NOTE: THE ORDER MADE BY THE HIGH COURT ON 28 MAY 2012 PROHIBITING PUBLICATION OF THE PARTIES' NAMES AND ANY PARTICULARS THAT WOULD IDENTIFY THE RESPONDENT (INCLUDING HER NAME, OCCUPATION, EMPLOYMENT HISTORY AND HEALTH) REMAINS IN FORCE PENDING FURTHER ORDER OF THE HIGH COURT.

IN THE SUPREME COURT OF NEW ZEALAND

SC 78/2014
[2014] NZSC 197

BETWEEN	LFDB Appellant
AND	SM Respondent

Hearing:	5 December 2014
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	M S Smith and E M Eggleston for Appellant A E Hinton QC for Respondent
Judgment:	5 December 2014
Reasons:	22 December 2014

REASONS FOR JUDGMENT OF THE COURT

A Leave to appeal is revoked.

B Costs are reserved.

REASONS

(Delivered by McGrath J)

[1] On 25 September 2014, this Court gave the appellant leave to appeal[1] against a judgment of the Court of Appeal debarring him from taking any further part in a

[1] *LFDB v SM* [2014] NZSC 131 [*LFDB v SM* (leave)].

relationship property proceeding.[2] In the course of hearing the appeal on 5 December 2014 and after hearing counsel on the point, the Court decided to withdraw the grant of leave. We now set out our reasons for doing so.

Background

[2] In March 2009, the respondent brought a relationship property proceeding in the Family Court. In October 2011, a Family Court Judge directed that the proceeding be transferred to the High Court.[3] The Family Court Judge observed that, by that time, the parties had embarked on 23 interlocutory applications, filed 53 affidavits, received seven judgments or directions from the Court and brought further applications or appeals in respect of those matters in the High Court. By this time the legal costs incurred by both parties were substantial. While recognising that both parties had brought contested interlocutory applications, and appealed against judgments on them, the Family Court Judge observed that the appellant's "conduct of the case so far tends to indicate that he is waging a war of attrition against the [respondent]".[4]

[3] On 19 September 2012, Priestley J made an unless order against the appellant in respect of his "longstanding and conspicuous failure" to pay costs awarded in the Family Court.[5] Unless he paid the costs and complied with other directions of the Court, by a set date he would be debarred from contesting the removed proceeding. The appellant paid the outstanding sum the day before the High Court's unless order took effect. At the time of Priestley J's judgment, the appellant was in default in relation to a number of other orders, including for discovery.[6]

[4] On 31 July 2013, after giving directions on interlocutory applications, Ellis J ordered that the appellant pay the respondent costs of $20,000 plus specified interest.[7] The appellant failed to make payment and the respondent applied for enforcement. On 29 August, after considering written submissions, Ellis J ordered:[8]

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2 *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494 [*SM v LFDB* (CA)].
3 *SM v LFDB* FC North Shore FAM-2009-44-726, 7 October 2011.
4 At [13].
5 *[SM] v [LFDB]* HC Auckland CIV-2011-404-6851, 19 September 2012 at [15]–[17].
6 At [13].
7 *SM v LFDB* HC Auckland CIV-2011-404-6851, 31 July 2013.
8 *[SM] v [LFDB]* HC Auckland CIV-2011-404-6851, 29 August 2013 at [6].

> …. If [LFDB] does not pay to [SM's] solicitors the sum of $24,435.08 plus interest calculated at 5 per cent per annum (from 10 May 2013 until the date of payment) by 5pm (New Zealand time) on Monday 9 September 2013 he will be debarred from taking any further part in the proceedings presently before this Court; …

[5] When the appellant did not comply with the costs order, the respondent sought an order debarring him from further involvement in the proceedings.

[6] On 14 October 2013, Ellis J rejected applications by the appellant to vary the unless order to permit him to pay the ordered costs in instalments. Her Honour dismissed his application to stay enforcement of the unless order and debarred the appellant from taking further part in the proceeding.[9] The Judge described the appellant's conduct of his case over the previous four months as involving multiple appeals and applications to extend time under or stay court orders. Some of these applications were withdrawn then reinstated.[10] He had not complied with orders imposed in respect of costs, preferring to make one or two part payments then stopping doing so and reactivating appeals against the orders which had earlier been abandoned.[11] The appellant did not appeal against this judgment of Ellis J.

[7] On 17 October, the appellant paid the costs order and accrued interest. He then applied for an extension of time to comply with the costs order and for discharge of the order debarring him.

