

[2] The Bank had security over a property in Auckland and sold that property pursuant to its rights as mortgagee. The sale proceeds were not sufficient to discharge all of Mr King's indebtedness to the Bank. The Bank sought to recover its shortfall. The Bank accordingly filed a counterclaim to Mr King's proceeding and sought summary judgment in respect of its counterclaim, as well as defendant's summary judgment in relation to Mr King's claims against the Bank.

[3] Katz J made orders for summary judgment against Mr King.¹ Mr King has appealed against the decision of Katz J.

[4] In this Court, the Registrar set security for costs in the sum of \$5,880. The appellant unsuccessfully sought dispensation from the requirement to pay security. In a letter dated 19 February 2014, the Registrar declined to dispense with security and ordered security to be paid by 19 March 2014. The appellant now seeks a review of the decision refusing to dispense with security.

Approach

[5] In the normal course, appellants in civil proceedings in this Court are required to pay security for costs.² An appellant may apply to the Registrar for a waiver and the Registrar may vary or waive security "if satisfied that the circumstances warrant it".³ The circumstances in which security will be waived have been described as follows:⁴

[7] Security for costs will be waived where it is in the interests of justice to do so. There must be some exceptional circumstance to justify waiver. The appellant must honestly intend to pursue the appeal and it must be arguable, as respondents should not face the threat of hopeless appeals without provision for security. The importance of the issues raised in the appeal will be significant, as will the question whether there is any public interest in having them determined. Impecuniosity alone is not usually sufficient to justify a waiver, but may be a reason to reduce the quantum of security.

¹ *King v ASB Bank Ltd* [2013] NZHC 2914.

² Court of Appeal (Civil) Rules 2005, r 35(2).

³ Rule 35(6).

⁴ *Spicer v Credit Link Factors Ltd* [2012] NZCA 69 (footnotes omitted); see also *Easton v Broadcasting Commission* [2009] NZCA 252, (2009) 19 PRNZ 675 at [5]; *Fava v Zaghloul* [2007] NZCA 498, (2007) 18 PRNZ 943 at [9]; *Hills v Public Trust* [2010] NZCA 401, (2010) 20 PRNZ 707 at [13]–[15]; *Clark v Clark* [2013] NZCA 284 at [6]; and *Siemer v Judicial Conduct Commissioner* [2013] NZCA 334 at [8].

The application for dispensation

[6] The basis for the appellant's original application for dispensation was that he was impecunious, as illustrated by the fact he was granted a waiver of the filing fee on the grounds of financial hardship. The Registrar correctly observed that the criteria for dispensation for security for costs were different to that for waiver of a filing fee. The Registrar also noted that impecuniosity alone did not necessarily mean security should be dispensed with. On that aspect, the Registrar did not consider the circumstances of the appeal were exceptional. The Registrar considered security was necessary to protect the respondent's interests.

[7] In seeking a review of the Registrar's decision the appellant says a dispensation should have been granted because he is impecunious. In addition, he submits the merits of the appeal are in his favour and there are various circumstances that put his case in the exceptional category. As to the latter, I need only refer to Mr King's submission that the fact his appeal is against a decision granting the defendant summary judgment puts his application for dispensation into a unique category.

[8] The respondent in opposing security submits that there is insufficient evidence to show the appellant is impecunious. Further, it is said that the merits of the appeal favour the Bank and there are no significant public interests in having the appeal determined.

Discussion

[9] I am not satisfied on the information before me that the appellant is impecunious in the sense contemplated by the authorities relating to security for costs. The appellant has provided information showing he is in receipt of a benefit. He has also provided information prepared for a legal aid application as to refunds, loans and debts as at 1 December 2013. However, none of that provides any information about his assets and shows a sum of around \$2,000 expected by way of a refund from Baldwins Intellectual Property.

[10] There are, in any event, other factors that tell against dispensation. Although the matter has been decided on a summary basis,⁵ there was only one factual issue in dispute in the High Court and that had no relevance to the outcome. Further, while the outcome is undoubtedly of importance to the appellant, the appeal does not raise any issues of public interest.

