

**BETWEEN**

**LFDB**

Appellant

**AND**

**SM**

Respondent

Hearing: 5 December 2014

Coram: Elias CJ  
McGrath J  
William Young J  
Glazebrook J  
Arnold J

Appearances: M S Smith and E M Eggleston for the Appellant  
A E Hinton QC for the Respondent

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**CIVIL APPEAL**

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**ELIAS CJ:**

Yes sorry.

**MR SMITH:**

If it pleases Your Honour, Smith and Eggleston for the appellant.

**ELIAS CJ:**

Thank you, Mr Smith and Mr Eggleston.

**MRS HINTON QC:**

Mrs Hinton for the respondent.

**ELIAS CJ:**

Thank you Mrs Hinton, right.

**MRS HINTON QC:**

I did mention to my friends that I wondered about the appropriateness of Mr Eggleston appearing. He did swear an affidavit which was filed in this Court. It's not, I accept –

**ELIAS CJ:**

It's not contentious.

**MRS HINTON QC:**

– it's not actually relevant to the appeal. It just seemed to me to be not terribly appropriate but I raise it and I'm happy to leave it with you.

**ELIAS CJ:**

Yes I think we will, I think we will carry on.

**MRS HINTON QC:**

Mhm.

**ELIAS CJ:**

Since we are pressed for time. I haven't considered whether there is a, whether there is a problem but if there's nothing contentious, it is not a good practice, Mr Smith, but anyway carry on.

**MR SMITH:**

I acknowledge that, it is on the basis there isn't anything contentious in the affidavit so far as this proceeding or the substantive is concerned that Mr Eggleston is appearing and I will, amongst other things, be very conscious of that fact in seeking

any assistance from Mr Eggleston and with luck there will be no need to seek any assistance this time to points of detail.

Now Your Honours should have before you a copy of a road map which I just circulated shortly before Your Honours entered and say it's a bound document with a single page road map on the front of it with two tabs.

**ELIAS CJ:**

Oh yes, thank you.

**MR SMITH:**

And the tabs have behind them respectively, tab 1 is *Prince Abdulaziz Bin Mishal Bin Abdulaziz v Apex Global Management Ltd & Anor* (Rev 2) [2014] UKSC 64 (26 November 2014) which is the very recent UK Supreme Court case which the Registrar just circulated yesterday and the second tab has behind it a full copy of the Property (Relationships) Act which might, in my submission, be helpful too, certainly on the point of the application of section 37 of the Property (Relationships) Act. It might be helpful to look at that at a later stage in the submissions.

**ELIAS CJ:**

Yes.

**MR SMITH:**

In terms of the structure my learned friend and I agreed last week, it might have been the week before that we'd organise the time so that I would present oral submissions for an hour and a half and then my learned friend would have an hour and a half to respond and then if there is any time for that, for reply submissions afterwards, we will proceed on that basis.

**ELIAS CJ:**

We need to stop no later than quarter to one. So if you can apportion your time accordingly I will try and keep you to that. I should say that we will take a short adjournment at 11.30, at 11 sorry.

**MR SMITH:**

Thank you, that is helpful Your Honour. In terms of the, or the structure that I wanted to follow for the oral submissions, I would like in the first instance to, having handed

up the road map, to respond to and identify some of the factual points that go to the interest of justice discretion that the appellant says is what the test for relief from the unless order sanction turns on and then having done that to return to, and these are factual or evidential points that are not dealt with in detail in the road map itself, and having taken Your Honours to some of the relevant evidence, to then turn to the legal principles and focus in particular on what I have identified in the road map document as the first issue, which is what is the correct test for relief from an unless order sanction and to address in that context the, what in the submission of the appellant is an inappropriate gloss that the Court of Appeal put on the English case law that it relied upon which is to say that the – and this is paragraph 31(d) and (e) of the Court of Appeal's decision that the outcome of an application for relief from an unless order sanction will largely turn on whether or not the Court concludes that a breach was intentional without good reason.

