IN THE COURT OF APPEAL OF NEW ZEALAND

CA614/2016
[2017] NZCA 350

BETWEEN	MALCOLM EDWARD RABSON Appellant
AND	ATTORNEY-GENERAL Respondent

Court:	French, Miller and Cooper JJ
Counsel:	Appellant in person H M Carrad for Respondent
Judgment: (On the papers)	16 August 2017 at 2.30 pm

JUDGMENT OF THE COURT

The application for an extension of time to apply for the allocation of a hearing date and file a case on appeal is declined.

REASONS OF THE COURT

(Given by Cooper J)

[1] Mr Rabson seeks an extension of time to apply for the allocation of a hearing date and file the case on appeal in support of an appeal.[1] The appeal is against a judgment of Ellis J delivered on 30 November 2016.[2]

[2] Mr Rabson's appeal was deemed abandoned pursuant to r 43(1) of the Court of Appeal (Civil) Rules 2005 on 28 March 2017. His present application, filed on

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1 Court of Appeal (Civil) Rules 2005, r 43(2) and (3).
2 *Rabson v Attorney-General* [2016] NZHC 2876.

11 April 2017, sought an extension of "60 days to file the submissions and the case on appeal". We have treated this as an application concerning the filing of the case on appeal and for the allocation of a hearing date, those being the steps he has not taken within the time prescribed by the Rules.

[3] We have dealt with this matter on the papers following Mr Rabson's advice that he would "be relying on the papers".

[4] In the High Court Ellis J struck out an application for judicial review on the basis that it disclosed no tenable cause of action and was an abuse of process. On receipt of the High Court judgment, Mr Rabson sought leave to appeal direct to the Supreme Court. In rejecting his application that Court observed:[3]

> We do not consider there are any exceptional circumstances justifying a grant of leave in this case. We see no appearance of error in the approach taken in the High Court and we see the attempted appeal as a continuation of the abuse of process identified by Ellis J in her decision.

[5] The Supreme Court had explained earlier in the judgment that in *Greer v Smith* the Court had dismissed an application made for a review of a decision of O'Regan J refusing an application for access to court documents.[4] That was on the basis that there was no statutory right to seek a review of such a decision by a single judge of that Court, and therefore there was no jurisdiction to review it.

[6] The Court then recorded that Mr Rabson, disagreeing with the Court's decision in *Greer v Smith*, had asked the Attorney-General to notify Cabinet of the Supreme Court's alleged "non-compliance" with s 28 of the Supreme Court Act 2003 (now s 82 of the Senior Courts Act 2016). The Attorney-General declined to do so and Mr Rabson made an application for judicial review of that refusal.

[7] The Supreme Court noted that Ellis J struck out the application for judicial review for three reasons, which we summarise as follows:

(a) First, that the Cabinet Manual was not independently justiciable, but even if it were the provision in it on which Mr Rabson purported to

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3 *Rabson v Attorney-General* [2017] NZSC 22 at [9].
4 *Greer v Smith* [2015] NZSC 196, (2015) 22 PRNZ 785.

rely affected only the relationship between the Attorney-General and the executive branch of government. In the circumstances there was no obligation for the Attorney-General to notify the Cabinet as claimed by Mr Rabson.

(b) Second, Mr Rabson's claim was concerned with the merits of the Supreme Court's decision in *Greer v Smith*, and was in effect asking the High Court to reach a different conclusion. This was impermissible.

(c) Third, Mr Rabson was seeking to relitigate a matter already determined in *Greer v Smith* by means of a collateral attack.

[8] The Supreme Court rejected a direct appeal on the basis that there were no exceptional circumstances justifying a grant of leave. However, the reasoning constitutes a clear endorsement of Ellis J's approach. Its terms are such that this Court would be compelled to the same conclusion. It follows that for present purposes we need to assess Mr Rabson's application for an extension of time on the basis that he is seeking to raise arguments on appeal that are untenable.

[9] In *Almond v Read*, the Supreme Court confirmed that the merits of a proposed appeal may be relevant in the exercise of the discretion to extend time.[5] It said that there were three qualifications to that principle:[6]

(a) instances in which the merits of a proposed appeal will be overwhelmed by other factors (such as the length of the delay and prejudice);

(b) cases where there has been insignificant delay as a result of a legal adviser's error and the proposed respondents had suffered no prejudice beyond the fact of an appeal; and

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5 *Almond v Read* [2017] NZSC 80 at [39]. Although the Court was there concerned with an application for extension of time in which to bring an appeal, the principles are equally applicable to an application for extension of time in which to apply for a hearing date and file a case on appeal.

6 At [39].

(c) the Court should only reach a view about the merits where they are obviously very strong or very weak.

[10] The Court noted:[7]

> … a decision to refuse an extension of time based substantially on the lack of merit of a proposed appeal should be made only where the appeal is clearly hopeless. An appeal would be hopeless, for example … where there is an abuse of process (such as a collateral attack on issues finally determined in other proceedings) or where the appeal is frivolous or vexatious. The lack of merit must be readily apparent.

[11] These words are apt to describe the present appeal. The appeal would be hopeless, it would constitute an abuse of process and is frivolous and vexatious. To allow it to continue would be to waste judicial time and resources, as well as causing unnecessary cost to the respondent.

[12] In these circumstances, Mr Rabson's application for an extension of time is declined. The appeal remains abandoned pursuant to the deeming provision under r 43.

Solicitors:
Crown Law Office, Wellington for Respondent

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7 At [39(c)].