

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA83/2023
[2023] NZCA 132**

BETWEEN	SANDY ZHUJUN DAI Applicant
AND	PROFESSIONAL CONDUCT COMMITTEE OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS First Respondent
	XIAOYAN SONG Second Respondent
	NZ NATURALS LIMITED Third Respondent

Court: Brown and Collins JJ

Counsel: Applicant in person
R B Moon for First Respondent
No appearance for Second and Third Respondents

Judgment: 28 April 2023 at 11.00 am
(On the papers)

JUDGMENT OF THE COURT

- A The application to review the Deputy Registrar’s decision declining an application for waiver of the filing fee is declined.**
- B The application to review the Deputy Registrar’s decision not to dispense with security for costs is declined.**
- C The application to stay execution of the Costs judgment made by the High Court is declined.**

- D The Professional Conduct Committee of the New Zealand Institute of Chartered Accountants is entitled to costs for a standard appeal on a band A basis with usual disbursements.**
- E The Registry is not to accept for filing any further documentation in relation to the matters dealt with in this judgment.**
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REASONS OF THE COURT

(Given by Collins J)

- [1] This judgment addresses three applications made by Ms Dai:
- (a) an application to review the Deputy Registrar’s decision to decline an application for waiver of a filing fee;
 - (b) an application to review the Deputy Registrar’s decision not to dispense with security for costs; and
 - (c) an application to stay execution of a Costs judgment made by the High Court.

Background

[2] Ms Dai, who represents herself, is an accountant and a member of the New Zealand Institute of Chartered Accountants (the NZICA). The first respondent, the Professional Conduct Committee (the PCC), referred complaints about Ms Dai’s professional conduct and practice to the NZICA’s Disciplinary Tribunal (the Tribunal). Three charges against Ms Dai were upheld by the Tribunal.¹

[3] Ms Dai then filed judicial review proceedings against the PCC. She filed several interlocutory applications, including for summary judgment, interim orders,

¹ *Dai v Professional Conduct Committee of the New Zealand Institute of Chartered Accountants* [2022] NZHC 4 at [15] [High Court judgment].

discovery, and joinder of additional respondents. The PCC applied to have Ms Dai's statement of claim struck out.²

[4] In striking out Ms Dai's statement of claim, Churchman J noted the majority of the matters alleged in Ms Dai's statement of claim were not matters that were amenable to judicial review.³ Where matters were justiciable, they lacked any merit:

[31] The allegations made by Ms Dai are clearly part of an ongoing pattern of behaviour, as identified in the Tribunal's decision. Not only is it apparent that the allegations in the statement of claim are baseless, but it appears that these proceedings have been filed for an improper purpose, in an attempt by Ms Dai to obtain a collateral advantage, rather than to properly interrogate the PCC's decisions to refer the complaints to the Tribunal. Virtually none of the voluminous material filed by Ms Dai in support of her application was relevant, and none of it provided a basis upon which the Court could conclude that her allegations are anything other than meritless.

[5] On 13 February 2023, Ms Dai filed a notice of appeal against the High Court judgment. The notice of appeal was amended on 23 March 2023. Ms Dai's grounds of appeal are difficult to comprehend. Her grounds of appeal appear to be:

- (a) The PCC breached s 27 of the New Zealand Bill of Rights Act 1990 (NZBORA) by allowing the Tribunal to carry out its five-day hearing without her consent.
- (b) The High Court judgment was wrong because it did not give a human rights consistent interpretation to the issues which Ms Dai wished to pursue.
- (c) The High Court judgment omitted a significant amount of strong or arguable causes of action that Ms Dai submits were available to her.
- (d) The High Court judgment relied on false and misleading affidavits provided by the PCC. The scope of the judicial review proceeding was misconceived by the High Court and the PCC's decision on 12 May

² At [1]–[3].

³ At [10] and [29].

2022 to prosecute Ms Dai was prima facie defamatory and designed to intimidate her.

First application: Application for review of the Deputy Registrar’s decision to decline fee waiver

[6] At the time she filed her notice of appeal, Ms Dai made an application for waiver of the filing fee of \$1,100.

