IN THE COURT OF APPEAL OF NEW ZEALAND

CA84/2013
[2014] NZCA 284

BETWEEN	MARGOT CREQUER Applicant
AND	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Court: Harrison, Stevens and Miller JJ

Counsel: Applicant in person
D L Harris for Respondent

Judgment: (On the papers) 30 June 2014 at 3.00 pm

JUDGMENT OF THE COURT

A The application for an extension of time for filing the case on appeal and applying for a hearing date is dismissed.

B The applicant must pay the respondent costs on a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Stevens J)

Introduction

[1] This is an application for an extension of time to file the case on appeal and apply for a hearing pursuant to r 43(2) of the Court of Appeal (Civil) Rules 2005 (the

Rules). The appeal is against a judgment of Mallon J in the High Court[1] dismissing an application to vary or rescind an order made in an earlier judgment.[2]

The litigation context

[2] The applicant, Ms Crequer, sought to appeal a decision of the Social Security Appeal Authority (the Authority). The proposed appeal included 22 questions of law posed by the applicant. The Authority "settled" the case stated by substituting those 22 questions with three questions of law suggested by the Ministry of Social Development.

The first High Court judgment

[3] In the High Court the applicant challenged the way in which the case had been settled by the Authority. She submitted the Authority could only make amendments to correct errors of fact. Mallon J concluded the High Court Rules (HCR) were subject to s 12Q of the Social Security Act 1964,[3] meaning in effect that it was for the Authority to determine the case.[4] Mallon J dismissed the application for an order that the case stated be returned to the Authority.

The second High Court judgment

[4] The applicant did not appeal against the first High Court judgment. Rather she applied under r 7.49 of the HCR to vary or rescind the first High Court judgment. Mallon J dismissed the application noting that as the submissions were directed to disputing the reasons for the first High Court judgment, this was not a basis on which she could grant the application. The Judge considered it to be in both parties' interest that the appeal proceed to a substantive hearing. It is this decision that the applicant seeks to appeal to this Court.

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1 *Crequer v Chief Executive of the Ministry of Social Development* [2012] NZHC 3620 [the second High Court judgment].

2 *Crequer v Chief Executive of Ministry of Social Development* [2012] NZHC 2575 [the first High Court judgment].

3 This provision provides for appeals to the High Court from the Social Security Appeal Authority on questions of law only.

4 The first High Court judgment, above n 2.

This appeal

[5] The applicant failed to file the case on appeal and apply for a hearing date within the three month period. The appeal was deemed abandoned pursuant to r 43 of the Rules. By letters from the Registry dated 16 May and 14 June 2013, the applicant was informed she would need to file an application for an extension of time.

[6] The applicant then sought a review of the contents of the 14 June letter. Despite finding the Court did not have jurisdiction to undertake such a review,[5] French J determined that a letter from the applicant (dated 22 May 2013) would nevertheless be accepted for filing as an application for extension of time under r 43(2) of the Rules.[6] This was an "indulgence" as the letter was not a formal application for an extension of time. French J further directed that the applicant file a formal application.

The application under r 43

[7] The applicant finally filed a notice of application for an extension of time to file a case on appeal and to apply for a hearing date under r 43(2).[7] She submits the Court should grant an extension of time because she is a lay litigant being assisted by her father, who was mistakenly a couple of days late in sending the required documents, which were received by the Court on 15 May 2013. She claims the respondent cannot lawfully oppose the granting of this application.

[8] She submits she had a right of appeal without leave against the first High Court judgment. This has been defeated by the second High Court judgment which is therefore unlawful. A miscarriage of justice has occurred and future miscarriages of justice may occur if this abuse of process by the Court continues.

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5 Judicature Act 1908, s 61A(3) and Court of Appeal (Civil) Rules 2005, r 7(2).
6 Minute dated 6 December 2013.
7 Dated 23 December 2013.

Opposition

[9] Counsel for the respondent filed a memorandum in opposition to the application under r 43. Counsel referred to the length of the delay, and the fact the applicant has not offered any explanation for the delay, other than pointing to the fact she is assisted by her father who is not a lawyer. The respondent also submitted that the proposed appeal is meritless and should not proceed, but acknowledged the delay was not prejudicial to the proceeding.

The applicant's response

[10] In her submissions in response the applicant disputes the need to justify her application. She submits that a r 43 application may be informal, or oral, or anything that resembles an application, and there is no expectation that any application within time would be refused. She submits there are no criteria specified in r 43 that must be met, other than the application being within time, which has now been done. She refers to the respondent's concession on prejudice and submits it is self-evident that the respondent has no grounds on which to oppose the application. The applicant submits that the respondent is deliberately pursuing an unnecessary step in the proceedings by opposing this application.

[11] The applicant submits that her delay was either a mistake or extremely minor in that it was nearly as short a delay as there practically could be. She submits it is in the interest of justice that she be granted an extension of time.

Evaluation

[12] The test for allowing an extension of time under r 43(2) was set out *Russell v Commissioner of Inland Revenue*,[8] and summarised in *Harris v Davies*:[9]

> Once an appellant has allowed r 43 to be triggered, he or she is then in a position where, instead of being able to appeal as of right, he or she "requires the exercise by this Court of a positive discretion" … Before exercising that discretion, this Court is always interested in the reason why an appeal has not been prosecuted diligently. Another relevant factor, as

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8 *Russell v Commissioner of Inland Revenue* (2006) 22 NZTC 19,807 (CA) at [10].