So without that framework, starting with some of that, it will be helpful to begin by acknowledging that this is not an easy case and that's reflected in my submission the fact that the outcomes at first instance and in the Court of Appeal were the opposite ones, showing that different Judges can and did reach different outcomes as to the balancing of relevant considerations and within that context too, to identify and to offer responses to a lot of the issues that my learned friend raises as fairly going to the exercise of the interest of justice discretion and relevant to whether or not relief should be granted to the unless order sanction. The first of those points and I acknowledge is that the order, the unless order which expired at or crystallised, so to speak, at 5.00 pm on the 9<sup>th</sup> of September 2013 was breached, that's certainly not arguable. The response that the appellant has for that is that an application was made within time and that came to be, that was the application dated 4 September, emailed to the Court on 5 September and formally filed on 9 September. So there was an application within time that there was thereafter considered, rejected and that was the first judgment of Justice Ellis dated 14 October 2013 which led to the payment of the outstanding costs and interests and the second application which was ultimately accepted, successful.

I also acknowledge as the Courts below have both found, that there wasn't any good reason for the breach of the unless order in the sense of a reason which would of itself justify characterising the breach of the ordered the non-payment of costs by the set date, as one which would of itself excuse compliance and I have in mind there the decision of – and I make that acknowledgement in light of the decision of the English

Court of Appeal in *Denton v TH White Ltd* [2014] EWCA CIV 906 which was one of the three consolidated appeals that the English Court of Appeal considered; there was the Decadent appeal where they acknowledged that failure to pay costs on the date set in the order was a significant breach of requirement, Court order Court requirements that in the circumstances hadn't been explained by the fact that the solicitors hadn't taken steps, adequate steps to pay those costs before the time for doing so expired. So I acknowledge that as part of the interests of justice discretion, the explanation of the appellant for non payment of the costs by 5.00 pm on the 9<sup>th</sup> of September is not one which is weighty of itself.

In terms of the effect that the breaches had on each party as set out in the written submissions, I acknowledge that there has been prejudice to the respondent in the appellant not paying the costs order by the date that was set for the payment of those, but to a degree as set out in the written submissions, that breach has been remedied by the fact that interest continued to accrue on the costs order that was payable and when it was finally paid on the 17<sup>th</sup> of October, five weeks after the date for paying it, the interest had accrued to that point. So there was that offsetting of the prejudice to that extent, I accept that there would be and indeed the Court fairly concluded that there would be other forms of prejudice including in terms of the time that needed to be taken and the costs associated with the applications that followed for relief from sanctions, but in my submission offsetting that is the fact that the appellant, the respondent sorry, now has been awarded costs for those steps on the uplifted basis and that, or those costs are now payable. Now I accept that they, or those costs were ordered in judgment of 6 October, for Her Honour Justice Ellis which is in the case on appeal. The order which followed from that and this is evidence from the bar, was served on the 2<sup>nd</sup> of December I think it was, the 10 working days set in that are ticking, so to speak, for the payment of that cost figure.

**WILLIAM YOUNG J:**

When did he learn of the order?

**MR SMITH:**

It was the date that the order was published on the Auckland District Law Society email list which led to the correspondence behind the stay application, that was from memory the 20<sup>th</sup> of October. At that stage –

**WILLIAM YOUNG J:**

So he's still, sort of up to his old tricks then really, in terms of dragging it out. Why not pay it straight away?

**MR SMITH:**

– he –

**ELIAS CJ:**

Particularly if you were coming here.

**WILLIAM YOUNG J:**

Yes.

**MR SMITH:**

– yes and I acknowledge that point. At present the \$20,000 has been paid, that was paid –

**WILLIAM YOUNG J:**

No but the most recent order for costs hasn't been paid.

**MR SMITH:**

– \$20,000 of that cost order has been paid.

**WILLIAM YOUNG J:**

Oh I see.

**MR SMITH:**

So of the 52,000, 20,000 has been paid and the appellant has proposed to pay the remaining three instalments amounting to slightly over \$32,000 in the next three months, at the end of each month on an equal basis.

**WILLIAM YOUNG J:**

It might have been better to pay it and not muck around.

**MR SMITH:**

Yes quite, Your Honour.

