

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA550/2014
[2015] NZCA 129**

BETWEEN MALCOLM EDWARD RABSON
Appellant

AND REGISTRAR OF THE SUPREME
COURT
First Respondent

MINISTRY OF JUSTICE
Second Respondent

Counsel: Appellant in Person
K Laurenson for Respondents

Judgment: 22 April 2015 at 11:30 am
(On the papers)

JUDGMENT OF RANDESON J

- A The application for a review of the Registrar’s decision dated 7 April 2015 declining to dispense with security for costs is dismissed.**
- B Security for costs of \$5,880 must be paid no later than 29 May 2015.**
- C The time for filing the case on appeal and to apply for the allocation of a hearing date is extended to 29 May 2015.**
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REASONS

Background

[1] The appellant Mr Rabson is seeking a review under r 7(2) of the Court of Appeal (Civil) Rules 2005 and s 61A of the Judicature Act 1908 of a decision by the Registrar of this Court declining an application to dispense with security for costs.

[2] Mr Rabson is seeking to appeal against a minute issued by Dobson J in the High Court in Wellington on 25 August 2014. In his capacity as Executive Judge, Dobson J directed the Registrar of the High Court not to accept for filing an application for judicial review by Mr Rabson and Mr Siemer of a decision of the Registrar of the Supreme Court.¹ Dobson J recorded that the gravamen of the complaint was the manner in which the Supreme Court dealt with applications to recall earlier judgments of that Court. The respondent in both the Supreme Court judgments for which recall was sought was Mr Stiassny.²

[3] Dobson J noted that Mr Siemer was subject to orders under s 88B of the Judicature Act 1908 which prevent him from taking steps in proceedings without first seeking the Court's leave in relation to proceedings of specified types.³ It followed in Dobson J's view that Mr Siemer could not institute the present proceeding without obtaining the leave of the Court. Since Mr Siemer and Mr Rabson had jointly pleaded the alleged error of law and procedural impropriety on which they relied in order to seek relief, it followed that Mr Rabson's application for judicial review could not stand on its own. Accordingly, the Registrar was directed to return the originals of the documents filed to the plaintiffs.

[4] Dobson J indicated that if Mr Rabson wished to pursue an application for review on his own, then, as an undischarged bankrupt, the pleading needed to specify the terms, if any, on which he had notified the Official Assignee of the step taken and, if the intended step had been conveyed to the Assignee, any response that the Assignee had made.

¹ *Siemer v Registrar of the Supreme Court* HC Wellington CIV-2014-485-10918.

² *Siemer v Stiassny* [2014] NZSC 70 and *Siemer v Stiassny* [2014] NZSC 80.

³ *Attorney-General v Siemer* [2014] NZHC 859 at [204].

[5] Since Mr Rabson filed this appeal last year, a number of procedural issues have arisen which it is unnecessary to relate in detail. The last step involving the Court was a judgment issued on 13 March 2015.⁴ In that judgment, Mr Rabson's application for a review of an earlier judgment of French J was dismissed.⁵ To assist Mr Rabson, this Court ordered in its judgment of 13 March 2015:

[10] The application for review and temporary stay is dismissed but, in view of the time that has elapsed between the date of the application on 2 February 2015 and delivery of this judgment we grant further extensions of time as follows:

- (a) The appellant is granted an extension of time under r 43(2) of the Court of Appeal (Civil) Rules 2005 until 30 April 2015 to apply for the allocation of a hearing date and to file the case on appeal.
- (b) The appellant is granted an extension of time relating to security for costs. Within 20 working days of the date of this judgment he must either apply to the Registrar for dispensation from payment of security or he must pay security for costs in accordance with the Court of Appeal (Civil) Rules 2005.

The Registrar's decision

[6] In response, Mr Rabson applied on 18 March 2015 to have security dispensed with under r 35(6) of the Court of Appeal (Civil) Rules. The application was opposed by the respondents. The Registrar of this Court dismissed the application on 7 April 2015. In summary, the Registrar's reasons were:

- (a) Impecuniosity had not been relied upon as a ground for dispensation and, in any event, impecuniosity alone would not warrant dispensation.
- (b) There was nothing to support Mr Rabson's claim that judicial officers had mishandled his appeal.
- (c) Concerns by Mr Rabson about damage to his reputation as a result of an article published in the news media were not relevant to the application for dispensation.

⁴ *Rabson v Registrar of the Supreme Court* [2015] NZCA 68.

⁵ *Rabson v Registrar of the Supreme Court* [2015] NZCA 5.

- (d) Security for costs would only be dispensed with where the Registrar considered it was right to require the respondent to defend the judgment under challenge without the usual protection of costs provided by way of security.
- (e) If a reasonable and solvent litigant would not proceed with the appeal having regard to the benefits and costs involved, security for costs would not be dispensed with.⁶
- (f) The case did not indicate any exceptional circumstances or significant public interest.
- (g) The respondents had advised that Mr Rabson had followed Dobson J's advice and filed a statement of claim as sole plaintiff as well as providing information about the views of the Official Assignee. The fresh proceeding had since has been struck out by Mallon J.
- (h) The Registrar agreed with the respondents' submissions that a solvent appellant, faced with incurring the expense of legal representation, would simply have complied with the direction of Dobson J rather than appealed against it.
- (i) The Registrar also accepted a submission made by the respondents that the point raised on appeal was moot given that Mr Rabson had filed new proceedings as suggested by Dobson J.
- (j) There was no merit in proceeding with the appeal. It was not a step that a reasonable and solvent litigant would take.

