IN THE COURT OF APPEAL OF NEW ZEALAND

CA333/2017
[2017] NZCA 349

BETWEEN	MALCOLM EDWARD RABSON Appellant
AND	JUDICIAL CONDUCT COMMISSIONER First Respondent
	JUSTICES WILLIAM YOUNG, ARNOLD, GLAZEBROOK, O'REGAN AND ELLEN FRANCE Second Respondents

Counsel: Appellant in person
A F Todd for Second Respondents

Judgment: (On the papers) 16 August 2017 at 10.00 am

JUDGMENT OF FRENCH J
(Review of Registrar's decision)

A The application for review of the Registrar's decision refusing to dispense with security for costs is declined.

B Security for costs in the sum of $6,600 must be paid into Court by 24 August 2017.

REASONS

[1] Mr Rabson has filed an appeal against a costs order made in the High Court by Faire J.[1] Security for costs on the appeal was set at $6,600. Mr Rabson applied for dispensation from payment under r 35(6)(c) of the Court of Appeal (Civil) Rules 2005. In a decision dated 20 July 2017, the Registrar declined to grant dispensation and ordered that security of $6,600 was to be paid by 17 August 2017.

[2] Mr Rabson now seeks a review of the Registrar's decision.

[3] The first ground of review is that the Registrar was wrong when she found Mr Rabson had not provided any evidence of impecuniosity to support his application for dispensation. Mr Rabson says there was evidence because he filed a "statement of financial means" for the purposes of obtaining a waiver of the filing fees and that would have been on the file for the Registrar to see.

[4] However, the only financial information contained in the form completed by Mr Rabson is that he is in receipt of a benefit. Far more detailed financial information, including a statement of assets and liabilities, is required in order to establish impecuniosity in the context of security for costs. No such information was provided.

[5] The second ground of review relates to the Registrar's finding that the appeal did not involve any element of public interest and lacked sufficient merit.

[6] The background to the costs order made by Faire J is as follows. Mr Rabson wanted to challenge a decision of the Judicial Conduct Commissioner regarding a complaint he had made to the Commissioner against five Judges of the Supreme Court. Mr Rabson commenced judicial review proceedings in the High Court against the Commissioner as first respondent and against the five Judges as second respondent. The Judges applied for an order to remove them as respondents. They also sought an order for increased costs on the grounds that Mr Rabson was well aware from a previous court decision that the Judges should not have been cited as respondents.

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[1] *Rabson v Judicial Conduct Commissioner* HC Wellington CIV-2017-485-133, 8 June 2017 (Minute of Faire J).

[7] Mr Rabson says he did not oppose the application for removal and abided the decision of the Court.

[8] By minute dated 7 April 2017, Ellis J granted the application for removal and increased costs. Counsel for the Judges then filed a memorandum dated 29 May 2017. The memorandum advised that although an increase in scale 2B costs of 20 per cent would have been appropriate, amounting to $1,605.60, the Judges' actual costs were less than that. The actual costs were only $777.50 and on the basis of the rule that an award of costs should not exceed actual costs,[2] an order was sought for the lesser sum of $777.50. A draft order for sealing was enclosed with the memorandum.

[9] The memorandum was put before Faire J. He issued a minute stating that he considered $777.50 was an appropriate amount and directing that an order for costs could be sealed for that sum.

[10] Mr Rabson's appeal is based on several arguments. The first is that Faire J's costs order is unlawful because it relied upon an unlawful minute of Ellis J. The reason Mr Rabson says the latter was an unlawful minute is because it was contained in the text of an email from the High Court Registry. This ground of appeal is untenable. What matters is that the Judge made the direction she did and that it was accurately recorded in the email.

[11] The second argument is that neither Faire J nor Ellis J gave any reasons for their decision. This argument is similarly untenable. In her minute, Ellis J expressly stated that she was making orders in accordance with specified paragraphs in a joint memorandum that had been filed by the respondents. The specified paragraphs in turn referred to a memorandum filed by the Judges' counsel on 3 April 2017 which contained the reasons why increased costs were warranted. In making the orders she did in reliance on those paragraphs, Ellis J clearly endorsed and accepted the reasons. Justice Faire in turn recorded that he had considered Ellis J's minute as well as the memorandum of 29 May 2017 from the Judges' counsel which had reiterated the reasons for increased costs.

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2 High Court Rules, r 14.2(f).

[12] The third argument Mr Rabson advances on appeal is that in citing the Judges as respondents, he was acting in accordance with s 9 of the Judicature Amendment Act 1972. He should therefore not have been punished by an award of increased costs, especially when he did not oppose the application for removal. As will be apparent, the argument about s 9 is not new. It is in effect a collateral attempt to re-litigate an issue that has already been decided against Mr Rabson.[3] It does not directly arise in this appeal because he is not appealing the order for removal. The fact he abided the decision and the weight that should attach to that for the purposes of a costs award is a case-specific issue.

[13] A further argument Mr Rabson raises on appeal is that the costs order was not enforceable because at the time he made it Faire J had retired and because he made the costs award in favour of the first respondent instead of the second respondent. These arguments are also devoid of merit. Although Faire J retired in December 2016, he was appointed an acting Judge from 24 April 2017 to 23 July 2017.[4] The costs order was made on 8 June 2017. On 9 June 2017, the Judge realised the mistake he had made in naming the wrong respondent. He recalled the minute and issued an amended minute.

[14] I am satisfied the appeal can fairly be described as hopeless. I consider the Registrar was correct when she found it did not raise any issue of public interest and that it is not an appeal a reasonable and solvent litigant would pursue.[5] Not only are the proposed grounds of appeal weak, the amount at stake is very small and much less than the likely costs of defending the appeal. It would be unjust to require the second respondent to defend the order under appeal without the usual protection as to costs provided by security.

[15] The application for review of the Registrar's decision refusing to dispense with payment of security for costs is accordingly declined.

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3 *Rabson v Judicial Conduct Commissioner* [2016] NZHC 884.
4 "Appointment of Acting Judge of High Court" (13 April 2017) 39 *New Zealand Gazette* 127.
5 See *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [20] and [35].

[16] Security for costs in the sum of $6,600 must be paid into Court by 24 August 2017.

Solicitors:
Crown Law Office, Wellington for Second Respondents