Supreme Court of New Zealand
Te Kōti Mana Nui

27 NOVEMBER 2018

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

JEREMY JAMES MCGUIRE v SECRETARY FOR JUSTICE

(SC 22/2018) [2018] NZSC 116

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

In issue in this appeal is a decision by the respondent, the Secretary for Justice, to decline an application made by the appellant, Mr Jeremy McGuire, a practising lawyer, for approval to provide legal aid services as a lead provider in family law. This decision was made on 7 November 2013 (the 2013 decision).

Three years later, Mr McGuire issued judicial review proceedings in the High Court, with part of his claim resting on a challenge to the 2013 decision. In response, the Secretary applied to strike out the part of the claim referring to the 2013 decision.

In the High Court, Cull J dismissed the Secretary's strike-out application. In doing so, she rejected an argument that Mr McGuire's failure to exercise his statutory review rights under s 82 of the Legal Services Act 2011 in respect of the 2013 decision meant s 83 of the Act precluded him from applying for judicial review. This section provides:

> A person may not apply for judicial review of any decision made under this subpart until the person has sought and obtained a review of the Secretary's decision under section 82.

In the High Court, Mr McGuire had represented himself. Despite his success, Cull J did not award Mr McGuire costs; this notwithstanding the

85 Lambton Quay, Wellington
P O Box 61 DX SX 11224
Telephone 64 4 918 8222 Facsimile 64 4 471 6924

then usual practice of awarding costs to lawyers who had successfully sued or defended in person.

Mr McGuire appealed to the Court of Appeal on the costs point, with the Secretary cross-appealing on the substantive issue. The Court of Appeal allowed the cross-appeal and struck out Mr McGuire's claim in respect of the 2013 decision. It found that exercising the statutory review rights provided by the Act was a prerequisite to bringing a claim in judicial review. As Mr McGuire had not exercised his statutory review rights in a timely manner, he was precluded from seeking judicial review. This necessarily meant that Mr McGuire's appeal in respect of costs failed. As the judgment made clear, however, his appeal would have failed in any event because in *Joint Action Funding v Eichelbaum* [2017] NZCA 249, [2018] 2 NZLR 70, a decision released before the Court of Appeal hearing in the present case, the Court of Appeal had held that lawyers acting in person are not entitled to costs.

The Supreme Court granted leave on both: (a) whether the Court of Appeal was correct to strike out Mr McGuire's claim in respect of the 2013 decision; and (b) whether *Joint Action Funding* was correctly decided. The New Zealand Law Society and the New Zealand Bar Association were given leave to act as interveners.

The Supreme Court has unanimously dismissed the appeal. It has also held *Joint Action Funding* to be wrongly decided.

The Court found that the application for review of the 2013 decision was misconceived. The statutory review process initiated promptly after the 2013 decision, providing for fresh consideration of the application and conducted with reasonable speed, would have offered a far better mechanism for challenging the 2013 decision than judicial review commenced nearly three years later. The Court saw no justification for Mr McGuire being permitted to challenge the 2013 decision so long outside the time limits provided by the Act and where no sensible remedy could be provided. The Court accordingly held that his application for judicial review of the 2013 decision was properly struck out.

In respect of the costs issue, the position prior to *Joint Action Funding* was that litigants in person were not entitled to costs (the primary rule) unless the litigant in person was a lawyer (the lawyer in person exception). A litigant represented by an employed lawyer was also entitled to recover costs (the employed lawyer rule). Under the approach adopted in *Joint Action Funding*, the primary rule was upheld and the lawyer in person exception abandoned; this on the basis that under the current costs rules, costs may only be awarded to reimburse a party for legal fees actually incurred (the invoice required approach). The Court of Appeal did not directly address the employed lawyer rule but the invoice required approach it adopted was inconsistent with the continuation of that rule.

The Supreme Court has concluded that *Joint Action Funding* was wrongly decided in that the current costs regime in the High Court Rules

did not override the primary rule, the lawyer in person exception or the employed lawyer rule. The result is that the law as it was understood to be before *Joint Action Funding* is to continue to apply – namely, lawyers representing themselves in litigation are entitled to costs, as is a litigant represented by an employed lawyer, but litigants in person are otherwise not entitled to costs. If any change is to be made, this should be effected by Parliament or perhaps the Rules Committee.

Ellen France J agreed with the conclusion reached by the other members of the Court on the costs issue. However, she noted that if the underlying premise of costs is to recompense a person for loss of opportunity cost, the distinction drawn in the primary rule between lawyers who appear in person and other self-represented litigants is irrational.

Contact person:
Kieron McCarron, Supreme Court Registrar (04) 471 6921