

IN THE COURT OF APPEAL OF NEW ZEALAND

CA314/2013
[2014] NZCA 556

BETWEEN JEREMY JAMES MCGUIRE
Applicant

AND THE MINISTRY OF JUSTICE
Respondent

Court: Ellen France P, Harrison and Stevens JJ

Counsel: Applicant in person
P J Gunn for Respondent

Judgment: 19 November 2013 at 10.00 am
(On the papers)

JUDGMENT OF THE COURT

- A The application for an extension of time to appeal is dismissed.**
- B The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Stevens J)

Introduction

[1] The applicant, Mr McGuire, seeks an extension of time in which to appeal against a decision of Dobson J in the High Court at Wellington.¹ Dobson J dismissed Mr McGuire's application for judicial review of decisions in relation to him by the

¹ *McGuire v Ministry of Justice* [2013] NZHC 894 [High Court decision].

Legal Services Agency's Cancellation Consideration Panel (the Panel) and subsequently the Cancellation Review Panel (the Review Panel).²

[2] Mr McGuire filed a Notice of Appeal on 21 May 2013. Two extensions of time were granted on application under r 43 of the Court of Appeal (Civil) Rules 2005 (the Rules).³ The extended time required compliance with r 43(1) by 22 December 2013. Mr McGuire failed to comply. His appeal was deemed abandoned from that date. A notice of abandonment was issued.

[3] Mr McGuire purported to file a further application for an extension of time under r 43 on 15 April 2014, arguing his application was valid based on a particular calculation of the number of days having elapsed. This Court formed the view that his appeal had been deemed abandoned and thus it had no jurisdiction to grant any further extension of time under r 43(3).⁴

[4] By minute, Mr McGuire was informed of that view and invited to apply pursuant to r 29A of the Rules for an extension of time in which to appeal. He made that application.⁵

Mr McGuire's submissions

[5] In respect of r 29A Mr McGuire submits he should receive an extension of time because:

- (a) his delay under r 43 was minimal, being only a day late. He says an incorrect formal notice of abandonment was issued by this Court. It would be unfair for this Court to then rely on its own mistake as a reason for disallowing his appeal;

² Pursuant to the Legal Services Act 2000, s 73(1)(d). That Act has since been repealed by the Legal Services Act 2011. The Ministry of Justice now administers legal aid according to the 2011 Act – hence the respondent is listed as the Ministry, as opposed to the Legal Services Agency.

³ Court of Appeal (Civil) Rules 2005, r 43(2)(a) and (b).

⁴ *McGuire v Ministry of Justice* CA314/2013, 21 July 2014 at [4].

⁵ Despite the filing of the r 29A application Mr McGuire maintained his submission in relation to the previous r 43 application. We will address this contention in our discussion when dealing with the issue of delay.

- (b) to refuse to grant an extension would cause him significant prejudice;
and
- (c) the prospective merits of his appeal are strong.

[6] Mr McGuire argues that Dobson J accepted there was a problem of bias, a breach of natural justice and an error of law in the initial decision of the Panel, but wrongly held these were rectified later on review before the Review Panel. He contends accordingly Dobson J's decision, and the decisions of the two Panels before that, were wrong in law. In particular he argues the Panel's decision to cancel his contract as a legal aid services provider was wrong and this could not be corrected on review, as the only correct remedy was for the decision to be reversed.

[7] Mr McGuire seeks damages for having his contract with the Legal Services Agency cancelled. He further alleges Dobson J breached s 50 of the Evidence Act 2006 in the course of making his decision (which prohibits the use of a civil judgment or finding of fact therein to prove the existence of a fact in issue in a subsequent proceeding). He says the Judge relied on statements critical of the applicant, in respect of which he now wishes to adduce evidence to disprove, and that the Judge wrongly characterised his proceeding as a challenge to the reasonableness of the substantive outcome.

[8] Therefore, he contends the interests of justice are served by granting him an extension of time in which to appeal.

The Ministry's submissions

[9] The Ministry of Justice (the Ministry) emphasises the length of the delay. Dobson J's decision was delivered on 26 April 2013. Mr McGuire's notice of appeal was filed on 21 May 2013. Two extensions of time under r 43 were granted at the applicant's request, the purpose of which was to preserve his right to appeal while he applied to be a legal aid service provider under the new regime. His application was declined on 8 November 2013. The Ministry says this was long before his appeal was deemed abandoned and before an application to extend time was barred. He had ample time to comply with r 43 and he did not.

[10] Secondly, the Ministry contends it is entitled to finality in this matter. It was cooperative initially and would suffer prejudice to have to oppose the appeal after a significant five-month delay from the applicant.

[11] Thirdly, the proposed appeal lacks merit.

Legal principles

[12] The test in considering an application under r 29A is whether granting an extension would “meet the overall interests of justice”.⁶ Relevant considerations include the length of the delay and the reasons for it, the parties’ conduct, the extent of prejudice caused by the delay and the prospective merits of the appeal.⁷

Analysis

[13] We deal with each of the relevant considerations in turn.