[11] The context of the parties' dispute is that from mid-2010 Mr King defaulted on his obligations to the Bank. Mr King was put on notice from late September 2010 that non-payment put at risk his property over which the Bank had security. The initial arrears were repaid but by November 2011 the appellant was again in default. In early 2012 the parties reached agreement on repayment arrangements. The appellant initially met these but then, again, was in default. Further demands were unremedied in June and July 2012. Around this period, the Bank was advised that Mr King had filed a complaint with the Banking Ombudsman.

[12] A Property Law Act notice was served by the Bank in late July 2012. That notice was unremedied. But, at Mr King's request, the Bank gave him two months to try to sell the property himself. He could not do so. On 17 October 2012 the Banking Ombudsman's initial assessment in the Bank's favour was released. An auction date was set for the property. There was then further discussion between the parties about possible arrangements to stave off the mortgagee sale. Mr King obtained an interim injunction⁶ but that was lifted after the proposal for rearrangements failed.⁷ The property was rescheduled for auction on 3 April 2013. After a further injunction application by Mr King was dismissed,⁸ the property was sold. Following the allocation of the net proceeds of sale a shortfall remained owing by Mr King.

[13] Against the background, I turn to the case in the High Court. The first key finding by Katz J was that there was no factual foundation to the allegation the Bank sold the property in retribution for the appellant having complained about the Bank

⁵ An application for review of the registrar's decision declining to reduce security for costs was unsuccessful in a case where the respondent had obtained summary judgment in *Kumar v Westpac Life NZ Ltd* [2008] NZCA 399.

⁶ *King v ASB Bank Ltd* [2013] NZHC 84.

⁷ *King v ASB Bank Ltd* HC Auckland CIV-2013-404-561, 21 February 2013 (Minute of Ellis J).

⁸ *King v ASB Bank Ltd* [2013] NZHC 676.

both directly and to the Banking Ombudsman. Secondly, the Judge concluded there was nothing in the claim the Bank had misled the Banking Ombudsman. The claim the Ombudsman was misled related to the treatment of a further advance and whether that advance was intended to reduce a facility. However, there was no question about the amount actually advanced or that it was not repaid. Thirdly, Katz J said the assertions that the Bank summarily dismissed a repayment offer made by the appellant were not seriously arguable. The same position applied to allegations the Bank had not negotiated in good faith over the final proposal for a rearrangement of the loans. The Judge said there was no evidence of bad faith. Finally, Katz J considered it was not “remotely arguable” that “a passing reference in the Bank’s internal log to incorrect information of a relatively minor nature” could comprise oppression.⁹

[14] The matters raised by the appellant in the High Court which he wishes to pursue on appeal can be characterised as in the nature of collateral challenges. There is no direct challenge to the indebtedness.

[15] Katz J summarised the position in this way:

[52] Mr King’s story is, sadly, not uncommon. He borrowed money from the Bank no doubt believing he would be able to service the debt and ultimately repay the capital. Unfortunately, however, he could not keep up with the repayments and fell into arrears. The Bank exercised considerable restraint in enforcing its security. Repayment arrangements were entered into, but Mr King was not able to honour them. Mr King was given time to try and sell the Property himself. Meanwhile, the Bank’s security position continued to deteriorate. Ultimately, the Bank sold the Property at mortgagee sale, but the proceeds were not sufficient to fully repay the loans.

[16] When all of these matters are considered, I am satisfied the Registrar’s decision was correct.

[17] I have also considered whether security should be reduced but have decided that the interests of justice require that the respondent should have the protection of a full sum of security.

⁹ *King v ASB Bank Ltd*, above n 1, at [44].

[18] For these reasons, I uphold the decision of the Registrar to refuse to dispense with security.

Result

[19] The application for review of the Registrar's decision refusing to dispense with security for costs is dismissed.

[20] Security for costs of \$5,880.00 must be paid into Court by 28 April 2014.

Solicitors:
Simpson Grierson, Auckland for Respondent