**WILLIAM YOUNG J:**

Because I mean, this whole exercise, this leaves you pretty cold.

**MR SMITH:**

I acknowledge that it's his failure to pay these full, that this latest full cost is relevant to him, as Your Honour says, does chill his application to a degree. The appellant's position communicated to the respondent, and I acknowledge that it hasn't found favour with other Judges earlier, is that payment of, in this case, a \$50,000 costs order straight away is not something that he has the financial means straight away to pay, and it's on that basis that \$20,000 has been paid and the proposal made to pay the balance over the next three months.

**GLAZEBROOK J:**

He hasn't put any – is there any evidence of that? His financial means?

**MR SMITH:**

The most recent affidavit that provides evidence related to that is the affidavit sworn in support of the final, the 17 October application for relief and sanctions, and that's in volume 3 of the case on appeal, behind tab 111. Now this obviously related to the appellant's financial means over the course of the applications and up to that time and he refers, and I just refer Your Honour by way of example to the introduction in paragraph 2(c) there acknowledging the appellant's concerns that he did not have the resources at the time to pay the costs orders. There's no, in the case on appeal, there's no more recent sworn evidence from the appellant on these issues.

**ELIAS CJ:**

Well, why not, really, because it's then a – it's a continuing process.

**MR SMITH:**

The, I can only take it as far as the evidence of the appellant, which is that he just does not have those financial resources.

**ARNOLD J:**

He was immediately able to pay the order for costs when his extension application didn't work?

**MR SMITH:**

That's right, but that was on the basis that he had not paid creditors a sum that was ultimately paid to the – for the costs and that's in the same affidavit, and then he didn't pay all of the legal costs that he then had outstanding to his own lawyers to meet the payment.

**McGRATH J:**

So when does the current order expire?

**ELIAS CJ:**

Ten days.

**MR SMITH:**

Within 10 working days of service so that –

**GLAZEBROOK J:**

But he doesn't intend to pay them within 10 working days, is that what I understood?

**MR SMITH:**

So he's paid \$20,000 immediately the next 10 or 11 approximately thousand.

**GLAZEBROOK J:**

So he intends to be in breach of that order as well?

**MR SMITH:**

On the basis that he doesn't have financial resource to pay it, yes, Your Honour.

**ELIAS CJ:**

Sorry, are you indicating to us that he will not pay within the 10 working days?

**MR SMITH:**

That is my instructions. He's not able. He doesn't have the financial resources to pay.

**ELIAS CJ:**

So the fact that there's still 10 working days is neither here nor there?



**MR SMITH:**

That was the position communicated by letter of yesterday or the day before to solicitors for the respondent and my instructions reflect that.

**ELIAS CJ:**

All right.

**MR SMITH:**

But I can seek further instructions subsequent to this hearing and file those but those are my instructions at present, and...

**ELIAS CJ:**

Well, I'm just wondering why we should hear this, whether we should adjourn this.

**GLAZEBROOK J:**

Well, it's not particularly satisfactory coming to the Court to say, "We should have relief but, in fact, we intend to be in breach of the next order as well, so we only pay out when we really absolutely have to," after – "and we don't have the financial resources," after it seems playing chicken with the Court. As Justice Ellis said, this isn't just the – this is the last straw, isn't it, rather than – it's a series of difficulties. Crying poverty when so much has been spent on legal expenses, and one has to wonder how, to what effect or what need there is for these endless applications.

**MR SMITH:**

I would accept that this is relevant to the exercise of the Court's discretion in relation to this appeal. My submission in response would be, to Your Honour, Justice Glazebrook, would be that it's not of itself something that should be determinative and I make that submission –

**GLAZEBROOK J:**

Even the current breach shouldn't be determinative. The current intent to breach.

**McGRATH J:**

Threatened breach, yes.

**ELIAS CJ:**

I suppose your contention there is that that is not before the Court at the moment, but having been advised of it, I'm not sure that this Court should allow litigants to toy with the Court in this way, and while leave was granted on the basis that the use and application of unless orders is a matter of some public importance, I'm wondering whether given the indication we should be reconsidering our grant of leave in this case.