The application for review of the Registrar's decision

[7] In applying for a review of the Registrar's decision on 9 April 2015, Mr Rabson raised these points:

⁶ *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.

- (a) The decision was in conflict with the Supreme Court's judgment in *Reekie v Attorney-General*.⁷
- (b) The Registrar's powers were not unconstrained by the rule of law.
- (c) Matters of personal reputation were relevant to the decision.
- (d) The Registrar was wrong to decide that security for costs would only be dispensed with where she was of the view that it was right to require the respondent to defend the judgment under challenge without the usual protection for costs provided by security.

Analysis

[8] I am satisfied that the Registrar's decision declining to dispense with security for costs was correct, essentially for the reasons she gave. For present purposes, the key points to emerge from the Supreme Court's decision in *Reekie* are these:⁸

- (a) The Registrar should dispense with security if he or she is of the view that it is right to require the respondent to defend the judgment under challenge without the usual protection as to costs provided by security.⁹
- (b) The discretion to dispense with security should be exercised so as to:
 - (i) 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
 - (ii) 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.¹⁰

⁷ *Reekie v Attorney-General*, above n 6.

⁸ *Reekie v Attorney-General*, above n 6.

⁹ At [31].

¹⁰ At [35].

- (c) A reasonable and solvent litigant would not proceed with an appeal which was hopeless or one where the benefits (economic or otherwise) to be obtained are outweighed by the costs (economic and otherwise) of the exercise (including the potential liability to contribute to the respondent's costs if unsuccessful).¹¹
- (d) The analysis of costs and benefits should not be confined to those which can be measured in money. An appeal may raise issues of public interest not measurable in economic terms. As well, considerations personal to the appellant (for instance, considerations affecting reputation) may legitimately need to be considered as part of the cost/benefit assessment. Proceedings relating to the vindication of rights under the New Zealand Bill of Rights Act 1990 may have both personal and public non-financial benefits.¹²
- (e) A waiver of fees granted by the Registrar may be indicative of impecuniosity but is not conclusive. Proof that security cannot be provided may require full disclosure of financial circumstances.¹³
- (f) In the end, an exercise of judgment is called for.¹⁴

[9] Mr Rabson challenges the Registrar's statement that security for costs will *only* be dispensed with where she is of the view that it is right to require the respondent to defend the judgment under challenge without the usual protection as to costs provided by security. However, unless the appellant is legally aided,¹⁵ the Registrar's statement captures the essence of the broad principle established in *Reekie* and referred to at [8](a) above.

[10] The second main point raised by Mr Rabson is that the Judge was wrong to say that reputation was not relevant to the decision she had to make. He pointed to a

¹¹ At [35].

¹² At [35] and [41].

¹³ At [42] and [43].

¹⁴ At [41].

¹⁵ In which case security for costs is not required by virtue of r 36 of the Court of Appeal (Civil) Rules 2005.

publication on 10 March 2015 by the New Zealand Herald of an article attributed to a website known as New Zealand Media and Entertainment. He submitted that this article suggested he was obtuse and vexatious in respect of repeated applications he had made to the Supreme Court just to be heard in relation to this judicial review. He also submitted that the publication contained other inaccuracies relating to his appeal. He submitted that the New Zealand Media and Entertainment website attracted a large audience and that a hearing of his appeal was appropriate to correct the impressions created by the media publicity. Mr Rabson had submitted to the Registrar that the judicial review proceedings had been “struck out” by Dobson J without notice or a hearing and that this was a matter of broad public importance. The appeal was necessary to vindicate his reputation.

[11] I am satisfied that the reference by the Supreme Court in *Reekie* to proceedings affecting the reputation of an appellant is intended to refer to proceedings in which the judgment under appeal is one where the appellant’s reputation is at issue. Here, Mr Rabson’s concern is effectively about publicity suggesting that the judicial review proceedings were without merit. The judicial proceeding itself did not raise issues of Mr Rabson’s reputation as such. I am not persuaded that publicity about the court proceeding in question is the kind of reputational issue that the Supreme Court had in mind in *Reekie*.

[12] Even if Mr Rabson’s reputation were somehow at issue in the proceeding he sought unsuccessfully to file in the High Court, I remain of the view that this appeal is not one that a reasonable and solvent litigant would be justified in pursuing for the reasons the Registrar gave.

Result

[13] The application to review the Registrar’s decision dated 7 April 2015 declining to dispense with security for costs is dismissed.

[14] The Registrar decided that security would remain set at \$5,880 and must be paid on or before 29 April 2015. This should be extended for a reasonable period to allow for the delay occasioned by the review application. Accordingly, security for costs at \$5,880 must be paid no later than 29 May 2015.

[15] The time for filing the case on appeal and to apply for the allocation of a hearing date is extended to 29 May 2015.

Solicitors:
Crown Law Office, Wellington for Respondent