[7] Regulation 5(2) of the Court of Appeal Fee Regulations 2001 (the Fee Regulations) outlines when the Deputy Registrar can waive a fee:

The Registrar may waive the fee payable by the applicant if satisfied,—

- (a) on the basis of one of the criteria specified in subclause (3), that the applicant is unable to pay the fee; or
- (b) that the proceeding,—
 - (i) on the basis of one of the criteria specified in subclause (4), concerns a matter of genuine public interest; and
 - (ii) is unlikely to be commenced or continued unless the fee is waived.

[8] Ms Dai made her application solely on the ground of genuine public interest under reg 5(2)(b) of the Fee Regulations.

[9] The Deputy Registrar did not consider that the first requirement, reg 5(2)(b)(i), was met, as they were not satisfied that the proposed appeal of the strike out decision raised any question of law that was of significant interest to a substantial portion of the public. This is the criterion outlined in reg 5(4) of the Fee Regulations.

[10] The Deputy Registrar concluded that the second requirement, reg 5(2)(b)(ii), was not met, as Ms Dai said in her application that she would continue with the proceeding even if the fee was not waived.

Application for review of the Deputy Registrar’s decision

[11] On 7 March 2023, Ms Dai paid the filing fee and filed an application to review the Deputy Registrar’s decision declining the waiver. Ms Dai said that reg 5(4)(a) has

been met, as there is a question of law, and that judicial review cases commonly engage public interest. Ms Dai says the question of law raised is the interpretation of rr 13.99 and 13.100 of the NZICA Members Rules, which relate to disclosure of confidential information.

[12] Ms Dai also says that the second requirement for a fee waiver in reg 5(2)(b) is satisfied as the proceeding is a matter of genuine public interest.

[13] The PCC oppose the review application and say that neither ground required by reg 5(2)(b) have been established by the evidence. In particular, the PCC say that the appeal would be limited to its own facts and thus does not raise any matters of public interest, and the proceeding appears likely to continue, even if the application for review is declined.

[14] Subsequent to Ms Dai's application to review the decision to decline the fee waiver, Ms Dai amended her application to say the proceeding would be unlikely to proceed if the application was declined. She emphasised the application is not made under financial hardship grounds, but in reliance on public interest.

Analysis

[15] Ms Dai has not adequately explained how the appeal has any public interest. Her review application fails to highlight how either of the grounds in reg 5(2)(b) are applicable. This case is confined to a very fact-specific situation and in any event, Ms Dai has already paid the filing fee. As such, the proceedings could proceed. Ms Dai has not provided reasons why the proceedings could not proceed if the filing fee was not waived for public interest grounds. This makes her case unsuitable for a fee waiver under reg 5(2)(b)(ii).

[16] The application to review the Deputy Registrar's decision to decline to waive the fee waiver is declined.

Second application: Application for review of the Deputy Registrar’s decision not to dispense with security for costs

[17] After the notice of appeal was accepted for filing on 13 February 2023, security for costs was set at \$21,180 under r 35 of the Court of Appeal (Civil) Rules 2005 (the Rules). On 28 February 2023, Ms Dai filed an application to reduce and dispense with security for costs under s 35(6) of the Rules.

[18] The Deputy Registrar was satisfied that security for costs should be reduced, as the PCC is the only respondent that has filed a notice of appearance. Security was reduced to \$7,060, which is the amount required for one respondent.

Application to dispense with security for costs

[19] In her application to dispense with security, Ms Dai again says that her appeal is in the public interest.

[20] The security for costs regime ensures that a respondent has some protection as to costs in the event the appellant is unsuccessful and is ordered to pay costs. However, there are limited situations where security for costs can be dispensed with.

[21] In *Reekie v Attorney-General*, the Supreme Court identified two broad grounds on which security could be dispensed with:⁴

- (a) where costs are unlikely to be ordered against the appellant; or
- (b) where the appellant cannot pay or will suffer severe hardship if payment is required.

[22] The Deputy Registrar noted that there was no suggestion that this appeal is one where a costs order was unlikely to be made. As such, the first ground identified in *Reekie* is not applicable.

⁴ *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [19].

[23] At the time of her application, Ms Dai did not make her application based on impecuniosity. This means the second ground was also not applicable when the Deputy Registrar made their decision. Ms Dai submitted security should be dispensed with because the public importance of the appeal makes it right for the PCC to defend the appeal without security for costs.

