



[2] The date of the trial being fixed for 12 May 2000, the Crown, on 5 May, requested the Registrar to issue and serve subpoenas requiring its witnesses to attend to give evidence. But the witnesses were not served in time. As a consequence, the hearing was adjourned to 1 September 2000, the Respondent's request for an order for his costs being stood over and ultimately refused. On 23 August, at a pre-trial conference, the Crown informed the Court it was ready to proceed ; and on the afternoon of 31 August, counsel for the Respondent had a lengthy consultation with his client, followed by a number of hours of work on the case.

[3] However, on this second occasion, the Crown left it until barely 8 days before the hearing to request the issue of subpoenas. No other step seems to have been taken between May and September to ensure the attendance of witnesses. Not surprisingly, in these circumstances, witnesses were unavailable - indeed, only one of the five was got to Court on 1 September. (The Court understands the procedure followed was not unusual, but that did not make it appropriate.) Realizing the impending situation, counsel for the Crown advised the judge, in the afternoon of 31 August, that the case might not be proceeding the next day ; but he neglected to inform counsel for the Respondent, by that failure allowing his consultation with his client and later work on the case to go ahead.

[4] Among the witnesses who were unavailable was an essential witness, a Mr Peter Corbett, aged 78. He had undergone total hip replacement surgery in New Zealand some time before 18 August (on that day, he was reviewed by his surgeon, who noted that his "wound is well healed"). As at the day of the hearing, he required a further two months of convalescence before he would be fit to go to Court. Plainly, but for the Crown's neglect, his unavailability could have been ascertained well before 1 September.

[5] It was in this situation that the learned trial judge granted the Crown an adjournment, over the opposition of the Respondent, but ordered that it pay his costs assessed at \$150. Against the costs order, the Crown seeks leave to appeal.

[6] Leave should be refused for more than one reason. In the first place, it would not generally be appropriate to grant leave to the Crown to appeal against a costs order unless some important question of principle were at stake. There is no such question here.

[7] In the next place, the order was made in the exercise of a wide discretion ; indeed, two wide discretions were involved. One was the discretion, in relation to an application for an adjournment, to determine a fair basis on which it might be granted, compensating the party opposing the adjournment for a consequence of it, namely, the throwing away of costs ; and the other was the discretion, under s.15 of The Supreme Court Act, to determine by whom costs should be paid. It was conceded that the statutory discretion does extend to enable a costs order to be made against the Crown in a criminal prosecution. There would be great difficulty, for an appellate court, in interfering with an exercise of discretion so broadly based, unless no ground at all could be seen for the order made, or a specific error of law were apparent.

[8] In any case, it should be said that there were strong grounds for the judge's decision. Every party, including the Crown, has an obligation, to the Court and to all other parties, to ensure, well in advance, that it is ready for a hearing the date of which has been fixed, or that timely notice is given if some serious difficulty intervenes. There is no excuse for the late attempts to subpoena witnesses which twice occurred here, and still less for the failure even to ascertain by telephone that witnesses would be unavailable. If slovenly preparation leads to unreadiness to proceed, any party, including the Crown,

may face an order to strike out a proceeding or pleading, or a costs order, or some further or other consequence.

[9] For all these reasons, the application for leave to appeal should be dismissed with costs.



*G Ward*

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**Ward CJ**

*J Burchett*

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**Burchett J**

*J Tompkins*

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**Tompkins J**