UPDATE
CIVIL PROCEDURE

Interlocutory applications and appeal rights

BY **KATE CORNEGÉ**

THE SUPREME COURT'S DECISION IN *Ceramalus v Chief Executive of Ministry of Business, Innovation and Employment* [2018] NZSC 26 is noteworthy for what it asks, rather than what it answers.

The appellant had begun judicial review proceedings in the High Court. The proceedings were struck out by Woodhouse J, who found that each of the causes of action pleaded by the appellant was untenable. The appellant applied for leave to appeal the strike out decision directly to Supreme Court under section 69 of the Senior Courts Act 2016.

In its opposition, the respondent argued that the Supreme Court lacked jurisdiction to hear a 'leap-frog' appeal, as the strike-out decision was made on an interlocutory application and therefore precluded by s 69(c). The Supreme Court wondered whether a strike-out application could be an 'interlocutory application' for the purposes of s 69, given that it had the potential to finally determine the proceedings. However, it did not hear full argument on the jurisdiction point, and so did not answer its own question. Instead, it dismissed the leave application on its merits.

This article considers how the question should have been answered had it been fully argued.

Jurisdiction to hear direct appeals

The Supreme Court has jurisdiction to hear direct appeals under section 69 of the Act, which provides:

69 Appeals against decisions of High Court in civil proceedings

The Supreme Court may hear and determine an appeal by a party to a civil proceeding in the High Court against a decision made in the proceeding, unless –

(a) an enactment other than this Act makes provision to the effect that there is no right of appeal against the decision; or

(b) the decision is a refusal to give leave or special leave to appeal to the High Court or the Court of Appeal; or

(c) the decision is made on an interlocutory application

Section 69 is in the same terms as s 8 of the Supreme Court Act 2003.

Section 69(c) precludes direct appeals from decisions on 'interlocutory applications', defined in s 65 of the Act as:

interlocutory application–

(a) means an application in a proceeding or an intended proceeding for–

(i) an order or a direction relating to a matter of procedure; or

(ii) in the case of a civil proceeding, for relief ancillary to the relief claimed in the proceeding; and

(b) includes an application for a new trial; and

(c) includes an application to review a decision made on an interlocutory application

This definition is in substantially similar terms to the definition under the 2003 Act (and largely replicates the definition in s 4 of the Act).

Decisions under s 8(c) of the 2003 Act

The Supreme Court in *Ceralamus* was referred by the respondent to two of its own earlier decisions under s 8(c).

In *M v Minister of Immigration* [2011] NZSC 154 and *Peterson v Attorney-General* [2015] NZSC 154, the court concluded that a decision on a strike-out application was a decision made on an interlocutory application. In both cases, the court's reasoning was based on the definition of 'interlocutory order' in rule 1.3 of the High Court Rules, which expressly includes an order striking out proceedings. Neither decision referred directly to s 4 of the 2003 Act.