The High Court decision

[8] In a judgment delivered on 22 November, Ellis J rejected the appellant's explanation for the delay in payment of the costs, noting that the unless order had been made because lack of access to funds was unfairly prejudicing the respondent's conduct at the proceeding.[12] The Judge nevertheless reconsidered the position for two reasons. First, payment of the outstanding costs order had materially changed the position.[13] Secondly, the respondent would shortly be receiving an interim distribution of $250,000 following sale of a property owned by the parties, which

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9 *SM v LFDB* [2013] NZHC 2670.
10 At [6].
11 At [12]–[13].
12 *SM v LFDB* [2013] NZHC 3150 [*SM v LFDB* (HC)] at [2].
13 At [6].

would ameliorate some of the concerns about ongoing prejudice to her.[14] Ellis J granted the application to set aside the debarring order because some of the prejudice faced by the respondent had been addressed and in order to avoid further protracting the litigation.[15] The Judge added that the appellant's actions constituted "some protracted game of 'chicken' with the Court" and expressed concern over the prejudice that the respondent had suffered and continued to suffer in consequence.[16] She said:[17]

> …in granting the extension sought (and discharging the unless order) LFDB is on notice (if any were needed) that he is looking down the barrel of a gun; if there is any further obstruction or default by him there will be no further chances.

The Judge awarded the respondent costs on the application.

[9] The respondent appealed against the judgment.

The Court of Appeal decision

[10] On 14 July 2013, the Court of Appeal delivered judgment on the respondent's appeal.[18] The Court allowed the appeal and reinstated the debarring order, holding that Ellis J had failed to give sufficient weight to the flouting of the unless order by the appellant. The Court was satisfied that evidence of transfer of funds by the appellant to New Zealand, which were applied to fund his own legal costs, demonstrated he could meet the unless orders. Instead he had deliberately flouted them. The breach was contumacious. His payment of the costs, belatedly, did not regularise his position.[19]

[11] As well, the Court of Appeal was of the view that too much weight had been given by the Judge to the coincidental sale of the jointly owned property, which had enabled the interim distribution to be made to the respondent.[20] The Court also decided that the Judge's perception of the difficulties the Court would face in

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14 At [7].
15 At [13] and [15]–[16].
16 At [10] and [12].
17 At [18].
18 *SM v LFDB* (CA), above n 2.
19 At [33]–[34].
20 At [35].

determining the litigation fairly at a formal proof hearing had been overstated.[21] For these reasons the respondent's appeal was allowed.

[12] The appellant then applied for and was granted leave to appeal to this Court.[22]

The hearing on 5 December

[13] Soon after the commencement of the Court's hearing on 5 December 2014, counsel for the appellant, Mr Smith, informed the Court that a further order for costs for approximately $52,000 had been made against the appellant on 6 October 2014, which became known to the appellant by 20 October. The order had been served on the appellant on 2 December. He was then required to pay within 10 working days.

[14] Counsel said that $20,000 of the sum involved had been paid and the appellant proposed to pay the remainder in three equal monthly instalments. Counsel said that the appellant's position, which had been communicated to the respondent, was that he did not have the financial means to pay the outstanding costs order within the period ordered by the Court and would not do so. These circumstances were previously unknown to this Court. The appellant took this stance despite this Court having granted him leave to appeal so that he could seek to have Ellis J's judgment reinstated, and Ellis J's warning in that judgment that "if there is any further obstruction or default by him there will be no further chances".[23]

[15] The Court advised counsel at the hearing of its concern that the information before the Court indicated that the appellant's attitude to the outstanding costs order continued to be that of a recalcitrant and unreasonable litigant. The Court invited counsel to address the Court on why, in these circumstances, the Court should not revoke leave to appeal on the basis that the point of principle in the appeal should await determination in a more suitable case. Counsel for both parties were heard on that matter.

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21 At [36].
22 *LFDB v SM* (leave), above n 1.
23 See above at [8].

[16] Mr Smith took advantage of a short adjournment to take further instructions from the appellant. Counsel then indicated that the appellant would make arrangements to pay the outstanding costs in full the same day and proposed that the Court not withdraw leave on the condition that the appellant would file within a week confirmation of payment in full. Only failing that should leave be withdrawn. He submitted otherwise that the hearing should continue with the circumstances taken into account in relation to the exercise of the Court's discretion in awarding costs on the appeal.

[17] Mrs Hinton QC replied, pointing to a number of aspects of the High Court record which she said demonstrated that the appellant had the financial means to pay the various costs orders despite his assertions to the contrary. She submitted that the case was a hopeless one and inappropriate for determination of the issues in relation to unless orders.

Discussion

[18] The Supreme Court Act 2003 provides that appeals to the Court can only be heard with its leave.[24] The criteria for leave to appeal are set out in s 13:

> **13 Criteria for leave to appeal**
>
> (1) The Supreme Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal.
>
> (2) It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if—
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> (a) the appeal involves a matter of general or public importance; or
>
> (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or
>
> (c) the appeal involves a matter of general commercial significance.
>
> (3) For the purposes of subsection (2), a significant issue relating to the Treaty of Waitangi is a matter of general or public importance.

[24] Section 12.

> (4) The Supreme Court must not give leave to appeal to it against an order made by the Court of Appeal on an interlocutory application unless satisfied that it is necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal before the proceeding concerned is concluded.
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> (5) Subsection (2) does not limit the generality of subsection (1); and subsection (3) does not limit the generality of subsection (2)(a).