9 *Harris v Davies* [2007] NZCA 358 at [8]; see also *Schmidt v Ebada Property Investments Ltd* [2012] NZCA 452 at [7].

> stated in *Russell*, is "whether the proposed appeal is genuinely arguable". Appeals as of right can be brought regardless of merits, but once an appellant needs leave to continue, this court will generally grant such leave only if the appeal seems meritorious.

[13] We agree the length of the delay is not excessive. However, the only reason that appears to have been given for the delay is that the applicant is a lay litigant being assisted by her father, who is not a lawyer. This Court may allow some latitude for litigants in person where that is required in the interests of justice.[10] As noted, the respondent accepts that there would be no prejudice to the proceedings to allow the extension of time.

[14] However, the applicant is not entitled to an extension as of right. Whether the Court will extend time is discretionary. In that assessment the merits are important.

Is there any merit in the appeal?

[15] The applicant claims that the right to appeal the first High Court judgment has been negated by the second High Court judgment, which is an abuse of process. The outcome of the application under r 7.49 has been used as a means to deny the appeal rights that are inherent with the first High Court judgment. Rule 7.49 operates as an alternative to appeal,[11] and as the first High Court judgment was an interlocutory decision, we will assume for present purposes that there was a right of appeal.[12] We also assume there is a right of appeal against a decision of the High Court made under r 7.49.[13]

[16] We are satisfied, however, that the applicant's substantive appeal is entirely without merit. Her submission, based on a literal reading of the rules, is that r 7.49 only provides for the High Court judge to either rescind the decision or transfer the application to the Court of Appeal. The applicant claims that Mallon J had no jurisdiction to dismiss the application.

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10 *Schmidt v Ebada Property Investments Ltd*, above n 9, at [11]: citing *Rabson v Gallagher* [2011] NZCA 204 at [9].

11 *Wrightson NMA Ltd v McConnell* [1989] 2 NZLR 77 (HC) at 81.

12 Pursuant to s 66 of the Judicature Act 1908: *Siemer v Heron* [2011] NZSC 133, [2013] 1 NZLR 309 at [31] and, relevantly to this appeal, s 12R of the Social Security Act 1964.

13 *New Zealand Couriers Ltd v Curtin* [1992] 3 NZLR 562 (CA) at 563 per Cooke P and 566 per Richardson J: applying the predecessor rule.

[17] It cannot be the case that anytime an application is made under r 7.49, the only options for the reviewing judge are to rescind the earlier decision, or refer the case to this Court. Rule 7.49(6) specifies the two options apply "if the decision is shown to be wrong", meaning the High Court's jurisdiction under r 7.49 to rescind an interlocutory order or refer the application to this Court depends on the High Court judge being satisfied the decision is wrong.[14]

[18] In the second High Court judgment, the Judge dismissed the application for the following reasons:

> [2] … It is apparent that considerable time and effort has gone into the submissions that are filed for Ms Crequer. They are, however, directed at disputing the reasons for the judgment I gave. That is not a basis on which I can grant the application.
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> [3] A review of an order, sought under r 7.49, is generally appropriate only:[15]
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> (a) when there was not full argument on the first hearing; or
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> (b) if some relevant point of evidence was overlooked at the original hearing; or
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> (c) there has been a material change of circumstances; or
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> (d) some other special circumstance has arisen.
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> [4] None of the matters advanced on Ms Crequer's behalf fall into these categories. Nor is there any matter advanced that satisfies me that it is appropriate to transfer the application to the Court of Appeal. …

[19] Examination of the relevant authorities demonstrates that the basis on which Mallon J declined the application was entirely consistent with earlier case law.[16] Considering the predecessor to r 7.49 (r 264), this Court has stated:[17]

> Rule 264 is intended to provide an alternative to an appeal to this Court so that interlocutory matters may be dealt with expeditiously and less expensively in the High Court. The rule is particularly appropriate where some additional point not raised before has emerged or there are facts, whether or not arising from a change of circumstances, which were not previously before the Court and should be considered.

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14 *Kerr v Dominion Post* HC Wellington CIV-2009-485-1233, 11 February 2010 at [6].
15 Beck and others *McGechan on Procedure* (looselead ed, Brookers) at [7.49.04].
16 *Howard v Accident Compensation Corporation* [2013] NZHC 1004 at [4].
17 *Graebar Holdings Ltd v Taylor* [1989] 2 NZLR 10 (CA) at 16.

[20] That is not the situation in this case and the decision in *Graebar Holdings* provides a complete answer to the appeal on its merits. In short, it is hopeless.

Conclusion

[21] As the appeal is without merit, and the applicant has not provided compelling reasons for the delay, the application for an extension of time is dismissed. We agree with the Judge:[18] it is now in both parties' interest that the substantive hearing of the case stated proceed without delay.

[22] The applicant must pay the respondent costs on a standard application on a band A basis and usual disbursements.

Solicitors:
Crown Law Office, Wellington for Respondent

[18] The second High Court judgment, above n 1, at [4].