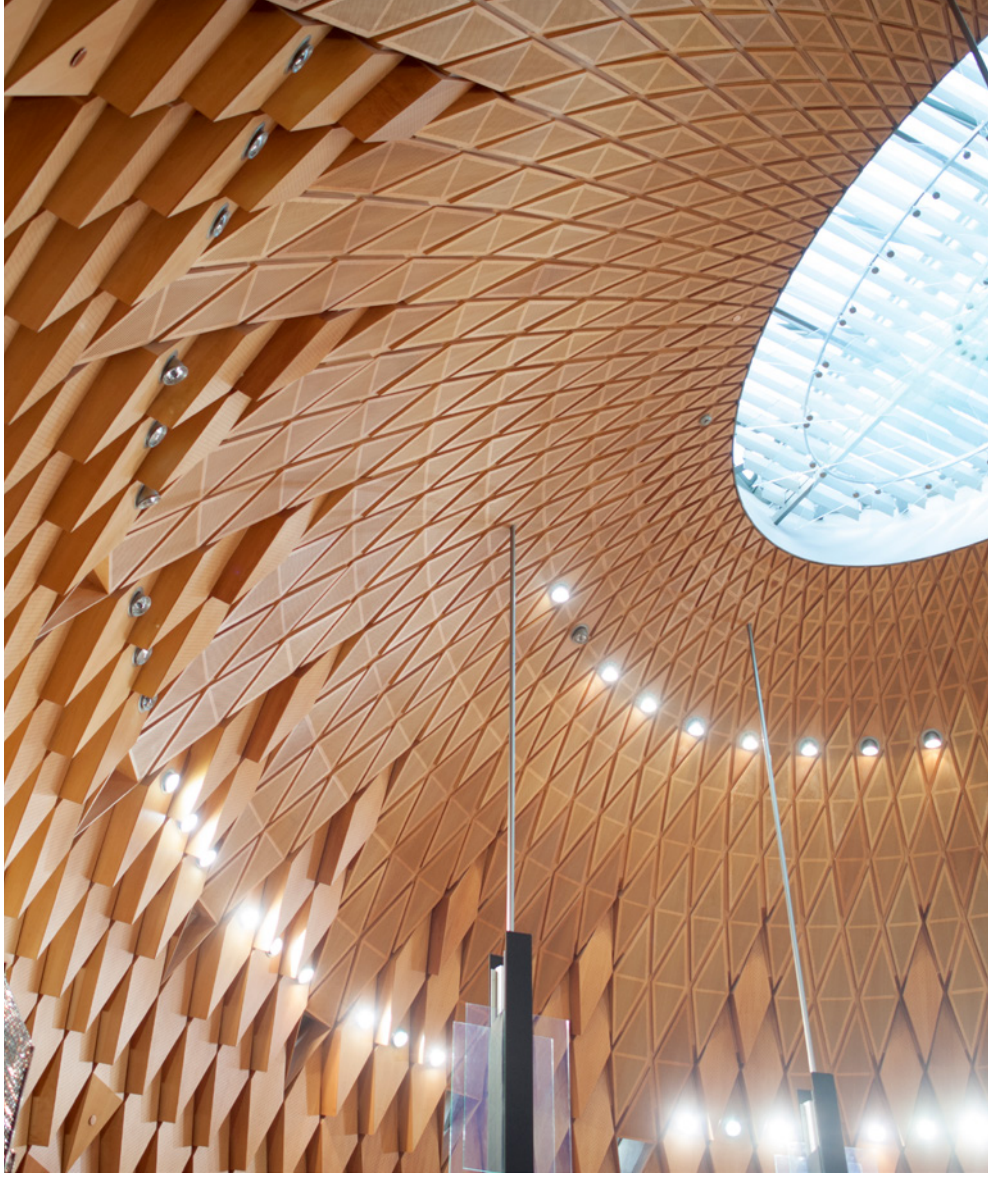
The Supreme Court (at [8]) noted that the court's previous reliance on the definition in the High Court Rules was wrong. Therefore, without the benefit of full argument the court was not prepared to conclude that a decision to strike out a proceeding and therefore bring it to an end was an 'interlocutory application'.

Is a decision striking out proceedings made on an 'interlocutory application'?

As noted by the Supreme Court, the starting point is the definition in the Act. The Court of Appeal has previously found that the equivalent definition in s 2 of the Judicature Act 1908 was apt to include an application for summary judgment (in *Waterhouse*, discussed below), and there can be little doubt that an interlocutory application for an order striking out proceedings would also be included on a plain reading.

However, as indicated by the Supreme Court, this may not be the end of the matter. Over the past century, considerable judicial attention has been dedicated to discussion of distinction between interlocutory determinations (whether defined by reference to 'decisions', 'orders' or 'applications') and substantive or final determinations, particularly in relation to appeal rights.

In *Waterhouse v Contractors Bonding Ltd* [2013] NZCA 151, the Court of Appeal considered the



meaning of 'interlocutory decision' under s 24G of the Judicature Act. The Court examined the definition of 'interlocutory application' in s 2 of the Judicature Act (in similar terms to s 65) and 'interlocutory order' in the High Court Rules, but considered that they did not determine the meaning of 'interlocutory decision' in s 24G.

The court concluded (departing from previous appellate authority) that "a decision is final and not interlocutory if it constitutes a final disposition of the rights of the parties in the proceeding, whether or not there has been consideration of the substantive merits" (at [33]). On this basis, the court confirmed that an order granting summary judgment was not an interlocutory decision, but a refusal to grant summary judgment would be. A 'substance over form' approach was also adopted in *Greer v Smith* [2015] NZSC 196 (on a different point).

Statutory context

Other references to 'interlocutory applications' in the Act provide some assistance:

(a) Sections 56 and 74 of the Act also deal with appeals from decisions on interlocutory applications:

(i) Section 56(3) and (4) provide that leave is required for an appeal to the Court of Appeal from a High Court decision on an interlocutory application, other than "an order or decision striking out or dismissing the whole or part of a proceeding, claim or defence" or "an order or decision granting summary judgment." The carve out in relation to s 56(4) is limited to successful strike out/summary judgment applications; other potentially dispositive interlocutory applications can only be appealed with leave.