**MR SMITH:**

My submission on that would be that, again, accepting that it is relevant to the appeal that is before this Court, that an appropriate response might be that the appellant is to have until the 10 working days expire to pay or not, which – and those are running at this stage.

**ELIAS CJ:**

But this is going to be a continuing issue. That's really what is being amply demonstrated, that in this litigation there is going to be a huge amount of time and money squandered because of the attitude being taken by what appears to be a quite recalcitrant and unreasonable litigant. So if you accept that the position in which he stands at the moment is relevant to this appeal, I'd quite like to hear you on why the Court shouldn't decide, given that indication, that it revokes its leave to appeal in this case on the basis that the point of principle should await determination in a more suitable case. Do you want to be heard on that?

**MR SMITH:**

Yes, Your Honour.

**ELIAS CJ:**

Yes.

**MR SMITH:**

The –

**WILLIAM YOUNG J:**

Would you like to take a moment to catch your breath?

**ELIAS CJ:**

Well, would you like us to withdraw for a few minutes and – yes, and you might consider where we're going with this. So perhaps you can indicate to the registrar when you'd like us to come back in.

**MR SMITH:**

Yes, I think that would be helpful. Thank you, Your Honour.

**ELIAS CJ:**

Thank you, Mr Smith.

**COURT ADJOURNS: 9.49 AM**

**COURT RESUMES: 10.10 AM**

**ELIAS CJ:**

Yes, Mr Smith.

**MR SMITH:**

Thank you for the adjournment in which I've been able to take further instructions and can communicate through that the, from my own calculations, the appellant has until Tuesday, the 16<sup>th</sup> of December to pay the costs order of Justice Ellis. My instructions are that through credit card it can be paid today. My proposal is that this Court does not withdraw the leave that has been granted for this appeal on the basis that the appellant is to file by next Wednesday by 5.00 pm confirmation of payment in full of the costs ordered by Justice Ellis, failure to file that and confirm that resulting automatically in a withdrawal of the leave that's been granted.

**ELIAS CJ:**

An unless order.

**MR SMITH:**

An unless order, and I realise the –

**ELIAS CJ:**

Mr Smith, the problem is that the indications that you have given us bear, as you accepted, directly on whether there has been a miscarriage of justice. The behaviour suggests that this is going to be a repeat problem. Why should we not simply decide

that leave should not have been granted because it is not necessary in the interests of justice to grant leave, given the indications we've had this morning. We would like, if there is anything you want to say on that, we want to hear that.

**MR SMITH:**

The submissions for the appellant on that are, firstly, and as I accepted before the adjournment, that this is relevant to, this is very – or it's relevant to the interests of justice discretion and it will be a further factor that will be taken into account by this Court there. I notice Your Honour, the Chief Justice, noted before the adjournment that this is not strictly in evidence before the Court, although I don't want to make anything significant of that fact. It's also, in my submission, a matter that goes squarely to the costs of this appeal and related to that the suggestion made before the adjournment that, and it would be based on what the Court decides in relation to the withdrawal of otherwise of the leave to be granted, but the...

**ELIAS CJ:**

You're saying that the matter can be dealt with by awarding costs for this hearing and doesn't require leave to be revoked?

**MR SMITH:**

That's my submission, Your Honour.

**ELIAS CJ:**

But how does that address the point that it's the indication of a pattern of behaviour which suggests that the case is not a suitable vehicle in which to ventilate what is a legal point of some public importance?

**MR SMITH:**

Yes, Your Honour. The, well, the response to that is that as I accept it's another relevant consideration that this Court might take into account in that connection in the same way that Justice Ellis at first instance took it into account in the exercise of discretion that Her Honour made as to whether or not to discharge the unless order and in the same way that the Court of Appeal took it into account at that level, and it's – I accept that it goes to that, squarely to that issue and to the scales of justice and the interests of justice discretion that is ultimately to be exercised and that it can be addressed by costs awards by this Court, as by the Courts below.

**GLAZEBROOK J:**

Costs awards that are only offered to be paid when it becomes absolutely clear that non-payment is going to have consequences, despite having been warned numerous times about it.

