#73

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-5818

	BETWEEN	B F MUDGWAY LIMITED Applicant
	AND	THE WINDOW COMPANY (2003) LIMITED Respondent

Hearing: 29 June 2009

Appearances: R B Hucker for Applicant
R G Ewen for Respondent

Judgment: 1 July 2009

JUDGMENT OF KEANE J

This judgment was delivered by Justice Keane on 2 July 2009 at 9.30 am pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:

Wynyard Wood, Auckland
Hucker & Associates, Auckland

[1] On 3 June 2009 Associate Judge Christiansen awarded to B F Mudgway Limited, whose application to set aside a statutory demand had been granted by consent on 12 December 2008, costs at scale 2B and disbursements.

[2] The Window Company (2003) Limited, against whom the award was made, seeks to challenge it by inviting the Associate Judge to recall it as wrong. Mudgway contends that the only recourse Windows has is to the Court of Appeal and whether that is so is the sole issue that I have to decide.

Context

[3] On 12 December 2008 Associate Judge Sargisson set aside, by consent, on the papers, a statutory demand made on Mudgway by Window on 20 August 2008 for $112,053.51 and reserved the issue of costs.

[4] The underlying building dispute, counsel advised her in a joint memorandum, was to be referred to arbitration without Window being deemed to have admitted that the demand was wrongly issued and without prejudice to its ability to re-issue the demand.

[5] The Associate Judge set down the costs issue, as she assumed before herself, in the Miscellaneous Insolvency List for 3 April 2009, as it was anticipated that by then the Arbitrator's award would have been given. She directed that Mudgway and Window file and serve brief memoranda at least two days beforehand.

[6] On 3 April 2009 the Arbitrator's award had still not been given and, by consent, the issue of costs was adjourned until 3 June 2009. The award, dated 5 May 2009, was issued on 19 May after Window had paid Mudgway's share of the Arbitrator's costs. Except as to a fraction the Arbitrator vindicated Window's claim.

[7] On 3 June 2009 the costs issue came before Associate Judge Christiansen in the Miscellaneous Companies List. Counsel for Window anticipated that it would be set down after further timetabling. Counsel for Mudgway thought that possible, and was not averse to it, but had a submission to hand.

[8] In a brief oral decision, presently only recorded in a hand written minute, the Associate Judge, though made aware it seems that the arbitration had favoured Window, held that Mudgway, having succeeded in its application to have the statutory demand set aside, was entitled to costs in scale 2B and disbursements as fixed.

[9] In this the Associate Judge appears to have acted on the principle identified by Associate Judge Faire in *International Airline Training (NZ) Ltd v Rohlig New Zealand Limited* (HC AK, CIV 2003-404-3464, 23 February 2004): that it is a misuse of the statutory demand process to issue a demand where, as here, the debt is predictably contentious; a statutory demand is not a surrogate for summary judgment.

[10] Be that as it may, Window, having succeeded on the arbitration, now seeks from the Arbitrator an indemnity award, some $70,000, and wishes also to contest the adverse award of the Associate Judge.

[11] The immediate issue is whether if, as is agreed, the Associate Judge gave his decision in open Court, not in chambers, Window must appeal to the Court of Appeal or whether, as it wishes, it is entitled to invite the Associate Judge to rescind his decision.

Review, appeal and recall

[12] Section 26P of the Judicature Act 1908 governs review of or appeals against decisions of Associate Judges. If an order or decision is given in chambers at a hearing, as r 1.3(1) has it, 'that takes place in circumstances in which the general public is not admitted, except with the leave of the Judge' that is susceptible of review by this Court: subs (1). (Rule 2.3 then applies.) Any order or decision not made in chambers may and must be appealed to the Court of Appeal: subs (2).

