IN THE COURT OF APPEAL OF NEW ZEALAND

CA833/2011
[2013] NZCA 364

BETWEEN	LOCKWOOD GROUP LIMITED Appellant
AND	BARRY SMALL Respondent

Hearing:	23 July 2013
Court:	O'Regan P, French and Winkelmann JJ
Counsel:	N W Taefi for Appellant C S Withnall QC for Respondent
Judgment:	12 August 2013 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay costs to the respondent calculated on the basis of 50 per cent of band A costs together with usual disbursements.

REASONS OF THE COURT

(Given by French J)

[1] Lockwood Group Ltd filed an appeal against a decision of Venning J in the High Court striking out parts of Lockwood's claim for want of particulars, ordering further particulars and removing the proceeding from the commercial list.[1]

[2] At the commencement of the appeal hearing, the Court raised a jurisdictional issue. The decision of Venning J was an interlocutory decision made in respect of a

[1] *Lockwood Group Ltd v Small* HC Auckland CIV-2009-404-1019, 16 November 2011.

proceeding entered on the commercial list and was therefore within the scope of s 24G of the Judicature Act 1908. Section 24G provides that no appeal shall lie from such a decision unless leave to appeal has been given by the High Court on application made within seven days of the decision being given or within such further time as the High Court may allow. Justice Venning's decision was given on 16 November 2011 and no application for leave has ever been made.

[3] It transpired that counsel had not turned their minds to this issue.

[4] We indicated that if Mr Small was willing to consent to the High Court giving leave then it might be possible for Winkelmann J in her capacity as a commercial list judge to consider whether it was appropriate to extend time and grant leave by consent. The appeal could then have proceeded. Mr Withnall QC subsequently advised that Mr Small did not consent.

[5] The appeal was then formally dismissed without hearing argument on the substantive merits.

[6] Mr Withnall sought costs. This was opposed by Ms Taefi. She submitted it would be inappropriate and unfair to award costs having regard to the fact that the respondent has never raised any jurisdictional issue.

[7] We accept that Mr Small has engaged in the appeal process and to that extent acquiesced in it. However, ultimately, responsibility for the error must rest with the appellant. It is the appellant who has invoked procedures which it had no right to invoke and who has put the respondent to the cost of preparing for an appeal hearing which has had to be aborted. We note too that it could not be said Mr Small is acting unreasonably in withholding consent to a leave application. The authorities suggest that there is a high threshold for granting leave.

[8] The appellant must pay costs to the respondent calculated on the basis of 50 per cent of band A costs together with usual disbursements.

Solicitors:
Stewart Germann Law Office, Auckland for Appellant
Race & Douglas, Dunedin for Respondent