[24] The Deputy Registrar concluded that the appeal does not involve matters of public interest but concerns the application of strike out principles. Security could not be dispensed with based on impecuniosity, nor on the basis that costs would not be ordered. As such, the dispensation application was declined, and security for costs was reduced to \$7,060.

Application for review of Deputy Registrar's decision not to dispense with security

[25] On 21 March 2023, Ms Dai applied for a review of the Deputy Registrar's decision not to dispense with security for costs. Ms Dai's application reiterates the public interest concerns from her statement of claim and her original application regarding security for costs. Ms Dai also submits that the appeal engages important rights and values, including the right to justice affirmed by s 27 of NZBORA.

[26] In addition, Ms Dai contends that there have been breaches of s 21 of the Human Rights Act 1993, which states the prohibited grounds of discrimination. Ms Dai says s 21(1)(d) has been breached, which protects her right to "ethical belief". Ms Dai says that the PCC referred her to the Tribunal because of her willingness to seek her rights to justice, human rights and righteousness, which is her ethical belief. She says the referral was retaliatory and discriminatory.

[27] Further, Ms Dai submits there are serious racial discrimination issues because Ms Dai stood up for her rights, and the NZICA caused her to suffer unequal opportunities due to her ethnicity.

[28] Despite her original application not claiming impecuniosity, Ms Dai has since provided this Court with information regarding her personal and company funds, including a signed affidavit. Ms Dai says this information supports her inability to pay security for costs, but it is unclear whether she intends to rely on impecuniosity

for her review application. For completeness, we consider whether Ms Dai's application for dispensation of costs would succeed on the ground of impecuniosity.

[29] The Court in *Reekie* discussed the principles that apply when reviewing dispensation decisions:⁵

- (a) it is for the appellant to show impecuniosity;
- (b) impecuniosity is not in itself enough to warrant dispensing with security;
- (c) security is the norm and security should be dispensed with only in exceptional circumstances;
- (d) a reduction in the amount of security required may, in some cases, meet the justice of the case; and
- (e) some assessment of the merits of the case is required, along with an assessment of whether the appeal raises issues of public interest.

[30] The discretion to dispense with security should be exercised to “preserve access to the Court of Appeal by an impecunious appellant in the case of an appeal which a solvent appellant would reasonably wish to prosecute”, and to “prevent the use of impecuniosity to secure the advantage of being able to prosecute an appeal which would not be sensibly pursued by a solvent litigant”.⁶ In addition, security should be dispensed with if it would be right to require the respondent to defend the judgment under challenge without the usual protection of security.⁷

Analysis

[31] While Ms Dai has now provided this Court with evidence of her impecuniosity, dispensation is limited to exceptional circumstances.⁸ An appellant is not required to

⁵ *Reekie v Attorney-General*, above n 4, at [27].

⁶ At [35].

⁷ At [31].

⁸ At [27]–[28].

show an exceptionally strong case to warrant dispensation.⁹ Ms Dai's case however is meritless, and there is no public interest in her appeal. This is not a case a solvent appellant would reasonably wish to prosecute. As noted in *Reekie*, dispensation is generally not granted when the appeal is hopeless or of doubtful merit.¹⁰ In addition, it would not be fair to require the respondents to defend this appeal without security as to costs, considering the costs already owed by Ms Dai and the vexatious approach Ms Dai has taken thus far.

[32] In any event, the Deputy Registrar did not have information on Ms Dai's impecuniosity at the time they declined to dispense with costs, nor was this ground relied on by Ms Dai. Therefore, the Deputy Registrar's decision was appropriate given the only ground submitted was on the basis that the appeal is in the public interest, which it is not. The public importance is limited to the current proceeding only. Even if the information about Ms Dai's financial position can be considered for the review, or Ms Dai made a fresh application to dispense with security on the basis of impecuniosity, dispensation would not be granted.

[33] The Deputy Registrar's decision was entirely appropriate because none of the bases on which to dispense with security are applicable to Ms Dai's case.

[34] The purported public interest is confined to a very fact-specific scenario that concerns the applicability of well settled strike out principles.

[35] The application to review the Deputy Registrar's decision not to dispense with security for costs is declined.

⁹ At [28].

¹⁰ At [27].