[19] Section 13(1) sets a threshold that applications for leave to appeal must meet before leave can be granted. The Court is precluded from granting leave to appeal unless satisfied that it is "necessary in the interests of justice for the Court to hear and determine the proposed appeal". Section 13(2) and (3) state circumstances in which an application for leave to appeal will meet the interests of justice threshold. But s 13(5) makes it clear that circumstances outside those described by s 13(2) and (3) may also do so.

[20] The Court is not, however, required to grant leave to every proposed appeal that meets the criteria in s 13(2) and (3). That is clear from the prohibitory expression and structure of s 13(1), which stipulates only when the Court must not grant leave. In that context, s 13(2) and (3) are to be read as describing situations where leave may be granted and not where it must be granted. Read as a whole, s 13 does not detract from the implicit residual discretion given to the Court under s 13(1) to refuse leave to appeal in any case.

[21] This discretion reflects the Court's role as a court of final appeal having the function of resolving important legal issues. There is a consequent need for the Court to be satisfied that the cases it decides to hear and determine are suitable for resolving the points that arise, and that it is in the public interest to do so in the particular circumstances and at that time. This Court has exercised this residual discretion to refuse leave to appeal where there is no, or insufficient, prospect of

success of a proposed appeal on the merits.[25] It may also be exercised where, for other particular reasons, a case is not a suitable one to determine the legal issues.[26]

[22] As well, the Court has power to revoke leave and has done so before. In *Blair & Co Ltd v Queenstown Lakes District Council* the Court said of s 13:[27]

> [10] Section 13(1) of the Supreme Court Act 2003 requires the Court not to give leave to appeal "unless it is satisfied that it is necessary in the interests of justice" that the appeal be heard and determined. The legislative intention is therefore that the Court should hear and determine appeals only if to do so is necessary in the interests of justice. That objective is defeated if, as a consequence of what has occurred subsequently to the grant of leave, it becomes apparent that the appeal cannot possibly succeed. In that situation, leave should be revoked. In practical terms, the test for possible revocation will be whether leave would obviously have been refused if the changed situation had pertained at the time leave was granted.

[23] This judgment reflects a wider principle which the High Court of Australia has expressed in this way:[28]

> It is always open to a court which has granted leave to appeal or special leave to appeal to rescind that grant if it later appears to the court, in the light of further information or argument, that the leave or special leave should not have been granted. That course has been taken by this Court in appropriate circumstances.

[24] When leave to appeal was sought in the present case, it was not disputed that the High Court had jurisdiction to make the unless order and the order debarring the appellant when the unless order was not complied with. The Court granted leave to appeal because it considered that issues of what sanctions should be set in unless orders and imposed on their breach and the circumstances in which relief from those sanctions might be granted are questions that concern the courts' ability to do justice in deciding matters ultimately in dispute in litigation. They are accordingly of public importance. The Court remains of that view.

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25 For example *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZSC 36, (2009) 19 PRNZ 281; *Laywood v Holmes Construction Wellington Ltd* [2009] NZSC 44, [2009] 2 NZLR 243; *Laidlaw v Parsonage* [2009] NZSC 98; and *Russell v The Commissioner of Inland Revenue* [2012] NZSC 73, (2012) 25 NZTC 20–140.

26 For example *Hussein v R* [2011] NZSC 86; *Dadzie v R* [2009] NZSC 94; *Taylor v R* [2009] NZSC 45, (2009) 24 CRNZ 862; and *University of Newlands Ltd v Nationwide News Pty Ltd* [2006] NZSC 16, (2006) 18 PRNZ 70.

27 *Blair & Co Ltd v Queenstown Lakes District Council* [2010] NZSC 44, [2010] 3 NZLR 17.

28 *Sanofi v Parke Davis Pty Ltd* (1982) 149 CLR 147 at 153.

[25] When the Court granted leave to appeal it was appreciated that the appellant had demonstrated a defiant attitude to past orders and that the trial Judge was concerned at the prospect of his conduct causing continuing prejudice to the respondent. But the Court also understood that he had paid what was due on outstanding costs orders, and saw the case as suitable for addressing the issues we have mentioned.

[26] The further information we received at the hearing made clear that the appellant's ongoing conduct of the litigation was such that it would inevitably create more continuing problems for the respondent and the courts than we had appreciated at the time leave was granted. In light of that information, the Court has formed the view that the manner in which the appellant has continued to conduct the proceeding is oppressive. It is clear the court system is being abused.

[27] The appellant's offer to make payment of the ordered costs in response to the indication at the hearing that the Court would consider withdrawing leave does not persuade us otherwise. It came too late. Plainly he has always had the means to comply with the unless orders in issue. The appellant is gaming the court system. It is intolerable for the respondent to be faced with this and inappropriate for the Court to countenance such abuse of its process.

[28] In the circumstances it is not in the interests of justice for the Court to hear and determine the appeal. Although there is a point of general and public importance to be determined in relation to the making of unless orders and when and in what form relief from their sanctions may be granted in cases of breach, this must await a case having suitable circumstances.

[29] For these reasons, the Court revoked leave to appeal, reserving costs.

Solicitors:
Holland Beckett, Tauranga for Appellant
Friedlander & Co Ltd, Auckland for Respondent