuccessful party may thereafter carry the appeal to the Privy Council. I interpret s 67 as giving a power to the Supreme Court to allow the case to go as far as the Court of Appeal. But I interpret the section also as securing for the successful party on the appeal to the Supreme Court the benefit of a final judgment except

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52 *De Morgan v Director-General of Social Welfare* [1997] 3 NZLR 385 (PC).
53 At 387.
54 *Moon v Kent's Bakeries Ltd (No 2)* [1947] NZLR 241 (CA).
55 At 246–247.

> where the Supreme Court in its discretion may consider it proper to permit resort to another specially nominated Court. In my view, therefore, there is no power in this Court to give leave to carry the case further than the Court of Appeal.

[51] The Judicature Act 1908 consolidated inter alia the Court of Appeal Act 1882. Sections 15 and 16 of the latter Act were in almost exactly the same terms[56] as ss 66 and 67 of the Judicature Act 1908 as first enacted and they had the same marginal notes. If these sections did not confer a general right to appeal without leave to the Court of Appeal from interlocutory decisions given in the course of dealing with appeals from inferior courts, it is impossible to identify any subsequent statute which conferred such a right of appeal. So I think that the issue in the present case falls to be determined on the basis of the true construction of the 1882 Act.

[52] The 1882 Act was drafted by a Royal Commission which presented its report on 2 June 1882.[57] This report is in short form and does not illuminate the thinking behind ss 15 and 16, and I have been unable to find any other contemporaneous material which is helpful. I think it likely, however, that the idea behind s 15 was taken from s 19 of the Supreme Court of Judicature Act 1873 (UK)[58] which provides in very general terms for a right of appeal from decisions of the High Court. In contradistinction, s 16 is a recapitulation, in different wording, of a right of appeal which was first conferred in 1862 and which I am about to discuss.

[53] It was the Court of Appeal Act 1862 which first constituted the Court of Appeal.[59] In its introductory provisions, that Act, by s 17, provided:

> The Court of Appeal shall have power to review the decisions of any Judge of the Supreme Court on appeals from the District Courts or other Inferior Courts in matters both Civil and Criminal. Provided that no such appeal shall lie to the Court of Appeal except by leave of the Judge whose decision is appealed against.

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56 Section 67 of the 1908 Act stipulated that the Supreme Court determination shall be final unless leave to appeal "is given" instead of "shall be given", as provided for in s 16 of the 1882 Act.

57 J Prendergast and others "Final Report of the Commission to Inquire into the Constitution, Practice, and Procedure of the Supreme Court and Other Courts" [1882] I AJHR A3.

58 Supreme Court of Judicature Act 1873 (UK) 36 & 37 Vict c 66.

59 I am deliberately disregarding the non-judicial Court of Appeals which was perhaps established by the Supreme Court Amendment Ordinance 1846 and is discussed in an anonymous article "The Supreme Court and the Court of Appeal: First Beginnings" [1938] NZLJ 261.

Section 17, standing alone, could be read as providing for an appeal with leave from interlocutory decisions of the Supreme Court on appeal from inferior courts. This, however, would not be a correct reading given s 60 of the 1862 Act which made it clear that the right of appeal to the Court of Appeal was confined to the substantive order of the Supreme Court.[60]

[54] Enacted on the same day as the Court of Appeal Act was the Resident Magistrates' Jurisdiction Extension Act 1862, which provided for appeals on points of law to the Supreme Court from decisions of Resident Magistrates. The appeal was by way of case stated and such appeals were to be set down for hearing "at the next practicable sitting" of the Supreme Court.[61] Section 17 of the Court of Appeal Act thus provided a right of appeal, with leave, from judgments of the Supreme Court on such appeals.

[55] The 1862 Act also provided for the civil jurisdiction of the Court of Appeal in relation to judgments of the Supreme Court. These provisions were complex and closely tied into the way in which the English Courts of Queens Bench, Common Pleas, Exchequer and Exchequer Chamber operated. It is, however, perfectly clear that the appeal rights created were only in relation to substantive decisions (including decisions on post-jury verdict applications).

[56] It follows that the Court of Appeal Act 1862 was not intended to confer rights of appeal against interlocutory decisions of the Supreme Court in the course of dealing with appeals from inferior courts:

(a) the language of ss 17 and 60, when read together, encompassed only substantive determinations; and

(b) there was no other head of jurisdiction under the 1862 Act which would have provided a basis for an appeal against an

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60 The right of appeal was conferred in favour of a party to an appeal against whom an order under s 102 of the District Courts Act 1858 had been made.

61 See s 3. A right of appeal had been earlier conferred, but only in cases where the amount involved exceeded £5, by s 12 of the Resident Magistrates' Courts Extension of Jurisdiction Act 1856, but this statute was repealed by the District Courts Act 1858.

interlocutory decision of the Supreme Court in the course of dealing with an appeal from an inferior court.

As well, the requirement in the Resident Magistrates' Jurisdiction Extension Act 1862 for appeals from Resident Magistrates to be set down at the next practicable sitting of the Supreme Court suggests that the legislators had not contemplated the possibility of as-of-right appeals to the Court of Appeal on interlocutory decisions of the Supreme Court.

[57] A little historical context is also material.[62] From 1862 to 1957, the Court of Appeal consisted of the Judges of the Supreme Court. In the late nineteenth century, there were two sessions a year, each of around two weeks. Although it had initially sat in Christchurch and Dunedin, from 1865 the Court of Appeal was sitting only in Wellington. Given the difficulties and cost of transportation and communication and the infrequency of sittings, the conferral of a right of appeal against interlocutory decisions given in the course of dealing with appeals from inferior courts would have seemed preposterous to the legislators of 1882. So I do not think that the policy referred in [34] of the reasons prepared by Blanchard J was material to the enactment of ss 16 and 17 of the 1882 Act.

[58] Despite the repetition, I think it helpful to review the salient features of the legislative history in reverse order.

(a) Section 17 of the Court of Appeal Act 1862 is the first precursor of s 67 of the Judicature Act 1908. For the reasons given, there was no right of appeal, at that time, against interlocutory decisions of the Supreme Court on appeal from inferior courts.

(b) Section 17 of the 1862 Act was replaced by s 16 of the Court of Appeal Act 1882. Given the marginal note, "No appeal on appeals from inferior Courts without leave", and the express provision that the determination of the Supreme Court on such

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62 See generally Peter Spiller *New Zealand Court of Appeal 1958–1996: A History* (Brookers, Wellington, 2002) and Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001).

appeals was final unless leave to appeal was granted, the legislature was simply replicating the position which had obtained under the 1862 Act. It follows that the general language of s 15 of that Act (corresponding to s 66 of the Judicature Act 1908) did not confer an unrestricted right of appeal in relation to interlocutory decisions of the Supreme Court on appeal from inferior courts. It will be recalled that in *De Morgan*, the provision for finality was applied by the Privy Council in a forward-looking way so as to exclude appeals from judgments of the Court of Appeal. It is, if anything, easier to read it in a backwards-looking way as excluding appeals from interlocutory decisions which precede the ultimate determination.

(c) Because ss 66 and 67 of the Judicature Act 1908 are in substantially the same terms as ss 15 and 16 of the 1882 Act, the same position applies in respect of the 1908 Act.

[59] I otherwise agree with the reasons prepared by Blanchard J and in particular agree that any appeal right Mr Siemer may have possessed in relation to the High Court's orders for security ceased to exist under the operation of s 74(2) of the District Courts Act.

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