Third application: Application for a stay of execution of the High Court’s judgment as to costs

[36] Following the High Court judgment on 10 January 2023, Churchman J issued a Costs judgment on 23 February 2023.¹¹ In the Costs judgment, Churchman J awarded costs in the sum of \$20,000 to the PCC.¹²

[37] Churchman J considered that an award of costs was appropriate in the circumstances, as Ms Dai’s claim was improper, misconceived and designed to frustrate the disciplinary proceedings against her.¹³ The Judge said the PCC had incurred unnecessary costs and had acted properly throughout the proceedings. In addition, the proceeding was not of public interest.

[38] On 6 March 2023, Ms Dai applied for a stay of the enforcement of the Costs judgment. Her application is based on the following grounds:

- (a) It was incorrect to strike out her original statement of claim.
- (b) The High Court judgment has been appealed, and as such, the PCC has not yet succeeded.
- (c) She would be prejudiced by misapplying funds to an incorrect costs decision, distracting her focus from her appeal, and thus, according to Ms Dai, this is against her “natural justice”.
- (d) A costs award is irrelevant to the NZICA process, and it is inappropriate to increase costs because of the NZICA’s own actions of breaching s 27 of NZBORA.
- (e) It is NZICA’s responsibility to bear the costs because it breached the “Court process and [NZBORA]”.

¹¹ *Dai v Professional Conduct Committee of the New Zealand Institute of Chartered Accountants* [2023] NZHC 278 [Costs judgment].

¹² At [8].

¹³ At [5]. Also see the High Court judgment, above n 1, at [31]–[32].

- (f) The PCC took unnecessary steps in Court by requesting an adjournment, contributing unnecessarily to time and costs for both parties.

[39] Churchman J commented on the stay application in a name suppression judgment issued on 10 March 2023:¹⁴

As to Ms Dai’s application for a stay of the [C]osts judgment, she is required to persuade the Court that if that application is not granted, her appeal rights would be rendered nugatory. I am satisfied that there is no sense in which Ms Dai’s appeal rights would be rendered nugatory if a stay is not granted. As such, the ordinary position, that a party is entitled to enjoy the fruits of a judgment in its favour, must apply.

Analysis

[40] Ms Dai’s application to stay execution of the Costs judgment is based on r 12 of the Rules. Subparagraphs (3) and (4) are most relevant. They provide:

- (3) Pending the determination of an application for leave to appeal or an appeal, the court appealed from or the Court may, on an interlocutory application,—
- (a) order a stay of the proceeding in which the decision was given or a stay of the execution of the decision; or
 - (b) grant any interim relief.
- (4) An order or a grant under subclause (3) may—
- (a) relate to execution of the whole or part of the decision or to a particular form of execution:
 - (b) be subject to any conditions that the court appealed from or the Court thinks fit, including conditions relating to security for costs.

[41] In determining whether to grant a stay, the Court must balance two factors. Firstly, that a successful litigant has the rights to the fruits of a judgment and secondly, that there is “the need to preserve the position in case the appeal is successful”.¹⁵

¹⁴ *Dai v Professional Conduct Committee of the New Zealand Institute of Chartered Accountants* [2023] NZHC 465 [Name suppression judgment] at [26(b)] (footnote omitted).

¹⁵ *Keung v GBR Investment Ltd* [2010] NZCA 396 at [11], citing *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87.

[42] Factors the Court should consider when undertaking this balancing exercise include:¹⁶

- (a) whether the appeal may be rendered nugatory if a stay is not ordered;
- (b) the bona fides of the applicant as to the prosecution of the appeal;
- (c) whether the successful party will be injuriously affected by the stay;
- (d) the effect on third parties;
- (e) the novelty and importance of questions involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

[43] The apparent strength of the appeal has also been treated as an additional factor that may merit consideration.¹⁷

(a) *Will the appeal be rendered nugatory if a stay is not ordered?*

[44] Ms Dai has submitted that if the respondent seeks to enforce the costs awarded by the High Court of \$20,000 and the costs order made by the NZICA of \$118,367.94, she will not be able to proceed with her appeal.