**MR SMITH:**

I accept that that's a consideration that's relevant to the exercise of discretion by this Court as it was by the Courts below and that it's something that is in the scales against the appellant in terms of the relief that he seeks and the advancement of this appeal.

**ELIAS CJ:**

It might be different if this was the end of the road that we had before a, say, substantive appeal. But the concern is that this yet another skirmish in an ongoing campaign in which your client's behaviour may be said to be oppressive of the respondent, and arguably verges on contempt of Court, in the lower Courts.

**MR SMITH:**

The contempt relating to the most recent cost award of Justice Ellis?

**ELIAS CJ:**

Yes but, but that being consistent with the earlier pattern of behaviour.

**MR SMITH:**

I accept that those are relevant considerations in the exercise of discretion. In terms of the point of whether or not this is the end of the road, that is one of the issues that is before the Court and in which the parties disagree as to whether or not, on the law as it stands, there is the, there is a right for a party in breach of Court orders. In the case of Mr Siemer an ongoing breach of contempt orders to bring an appeal proceeding. So whether or not the debarment has the effect of debarring further participation just in the High Court or whether or not that does, in fact, mark the end of the road.

**ELIAS CJ:**

Well that doesn't arise on the – that doesn't arise in this current appeal.

**MR SMITH:**

Not squarely but it's relevant in my submission to the interest of justice analysis because if my learned friend is correct that there is no ability for a debarred party to appeal against the substantive trial judgment then that in turn goes to the consequences of impropriety analysis that on the appellant's case, is tied up with the interest of justice test.

**ELIAS CJ:**

Yes but that argument can be run if it arises and if it raises a point of public importance, may, may come here.

**MR SMITH:**

That's, that's correct Your Honour. The, it was a discretionary consideration going back to the decision of 22 November of 2013, of Her Honour Justice Ellis was one of the considerations that Her Honour noted there in support of granting the relief that Her Honour granted, that the prospect of later appeals and that would be one appeal which would potentially be on the cards as a result of the outcome of this hearing, whether or not leave is withdrawn or the substantive appeal is dismissed, would be that there is still likely to be downstream appeals and if leave was withdrawn here, the matter gets to a substantive trial and judgments results from the proceeding in which the appellant is debarred, then it goes to whether or not the parties are likely to get finality sooner rather than later.

Now I appreciate that a response to that submission is that – well that will just eke this proceeding out and the case out further, but there is a right of appeal and if it really goes to in my submission the complexity of the underlying issues and based on that the prospect of the trial judgment being an unimpeachable trial judgment for appeal purposes in the event that the appellant is debarred.

**ELIAS CJ:**

But we're not determining that –

**MR SMITH:**

No.

**ELIAS CJ:**

– in these proceedings, so all you're doing really is suggesting to me that we might as well chop off one dead limb because there are others, well perhaps the analogy is with Hydra and the many heads, seem to be sprouting up but at least this matter can be, can be discontinued without affecting some of those other matters that you have indicated might be in the wings. Indeed it would suggest that it's probably again oppressive to carry on with this particular point, given that background.

**MR SMITH:**

I accept that that is one analysis Your Honour and the response would be that the passage of the, or the form and the participation of the appellant in the substantive trial proceeding is related to this because if the appeal. If for instance Your Honours allow the appeal to proceed, if the appeal was allowed.

**ELIAS CJ:**

The appellant wouldn't be precluded if he pays up everything from making an application to be heard, against to Justice Ellis, would he?

**WILLIAM YOUNG J:**

I think he would be.

**ELIAS CJ:**

By the Court of Appeal determination.

**GLAZEBROOK J:**

Yes I think he would –

**WILLIAM YOUNG J:**

No I think by the Court of Appeal decision.

**ELIAS CJ:**

Maybe it's a red herring then in the Court of Appeal.

**GLAZEBROOK J:**

Well he probably won't be precluded from making an application but he might be precluded from succeeding.

**ELIAS CJ:**

Yes.

