

IN THE COURT OF APPEAL OF NEW ZEALAND

CA47/2014
CA126/2014
[2014] NZCA 334

BETWEEN GARY OWEN BURGESS
Appellant

AND TSB BANK LIMITED
Respondent

Counsel: Appellant in person
N Davidson QC for Respondent

Judgment: 17 July 2014 at 10.00 am
(On the papers)

JUDGMENT OF WHITE J

- A The appellant's application for review of the Registrar's decision declining to consider his application to reduce or waive security for costs in appeal CA126/2014 is dismissed.**
- B The appellant's application for an extension of time for the Registrar to consider an application for a reduced amount of security for costs in appeal CA126/2014 is declined.**
- C The time for the appellant to pay the security for costs in appeal CA126/2014 is extended to 31 July 2014.**
- D No date for the hearing of the appeal in CA126/2014 is to be allocated unless the security for costs of \$5,880.00 is paid on or before 31 July 2014.**
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REASONS

[1] The appellant, Mr Burgess, has appealed against a High Court judgment obtained by the respondent, TSB Bank Ltd (TSB), for \$22,911.70, interest and costs.¹ Security for costs in that appeal (CA47/2014) was originally fixed by the Registrar in the sum of \$5,880.00, but following an application by TSB was subsequently increased by the Registrar to \$10,000.

[2] Mr Burgess paid the security for costs of \$10,000 for appeal CA47/2014 on 14 March 2014.

[3] Mr Burgess has also appealed against the High Court judgment of Gendall J declining to recall the judgment the subject of the appeal in CA47/2014.² Security for costs in the second appeal (CA126/2014) was fixed by the Registrar in the sum of \$5,880.00.

[4] By letter dated 21 March 2014 the Court Registry Officer advised Mr Burgess that in terms of r 35 of the Court of Appeal (Civil) Rules 2005 (the Rules) he was required to pay the security for costs of \$5,880.00 in appeal CA126/2014 or apply for an order reducing or waiving security within 20 working days of the filing of his notice of appeal. As Mr Burgess filed his notice of appeal on 14 March 2014, the 20 working day period expired on 11 April 2014.

[5] Mr Burgess did not pay the security for costs of \$5,880.00 in appeal CA126/2014 or apply for an order reducing or waiving security on or before 11 April 2014.

[6] Instead Mr Burgess filed an application dated 26 April 2014 seeking orders that:

(a) The two appeals (CA47/2014 and CA126/2014) be consolidated.

¹ *TSB Bank Ltd v Burgess* [2013] NZHC 3291.

² *TSB Bank Ltd v Burgess* [2014] NZHC 204.

- (b) An extension of time for the filing of the combined case on appeal be granted.
- (c) The appeals be heard together.
- (d) That the sum of \$10,000 paid as security for costs in the first appeal (CA47/2014) be the security for costs in the consolidated appeal.
- (e) If consolidation was not granted, an extension of time be granted for an application for a reduced amount of security for costs in the second appeal (CA126/2014).

[7] The application for these orders was served on TSB on 12 May 2014. TSB then filed a memorandum dated 13 May 2014 consenting to consolidation of the two appeals and an extension of time for filing the combined case on appeal, but opposing both the application for the sum of \$10,000 to be treated as security for costs in the consolidated appeal and the proposed application for an order reducing the amount of security in the second appeal (CA126/2014), noting that this latter application was out of time.

[8] On 20 May 2014 I directed by consent that:

- (a) The application for an extension of time under r 43 (that is, in relation to the filing of the combined case on appeal) be granted; and
- (b) The appeals be consolidated, subject to the issue of security for costs which was referred to the Registrar.

[9] The purpose of the direction consolidating the two appeals was to enable them to be heard together with a combined case on appeal. It did not mean that security for costs in respect of the second appeal was waived or reduced.

[10] On 9 June 2014 the Registrar advised Mr Burgess that the application to waive or reduce security for costs in the second appeal (CA126/2014) was out of time and referred to the decision of this Court in *Orlov v The National Standards*

Committee No 1 where it was held that under r 35(7) the Registrar has no discretion to extend the prescribed period for making such applications of 20 working days.³ The Registrar advised Mr Burgess that the security remained set at \$5,880.00 and had to be paid by 7 July 2014.

[11] By letter dated 18 June 2014 Mr Burgess challenged the Registrar's decision and suggested that the extension of time I granted on 20 May 2014 under r 43 of the Rules related to the issue of security for costs.