[45] When considering this appeal (being the appeal of the High Court judgment) in isolation from the NZICA proceeding, it is not reasonable to conclude that the appeal would be rendered nugatory if costs in the sum of \$20,000 were enforced against Ms Dai. Additionally, as submitted by the PCC, there is no information, financial or otherwise, to support Ms Dai's assertion that she would be unable to proceed.

¹⁶ *Keung v GBR Investment Ltd*, above n 15, at [11], citing *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9].

¹⁷ *Keung v GBR Investment Ltd*, above n 15, at [11].

(b) The bona fides of the applicant as to the prosecution of the appeal

[46] During these proceedings, Ms Dai’s claims have been considered an abuse of process, evident from them being struck out in the High Court judgment. In that judgment, Churchman J said Ms Dai’s claims were baseless, filed for an improper purpose, and were intended to frustrate the disciplinary proceedings against her by asking the High Court to relitigate matters that were determined in that process.¹⁸ Churchman J said that the decision to file the judicial review proceedings was “essentially a continuation of the improper conduct of which Ms Dai has been found to be guilty of”.¹⁹

[47] In the Costs judgment, Churchman J noted that it was appropriate that “Ms Dai be liable for costs where she has abusively pursued litigation that had no chance of success”.²⁰

[48] Ms Dai’s applications for stay mirror this approach. Her applications could be seen as an attempt to escape the penalties imposed on her, both for her unsatisfactory conduct as an accountant, and in response to her pursuit of vexatious litigation. Even if Ms Dai’s appeals are meritorious, her conduct throughout the proceedings is unlikely to be deemed as being in “good faith”. The consideration of the bona fides of Ms Dai weighs against a stay being granted.

(c) Effect on the PCC and the interests of third parties

[49] The PCC is unlikely to be injuriously affected by a stay, as they are funded through the NZICA. However, related parties are likely to be affected, as the costs of litigation are funded by the NZICA members. Enforcement of costs would replenish the NZICA’s finances.

(d) Novelty and importance of the questions involved in this case

[50] There is no novel issue involved in this case. The appeal will determine whether Churchman J was correct to strike out Ms Dai’s claim. As such, the appeal

¹⁸ High Court judgment, above n 1, at [31]–[32].

¹⁹ At [32].

²⁰ Costs judgment, above n 11, at [6(h)].

involves the application of well settled principles in the context of a strike out under r 15.1 of the High Court Rules 2016.

(e) *Public interest in the appeal*

[51] As the appeal will concern the application of strike out principles, there is little public interest in this appeal. It is likely any analysis will be confined to the facts.

(f) *Strength of case on appeal*

[52] Ms Dai's appeal is far from strong. As discussed by Churchman J, her claims appear to be vexatious and for an improper purpose. Additionally, Ms Dai's submissions are unclear and appear to conflate the substantive judicial review claims with the strike out appeal.

(g) *The overall balance of convenience*

[53] The balance of convenience favours the refusal of a stay. There is no evidence the appeal would be rendered nugatory if costs of \$20,000 are enforced, and it is unclear whether Ms Dai is seeking separate stays for each costs order she faces. The appeal is unlikely to have public interest given it is confined to the application of strike out principles to this particular case. Furthermore, Ms Dai's claims have been assessed as improper, misconceived, and an abuse of process. As a result of Ms Dai's claims, the PCC have been exposed to unnecessary cost in having to defend their position.

Analysis

[54] The following observation of Churchman J in the Costs judgment is apposite:²¹

I do not consider that it is in the interest of justice for costs to be refused in this [proceeding], rather, *it is appropriate that Ms Dai be liable for costs where she has abusively pursued litigation that had no chance of success*, and put the PCC to significant cost in doing so, while being aware of the likely costs implications ...

[55] The application to stay the execution of the Costs judgment is declined.

²¹ Costs judgment, above n 11 at [6(h)]. (Emphasis added).

Result

[56] The application to review the Deputy Registrar's decision declining an application for waiver of the filing fee is declined.

[57] The application to review the Deputy Registrar's decision not to dispense with security for costs is declined.

[58] The application to stay execution of the Costs judgment made by the High Court is declined.

[59] The PCC is entitled to costs for a standard appeal on a band A basis with usual disbursements.

[60] The Registry is not to accept for filing any further documentation in relation to the matters dealt with in this judgment.

Solicitors:

Richard Moon, Barrister & Solicitor, Wellington for First Respondent