

IN THE COURT OF APPEAL OF NEW ZEALAND

CA472/2014  
[2014] NZCA 534

BETWEEN IAN RUSSELL GEARY  
Applicant

AND ACCIDENT COMPENSATION  
CORPORATION  
Respondent

Court: Wild, White and Miller JJ

Counsel: A C Beck for Applicant  
I G Hunt for Respondent

Judgment: 5 November 2014 at 3.00 pm  
(On the papers)

---

**JUDGMENT OF THE COURT**

---

- A The application for review is dismissed.**
- B The respondent will have costs as for a standard leave application on a band A basis with usual disbursements, unless the applicant is legally aided, in which case we make no order as to costs.**
- 

**REASONS OF THE COURT**

(Given by Miller J)

[1] The applicant would have us establish a rule that a High Court judge may not, unless there is no practical alternative, decide an application for leave to appeal his or her own decision.

[2] The decision concerned was delivered by Gendall J on the applicant's appeal against a District Court judgment. Gendall J largely dismissed the appeal but substantially reduced the costs awarded against the applicant in the District Court.<sup>1</sup> He determined that costs in the High Court would lie where they fell.<sup>2</sup> It is the costs decision that the applicant wishes to bring to this Court. It is said that Gendall J erred; the applicant was substantially successful, he was legally aided, he incurred substantial disbursements in pursuing the appeal, and he confronted substantial non-compliance on the part of the respondent. In this Court Mr Beck indicated that he will argue Gendall J was "plainly wrong", although that is not one of the grounds of appeal.

[3] The matter comes before us in an unusual way. Under s 67 of the Judicature Act 1908 leave is required to bring an appeal from a decision of the High Court on appeal from an inferior court. If the High Court refuses leave, an application for leave may be made to this Court. When the applicant sought leave in the High Court the Registrar proposed to refer the application to Gendall J, in accordance with the usual practice. The applicant objected by memorandum, which was placed before Whata J as duty judge. In a minute dated 13 August 2014 Whata J declined the applicant's request and directed that the application for leave be referred to Gendall J for decision.<sup>3</sup> The respondent then moved under r 7.49 of the High Court Rules (the Rules) for review of Whata J's direction. Gendall J transferred the application for review to this Court pursuant to r 7.49(6)(b).<sup>4</sup>

[4] Accordingly, the question before us is whether Gendall J may determine pursuant to s 67 of the Judicature Act the application for leave to appeal to this Court.

[5] As we said earlier, the applicant would have us establish a rule that a High Court judge may not determine an application for leave to appeal his or her own decision. The applicant does not put it in that way. But such is the substance of the

---

<sup>1</sup> *Geary v Accident Compensation Corporation* [2014] NZHC 1037.

<sup>2</sup> *Geary v Accident Compensation Corporation* [2014] NZHC 1408.

<sup>3</sup> *Geary v Accident Compensation Corporation* HC Timaru CIV-2013-476-299, 13 August 2014 (Minute of Whata J).

<sup>4</sup> *Geary v Accident Compensation Corporation* HC Timaru CIV-2013-476-299, 27 August 2014 (Minute of Gendall J).

application, for the only ground relied upon is that the Judge had earlier reached a different view and so could not be impartial. Nothing about the issue before Gendall J, or the Judge's reasons, or the conduct of the Judge, is said to establish apparent bias; nor has the usual invitation to consider recusal been extended to him. This renders irrelevant the authorities to which we were referred. No authority establishes that the fair-minded observer might question a judge's impartiality in circumstances such as this. On the contrary, this Court has previously dismissed the argument summarily, as has the Supreme Court.<sup>5</sup>

[6] Notably, the fair-minded observer must be taken to know something of the legal process. He or she would appreciate that on a leave application the judge is not actually deciding whether the decision was correct, but merely whether an appeal is arguable and raises some issue that merits leave. He or she would appreciate that judges routinely make decisions during the course of a proceeding and are not ordinarily thereby disqualified from continuing. He or she would recognise the obvious efficiency in referring a leave application to the judge who made the decision. He or she would appreciate that reasons must be given for refusing leave.

[7] The practice of referring a leave application in the first instance to the judge who decided the matter is routine and longstanding. It is true, as Mr Beck points out, that the Rules do not prescribe that applications under s 67 of the Judicature Act should be referred to that judge, but what matters for purposes of this application is that the Rules endorse the practice by providing expressly for it. Ironically, r 7.49 itself contemplates that an application for review is to be heard by the judge who made the order or gave the decision. So does r 20.3, upon which Whata J relied, although it does not govern this case.

[8] The Rules also provide, as does s 67, for a right to seek leave from this Court should the High Court judge refuse it. This procedure is not an appeal, as Mr Beck suggests, but rather a *de novo* assessment. It is an integral part of the leave mechanism and a natural corollary of the practice of referring a leave application in the first instance to the High Court judge involved.

---

<sup>5</sup> *Reid v New Zealand Fire Service Commission* [2010] NZCA 133, (2010) 19 PRNZ 923 (CA) at [17]; *Jessop v R* [2007] NZSC 96 at [6].

[9] Mr Beck suggests that it is time to review the leave mechanism. The issue is before the Rules Committee, which may establish as an empirical matter how often judges erroneously refuse leave, and evaluate the efficiency considerations which favour the existing mechanism, and fashion an alternative leave mechanism should reform be found necessary. The present application is not the occasion for such a review.

[10] Accordingly, the application for review is dismissed under r 7.49. The application for leave to appeal under s 67 of the Judicature Act will be referred to Gendall J for decision.

[11] The respondent will have costs as for a standard leave application on a band A basis with usual disbursements, unless the applicant is legally aided, in which case we make no order as to costs.

Solicitors:  
Hazel Armstrong Law, Wellington for Applicant  
Young Hunter, Christchurch for Respondent