**MR SMITH:**

And that would raise all the issues that were raised at the first instance, as to second and subsequent applications for relief from sanctions of the High Court Rules 7.52 application point. And that in my submission wouldn't be desirable to go down that path if that was one of the, that was to be used as a reason for withdrawing the leave that's been granted here.

**ELIAS CJ:**

This is a, this is an interlocutory appeal.

**WILLIAM YOUNG J:**

It is.

**MR SMITH:**

Yes Your Honour.

**ELIAS CJ:**

Which has special hurdles –

**MR SMITH:**

Yes, Your Honour.

**ELIAS CJ:**

– in this Court. Is there anything else, and don't feel constrained. Is there anything else that you want to put to us on whether we should revoke the leave granted.

**MR SMITH:**

Just a broader submission that – well I accept that this is contingent upon this Court's decision as to whether or not to revoke the leave granted but in my submission if we are to have a hearing on this then it is appropriate for it to be done today in part because that would relieve both parties. I am particularly conscious my learned friend and the respondent as well of the costs in delays associated with resuming this appeal later. Now I say that based on that contingent basis, that I expressed it and then I think I've said, all I can reasonably say in relation to the arguments against leave being withdrawn that in summary that evidence is not squarely before the, and



the issues of that are not squarely before the Court and I accept that communicated the instructions.

**ELIAS CJ:**

We've had, we've had indications from counsel given to us in the Court which I would have thought we can rely on.

**MR SMITH:**

That's correct and then, or the indications that the outstanding cost can now be paid, updating instructions having been sought and I am not suggesting that Your Honour can't rely on those, that not for one moment, they should certainly be relied upon. That –

**ELIAS CJ:**

Well what evidence in addition to that do you think it would be necessary for us to receive, in addition to those concessions that have been made?

**MR SMITH:**

– the only evidence would be the further, the proposal that I've made that confirmation be given by memorandum next week through counsel, as to whether or not the payments have been made in full which will be within the 10 working –

**ELIAS CJ:**

Oh but that's if, that's if that opportunity is provided.

**MR SMITH:**

That's correct Your Honour.

**ELIAS CJ:**

In this Court yes.

**MR SMITH:**

Yes I accept that.

**ELIAS CJ:**

Any more submissions?

**MR SMITH:**

Those are the only points I think I can reasonably make on that Your Honour.

**ELIAS CJ:**

Yes thank you Mr Smith. If you just – Mrs Hinton is there anything you want to say on this?

**MRS HINTON QC:**

Well just briefly, I imagine and this is admittedly speculative, that Your Honours will have granted leave thinking that this is an important issue in terms of principles around these orders and so on and I can see that similarly the Court of Appeal were interested. But in my submission anyway, the case is actually a pretty hopeless one and so not a terribly good case for the Supreme Court to be dealing with that issue and the second point is that my friend's advice this morning, that even in the face of the indulgence that was granted with the leave on a matter such as this, that LFDB would not be paying the cost order which he has since repaired and he said the reason for that was that he can't afford to. I know Your Honours are conscious that he has raised this before but I thought it might be helpful just to refer you to a couple of easy references. Because on a number of occasions throughout this proceeding, the refrain has been that he cannot pay. He can't afford it and if you look at volume 2A, page 326 to 327, Justice Ellis there –

**ELIAS CJ:**

Sorry I missed that, volume?

**MRS HINTON QC:**

2A.

**ELIAS CJ:**

Yes.

**MRS HINTON QC:**

326 to 327.

**ELIAS CJ:**

Yes.

**MRS HINTON QC:**

And that's Justice Ellis in the interim distribution judgment.

**ELIAS CJ:**

Yes.

**MRS HINTON QC:**

And she refers there, I'll get it. So at para, page 326, a bit confusing with two page numbers on the bottom of these pages. Paragraph –

**ELIAS CJ:**

Is it the stamped one we are going –

**GLAZEBROOK J:**

It's tab 42.

**ELIAS CJ:**

Yes.

**MRS HINTON QC:**

Yes tab 42.

**ELIAS CJ:**

Yes I have it.

**MRS HINTON QC:**

And it's the stamped –

**ELIAS CJ:**

Yes.