Delay

[14] The overall delay in Mr McGuire furthering his appeal has been extensive. He first filed his appeal on 21 May 2013. He received two separate extensions under r 43, by consent of the Court and the respondent, allowing him until 22 December 2013 to further his appeal, at which time it was deemed abandoned. The outer limit during which he could apply for an extension of time following this deemed abandonment under r 43 was 14 April 2014. Mr McGuire had ample time following the decision declining to approve him as a legal aid service provider to take steps to comply with r 43. He did not do so.

[15] His explanation for this delay rests on first, the allegation that an initial notice informing him of the deemed abandonment was incorrectly dated. He says he relied on this incorrect date to his detriment. But the notice he received, although sent to him on 13 January 2014, stated clearly his appeal had been deemed abandoned from 22 December 2013. Further, the manner in which the running of time is calculated

⁶ *My Noodle Ltd v Queenstown-Lakes District Council* [2010] NZCA 224, (2009) 19 PRNZ 518 at [19].

⁷ *Robertson v Gilbert* [2010] NZCA 429 at [21]–[25]; *My Noodle Ltd*, above n 6, at [19]–[20].

means time was not counting against him on the date he received the notice. The period between 25 December and 15 January was not calculated in terms of his delay in compliance.⁸ Confusion on his part does not excuse the delay.

[16] Mr McGuire further argues the final date for his compliance has been miscalculated because the application of the next working day rule extends that date to 15 April 2014.⁹ We have already considered and rejected this argument.¹⁰ The appeal was validly deemed abandoned. Even if it had merit, that does not explain his dilatoriness over the course of the past 11 months since he first filed his appeal, resulting in the present situation.

[17] We consider Mr McGuire has not offered a satisfactory explanation for this delay.

Merits

[18] As to the merits, Mr McGuire contends first that Dobson J held the decision of the Panel was problematic due to bias, a breach of natural justice and error of law. He submits this could not be corrected on review and contends the correct outcome was to reinstate his contract with the Legal Services Agency. In the High Court, Dobson J accepted the Panel reached its decision in reliance on the incorrect provision of the Legal Services Act 2000.¹¹ The Review Panel identified that error and proceeded relying on the correct provision in its de novo hearing. The Judge thus found the error had been corrected on review.¹² In respect of the bias claim, whilst Dobson J criticised the overlap in composition of the Panel and the Review Panel, after closely examining the procedure and resulting decision, the Judge concluded that overlap had no operative effect on the decisions reached.¹³ Dobson J considered, in the de novo hearing before the Review Panel, any potential prejudice had been rectified.¹⁴

⁸ Court of Appeal (Civil) Rules, r 43(5).

⁹ Interpretation Act 1999, s 35(6).

¹⁰ *McGuire v Ministry of Justice*, above n 4, at [4].

¹¹ High Court decision, above n 1, at [36]–[37].

¹² At [39].

¹³ At [85]–[86].

¹⁴ At [62]–[63].

[19] We agree with Dobson J that the rehearing before the Review Panel rectified any errors in the Panel's initial decision. Mr McGuire has failed to demonstrate any continuing prejudice resulting from the Review Panel's decision.¹⁵ His claim that, due to the errors in the Panels' decisions identified by Dobson J, the decisions were void from the outset is incorrect.¹⁶

[20] There was thus no reason for setting aside the decisions. It followed that no damages were warranted, contrary to Mr McGuire's claim.

[21] There is nothing in the claim that Dobson J breached s 50 of the Evidence Act. Section 50 prevents a Judge from using a finding of fact in one civil proceeding in a separate proceeding to prove the existence of a fact in issue. That principle is irrelevant here. Dobson J was undertaking a review and no proof of facts was required, nor was it undertaken. The references made by the Judge to Mr McGuire's previous litigation history were to establish the procedural history, explain the source of his complaints and assess the propriety of the decision Mr McGuire himself had challenged. Such references were both necessary and appropriate. The Court did not receive further evidence.

[22] We note finally that this Court has already heard and dismissed the applicant's appeal relating to his original breach of the Legal Services Act 2000, leading to the Panel's decision to cancel his contract.¹⁷ Dobson J noted that decision, which neither Panel had the benefit of reviewing before making their decision, supported his assessment that any error of law had been corrected by the Review Panel and resulted in no prejudice to Mr McGuire. Moreover, reference to the facts of that decision does not constitute use by this Court in the manner prohibited by s 50 of the Evidence Act. We are satisfied any challenge under that provision must fail.

[23] Dobson J concluded Mr McGuire was attempting a substantive challenge to the review decisions against him, as opposed to genuinely challenging the

¹⁵ *Calvin v Carr* [1980] AC 574 (PC) at 592; *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA) at 437–438; *Malkit Singh v Attorney-General* [2000] NZAR 136 (CA) at [15]–[18].

¹⁶ *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA) at 6–7.

¹⁷ *McGuire v Sheridan* [2011] NZCA 15.

decision-making process undertaken. His various grounds of appeal against that decision are lacking in merit and cannot succeed.

[24] Having regard to the various factors discussed above we are satisfied this is not a case where the interests of justice merit an extension of time to appeal.

Result

[25] The application for an extension of time to appeal is dismissed.

[26] The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

Solicitors:
Crown Law Office, Wellington for Respondent