[12] By email dated 20 June 2014 the Court Registry Officer advised Mr Burgess (correctly) that my direction on 20 May 2014 had referred the issue of security for costs to the Registrar and that no extension of time was granted in respect of that issue.

[13] By application dated 22 June 2014 Mr Burgess now seeks a review of the Registrar's decision of 9 June 2014 declining to waive or reduce security in the second appeal (CA126/2014). The application is made on the grounds of breach of natural justice, breach of the rules of Court, failure to have regard to the directions of a Judge of the Court, misdirecting herself in law, misunderstanding the facts, acting contrary to principle, considering irrelevant matters, failing to consider relevant matters, and generally acting contrary to principle and the binding authority of the Supreme Court.⁴

[14] By memorandum dated 25 June 2014 TSB opposes the application by Mr Burgess for review of the Registrar's decision, but consents to my determining of the application by Mr Burgess made in his previous application of 26 April 2014 seeking a retrospective extension of time under r 5(2) of the Rules for the Registrar to consider an application for a reduced amount of security for costs in the second appeal (CA126/2014).⁵ TSB opposes the application for an extension of time on the grounds set out in its memorandum dated 13 May 2014.

³ *Orlov v The National Standards Committee No 1* [2014] NZCA 182 at [7].

⁴ *Reekie v Attorney-General* [2014] NZSC 63 and *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523.

⁵ Court of Appeal (Civil) Rules 2005, r 7(1) and (2).

[15] TSB also submits that the Court should:

- (a) disregard any application by Mr Burgess for a hearing date or confirm that any hearing allocated will consider only the first appeal; and
- (b) affirm the deadline for payment of security for costs on the second appeal (CA126/2014), which was 7 July 2014, and, in default of payment, make an order striking out the second appeal under r 37(1) of the Rules.

The application by Mr Burgess for review of the Registrar's decision of 9 June 2014

[16] This application made by Mr Burgess on 22 June 2014 must be dismissed because, as was held in *Orlov v The National Standards Committee No 1*,⁶ the Registrar has no discretion to extend the time for an application under r 35(7) for the waiver or reduction of security for costs. There is nothing in my direction of 20 May 2014 which did or could alter the position. There is therefore no decision of the Registrar which I am able to review. None of the grounds relied on by Mr Burgess in his application assists.

The application by Mr Burgess for an extension of time under r 5(2)

[17] Taking into account the relevant factors,⁷ this application made by Mr Burgess on 26 April 2014 must also be dismissed. My reasons are:

- (a) While the original period of delay in his application was some two weeks, Mr Burgess was aware of the 20 working day prescribed period for the payment in the second appeal from the notices he had received from the Court Registry Office in respect of both appeals.
- (b) Mr Burgess has given no satisfactory explanation for his delays in filing his application (two weeks) and serving TSB (one month).

⁶ *Orlov v The National Standards Committee No 1*, above n 3.

⁷ *Taylor v The Chief Executive of the Department of Corrections* [2014] NZCA 282 at [5]–[6].

- (c) There will be no real prejudice to Mr Burgess if he does not pay the security for costs for the second appeal and it does not proceed because he will be able to raise the same issues (alleged errors justifying recall) in his first appeal.
- (d) There will be prejudice to TSB if it is required to incur further costs in opposing the application unnecessarily when:
 - (i) Mr Burgess, who was able to pay the security of \$10,000 for the first appeal, has not established subsequent impecuniosity or absence of available financial assistance for payment of security in respect of the second appeal; and
 - (ii) Mr Burgess has not shown that a reasonable and solvent person would pursue an appeal against a refusal to recall a judgment which is already under appeal.⁸

An extension of time for the payment of security in the second appeal

[18] In view of the fact that the previous deadline for the payment of security for costs on the second appeal (7 July 2014) has passed, it is fair and reasonable that Mr Burgess should now be granted a further extension of time to do so. I fix 31 July 2014 as the new and final date for payment.

No hearing date for the second appeal is to be allocated until the security for costs is paid

[19] In terms of r 37(2) of the Rules, no hearing date for the second appeal should be allocated until the security for costs in respect of that appeal is paid.

[20] I decline to make an order that unless security for costs is paid by the extended date the second appeal should be struck out under r 37(1). If TSB wishes

⁸ *Reekie v Attorney-General*, above n 4, at [35] and [43]–[44].

to pursue its application, it may do so if Mr Burgess fails to pay the security by 31 July 2014.⁹

Solicitors:
Clendons, Auckland for Respondent

⁹ *Moodie v Strachan* [2014] NZCA 260 at [6]–[7] and [11]–[14].