**MRS HINTON QC:**

– so paragraph 45, “LFDB also contends he has no money and would be unable to meet any order for interim distribution. Previous assertions that he's short of funds have been the subject of judicial scepticism,” and then sets out what Justice Potter said and he says, at the beginning, in 33. “I have not been taken to any compelling evidence that the first plaintiff was forced by circumstances to stop those payments.

These are payments he was directed to make on a mortgage, the property ended up being sold.” And then further down at 42, in the middle of the paragraph, “Like the Judge therefore, I am left unconvinced by his argument that he cannot afford to sustain the outgoings on the Devonport property and requires rent from it to keep himself, his company and trust afloat.”

“Like the above Judge,” so this is still Justice Potter, “I have serious concerns about the ongoing failure by the first plaintiff to provide anything definitive, a simple assertion that he is stretched is hardly compelling.” And then Justice Ellis goes on at paragraph 46. She says, “She finds the evidence that he’s very recently sought to adduce, corroborating evidence to be of a bland, inchoate and generally unconvincing nature. He’s plainly a sophisticated businessman who has chosen to structure his financial affairs et cetera.” And then over the page, “It’s also in my view relevant that he’s being legally represented by very able senior counsel. I’ve mentioned that the respondent’s calculations based on the bank records provided, suggest this has cost him in excess of \$700,000. There is no evidence he won’t be able to continue to find the money to pay his own solicitors. Accordingly I have no hesitation in finding that LFDB has the ability to access the necessary funds if he chooses to exercise it.”

And then, so then when he breached the second unless order which the Court of Appeal found was deliberate, if you look at the Court of Appeal judgment around what happened about that, they, and that’s at paragraph 33. So they’re dealing here with the reason for the non payment and in the second sentence, the Judge found the respondent’s excuses to be not legitimate and unpersuasive, “We’re in no doubt the respondent deliberately flouted the second unless order. The breach was contumacious; the respondent had the money to pay the costs.” Because what happened is he filed an affidavit again belatedly and we pointed out that on the face of the bank statements that he produced, it showed during the period, while the unless order was sitting so the time he had in which to meet the costs, and until the unless order took effect, during that precise period he transferred \$AUS35,000, from an Australian to a New Zealand bank account and used that money to fund his own lawyers. And as the Judge, as the Court records, “Presumably including making the various applications and appeals, he launched unsuccessfully following the second unless order. Justice Ellis was surely right to observe the respondent continued to play some protracted game of chicken with the Court.” So he chose, again, and this was the reason effectively that the second unless order took effect because he was

funding his own lawyers rather than meeting the cost order. So I'm afraid I think that your reaction to the advice this morning is totally justified. I do not think it appropriate that the appeal be heard.

And it's not just a matter of being remedied by costs obviously, I think it speaks for itself.

**ELIAS CJ:**

Right. Mr Smith was there anything arising out of that, that you wanted to reply to?

**MR SMITH:**

Just I acknowledge and my learned friend has taken the Court to some of those criticisms of the appellant for, in relation to his financial means. The only reasonable point that can be made in response there is that – and I accept they've been repeated a number of occasions that these have been observations that have been made on the papers in interlocutory proceedings with no cross-examination of either party underlying them although I acknowledge that of course findings need to be made on the papers and proceedings. There has been –

**GLAZEBROOK J:**

Those affidavits, it was a criticism of the financial information put forward in the papers and a criticism of the fact that when pushed to the wire, as now, there's suddenly an offer and a finding of financial ability to pay money.

**MR SMITH:**

– and I need to accept that. Apart from that I don't have anything further that I am able to add to assist the Court.

**ELIAS CJ:**

All right, we will withdraw for a few minutes and consider how we are going to go forward.

**COURT ADJOURNS: 10.33 AM**

**COURT RESUMES: 10.35 AM**

**ELIAS CJ:**

Yes thank you. Leave to appeal is revoked, for reasons which will be given in a judgment to be delivered through the registry.

Counsel are to have, counsel for the respondent will have seven days to file a memorandum as to costs in this Court. Counsel for the appellant will have seven days to respond to that.

**COURT ADJOURNS:10.36 AM**