[13] There are at least two instances in which costs orders by Associate Judges have been reviewed under s 26P(1). In the first *Wallace Corporation Limited v International Marketing Corp Ltd* (HC AK CIV 2003-404-7227, 28 February 2005),

Heath J was explicit that there had been an exercise of the Associate Judge's chambers jurisdiction. Another instance is *Re: Gilbert ex parte Robertson* (HC AK, CIV 2007-404-7449, 9 February 2009), Lang J.

[14] If the decision were given in chambers Window could not ask the Associate Judge to rescind his order under r 7.49. That is precluded by the rule: r 7.49(2)(c). A Judge may always be invited to recall a decision, whether given in chambers or in Court, before a formal record of it is made and sealed: r 11.9. But that is reserved for the exceptional case: *Horowhenua County v Nash (No 2)* [1968] NZLR 632, at 633, Wild CJ.

[15] The issue remains on this application as it is, whether if costs were awarded in open Court, not chambers, Window is able to invite the Associate Judge to rescind his award under r 7.49 on the basis that it is an interlocutory order.

[16] There is a dearth of authority as to whether a costs order is final or interlocutory; and Mudgway relies on *Dempster v Auckland District Law Society* (HC AK, B No 959/95, 27 November 1995). There Master Gambrill held that a bankruptcy notice should not be set aside, there being a final costs order in existence execution of which had not been stayed. But that award was as a consequence of a grant of injunctive relief and it was that grant that was definitive. As she said:

> The Court has made an order, that order includes costs, the order has not been appealed and the creditor is entitled to use that judgment to found a bankruptcy petition.

[17] Mudgway also argues that a costs order cannot be interlocutory because it is final as opposed to an order, as the Oxford English Dictionary has it, which is 'pronounced during the course of an action; not finally decisive of a case or suit'. Mudgway also relies on *Laywood v Holmes Construction Wellington Ltd* [2009] 2 NZLR 243, where an Adjudicator's decision under the Construction Contracts Act 2002, though not finally dispositive, was held to be final for the purpose of s 19(1)(d) of the Insolvency Act 1967.

[18] The question whether a costs order can be interlocutory in character turns, however, on the definition in r 1.3(1), which was inserted on 24 November 2003:

An order or direction of the Court that

(i) is made or given for the purposes of a proceeding or an intended proceeding; and

(ii) concerns a matter of procedure or grants some relief ancillary to that claimed in a proceeding.

[19] An award of costs is certainly 'made or given for the purposes of a proceeding'. And there is no express need it to flow from an interlocutory application, which r 1.3(1) also defines. Such an application is defined only as to form. If made in writing it must conform with r 7.19. But it may be made orally: r 7.41. That can be by consent. It can also be where the rules do not require the filing of an application on notice, and they do not as to costs, and where there will not be any undue prejudice. Costs are commonly applied for and given orally.

[20] Equally, an award of costs is a grant of relief ancillary in character, at least in the usual almost invariable case, where it flows from or is related to substantive relief given or declined. It is not in that normal event a remedy in its own right. That it is final as to costs to that point, subject to recall, review or appeal, is not expressly made material.

Conclusions

[21] What rights to recall, review and appeal there can be as to an award of costs may conceivably differ depending on whether the award is made in chambers, often on the papers, as is common, or in open Court; and that may seem undesirable in principle. Whether that is so or not, however, I am unable to resolve the immediate issue more pragmatically.

[22] Window, it seems to me, is entitled to look to the Associate Judge, either by way of recall under r 11.9, and whether or not he gave his decision in chambers or open Court, or under r 7.49 on the basis that the award was interlocutory. However the application is framed, the issue is likely to be identical and if granted on whatever basis, that will obviate any need for review or appeal.

[23] If the Associate Judge declines the application on any basis Window could then reasonably invite him to confirm whether the hearing at which he made the award was in chambers or in Court. If in chambers Window would have the right to apply for review. If in open Court Window could invite the Judge, under r 7.49(6), to transfer the application to the Court of Appeal.

[24] As this is a preliminary decision as to jurisdiction and procedure, and the merits have still to be gone into, costs will be reserved.

P.J. Keane J