(ii) Section 74 provides that the Supreme Court must not give leave to appeal an order made by the Court of Appeal on an interlocutory application unless satisfied that 'it is necessary in the interests of justice to determine the proposed appeal before the proceeding concerned is concluded.' There is no express reference to strike out decisions.

(b) Other provisions governing how 'interlocutory applications' may be determined: for example, ss 62 and 82. Section 82 (which mirrors s 28 of the 2003 Act and provides that interlocutory applications in the Supreme Court may be determined by a single judge) contains an express carve out for 'an order or direction that determines or disposes of a question or an issue that is before the court in the proceeding.'

Legislative history

As originally drafted, the Judicature Modernisation Bill referred variously to 'interlocutory applications' and 'interlocutory orders'. Submitters supported the use of a consistent definition across what are now sections 56, 69 and 74.

Submitters (including the New Zealand Law Society, major law firms and the judges of the senior courts) also favoured the *Waterhouse* 'substance over form' approach to determining whether a decision is interlocutory or final when considering the availability and extent of a right to appeal. Submitters supported incorporating this distinction in the statutory definition of interlocutory order/application.

Rather than amend the definition of 'interlocutory application' to exclude decisions that are finally dispositive of some or all of a party's rights, the Act addresses these concerns (at least in relation to s 56) by including an express 'carve out' from the operative provisions. The carve out reflects the end result in *Waterhouse*: leave is required to appeal the refusal of strike out/grant summary judgment but not to appeal an order granting summary judgment because only the latter is final in substance. However, as noted, the same carve out does not apply under sections 69 and 74.

The decision not to amend the definition was made consciously, to avoid the risk of dispositive applications being unintentionally excluded from other provisions dealing with interlocutory matters (see report of the Ministry of Justice to the Justice and Electoral Committee dated April 2014). The decision to use the same definition across all three sections was also deliberate. However, it is not clear that the decision not to include a carve out in ss 69 and 74 was deliberate.

Conclusion

In my view, the respondents' position (that the Supreme Court lacked jurisdiction to hear a direct appeal, as the strike out decision was made on an 'interlocutory application'), would most likely have been upheld had the Supreme Court heard full argument.

This is because:

- Parliament chose to adopt a broad definition of 'interlocutory application', which does not distinguish between applications which have the potential to finally determine proceedings and those that do not.
- Similarly, Parliament elected to use the definition of 'interlocutory application' throughout, rather than 'decision' or 'order'. The definition focuses on the nature of the application, and not the effect of any decision or order.
- The drafters have included specific 'carve out' provisions in relation to both s 56 and s 82 to reflect the policy considerations raised by submitters and by the Court of Appeal in *Waterhouse*. In these circumstances, the absence of a similar carve out in s 69 (and s 74) cannot simply be presumed to be a drafting error.
- There are arguably sound policy reasons for taking a stricter approach to leap-frog appeals under s 69 than appeals to the Court of Appeal under s 56. Section 56 represented a change to the law, at least in relation to judges' decisions as leave to appeal was previously dealt with by case law. The carve out reflects the significance of that change.
- In contrast, the position contended for by the respondent in *Ceralamus* aligns with the decisions under s 8(c) of the 2003 Act. While the reasoning supporting these decisions can be challenged, there is nothing in the background material or the Act itself to indicate that Parliament intended the introduction of the Act to change the approach applied by the Supreme Court under the 2003 Act.

Nonetheless, there are cogent arguments to the contrary. First, the above conclusion may seem to be at odds with the 'substance over form' approach favoured by the Court of Appeal and the Supreme Court in other cases where appeal rights were in issue. Secondly, while there may be policy reasons for applying a stricter approach to leap-frog appeals, these reasons do not apply to s 74, as interlocutory decisions made by the Court of Appeal will necessarily be 'first instance' decisions in substance. Finally, while I consider that the absence of a carve out in s 69 should be taken to have been deliberate, there is no direct support for this in the legislative history, leaving room for a court to draw a contrary conclusion.

Comment

While applications for leave under s 69 are not common, undoubtedly this issue will surface again, particularly given the doubts expressed by the court in *Ceralamus*, and the potential for similar issues to arise in applications for leave under s 74. Clarity in relation to the proper appeal paths will help parties avoid unnecessary procedural steps, and minimise the risk of would-be appellants missing out on the opportunity to bring a valid appeal in time. ■

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