IN THE COURT OF APPEAL OF NEW ZEALAND

CA738/2014
[2015] NZCA 198

BETWEEN	NICHOLAS PAUL ALFRED REEKIE Applicant
AND	ATTORNEY-GENERAL (SUED ON BEHALF OF THE DEPARTMENT OF CORRECTIONS) First Respondent
AND	ATTORNEY-GENERAL Second Respondent
AND	THE DISTRICT COURT AT WAITAKERE Third Respondent

Hearing: 11 May 2015

Court: Ellen France P, Harrison and Stevens JJ

Counsel: R S Pidgeon for Applicant
J Foster for First to Third Respondents

Judgment: 27 May 2015 at 11.30 am

JUDGMENT OF THE COURT

A The application for an extension of time to appeal pursuant to r 29A of the Court of Appeal (Civil) Rules 2005 is dismissed.

B There is no order as to costs.

REASONS

HARRISON AND STEVENS JJ

(Given by Stevens J)

Introduction

[1] This is an application for an extension of time to appeal under r 29A of the Court of Appeal (Civil) Rules 2005 (the Rules) against a judgment of Wylie J given in the High Court on 30 July 2012.[1] The application is brought following a deemed abandonment under r 43 of Mr Reekie's earlier appeal,[2] for which he has previously been granted an extension of time.[3]

[2] The respondents oppose the application. They say it is not in the interests of justice for this Court to grant Mr Reekie a second indulgence by way of an extension of time to appeal, after a deemed abandonment. They submit the delay is due to Mr Reekie's inability to pay security for costs or seek legal aid in a timely manner and, as the Supreme Court has found, there is "little of practical moment in the appeal".[4]

Background

[3] Mr Reekie seeks to appeal against a High Court judgment dismissing his claims that:

(a) he had been falsely imprisoned for a period of time in September 2002 where no warrant of commitment had yet been issued (but an oral order remanding him in custody had been made); and

(b) he had been subjected to a specific act of torture in July 2002.

[4] Mr Reekie also claimed he had been subjected to numerous specific acts over the course of his imprisonment, which constituted a breach of his right to be treated

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1 *Reekie v Attorney-General* [2012] NZHC 1867 [High Court judgment].
2 Court of Appeal (Civil) Rules 2005, r 43(3).
3 *Reekie v Attorney-General* [2013] NZCA 318 [Extension of time judgment].
4 *Reekie v Attorney-General* [2014] NZSC 63 at [65] [Supreme Court judgment].

with humanity and dignity.[5] Wylie J dismissed the majority of these claims. Only four claims were upheld.[6] Declarations were granted under s 23(5) of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) in respect of the breaches found, but a compensatory award was declined.[7]

[5] Mr Reekie filed an appeal on 24 August 2012. The notice of appeal filed was inadequate in material respects and he was directed to file an amended notice of appeal by 23 November 2012 or his appeal would be treated as abandoned. Mr Reekie failed to file an amended notice of appeal on time, and subsequently applied for an extension of time. This Court granted the application to extend time to appeal, noting it involved granting Mr Reekie an indulgence on the basis the delay in filing the amended notice of appeal was short and the respondents were not prejudiced.[8] The ensuing amended notice of appeal was filed on 7 December 2012.[9]

[6] Mr Reekie is a sentenced prisoner and is impecunious. Until recently he chose to be self-represented. According to his affidavit in support of the application, he had earlier decided not to apply for legal aid for the appeal.[10] The Registrar declined to waive security for costs and required the applicant to pay security of $5,880.00. On 6 May 2013 this Court dismissed an application to review the Registrar's decision.[11] Mr Reekie appealed to the Supreme Court. Leave was granted but the substantive appeal was dismissed on 29 May 2014, the Supreme Court finding it would not be just to require the respondents to defend the judgment without security.[12] An application to recall that decision was dismissed by the Supreme Court on 30 July 2014.[13]

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5 In breach of New Zealand Bill of Rights Act 1990, s 23(5).

6 All of these claims were examined in detail and were the subject of evidence before Wylie J: High Court judgment, above n 1, at [138]–[275]. The summary of his findings appears at [276].

7 At [283]–[290].

8 Extension of time judgment, above n 3, at [8].

9 Recorded under the file number CA532/2012.

10 See Supreme Court judgment, above n 4, at [66] where the Supreme Court noted "[t]he appellant has chosen not to apply for legal aid. We appreciate that he had difficulties over legal aid in relation to the proceedings at first instance, but there would have been no impediment to him applying for aid on the appeal. Indeed, it is apparent from what he told us that he gave consideration to doing so."

11 *Reekie v Attorney-General* [2013] NZCA 131 per White J.

12 Supreme Court judgment, above n 4.

13 *Reekie v Attorney-General* [2014] NZSC 98.

[7] On 30 May 2014, the appeal was deemed abandoned pursuant to r 43. Mr Reekie was out of time for applying for a hearing date, filing a case on appeal and applying for an extension of time to do so. Mr Reekie was advised of the deemed abandonment by way of notice of result dated 25 August 2014.

[8] On 24 November 2014 the Court declined to review the Registrar's decision that the appeal was abandoned under r 43. Mr Reekie was directed by way of a minute of this Court to apply for an extension of time to appeal under r 29A if he wished to proceed with the appeal.[14]

[9] Mr Reekie then filed this application for an extension of time for filing an appeal under r 29A and two affidavits in support.

[10] Mr Reekie has sought legal aid for an appeal but his application has been declined. Mr Reekie has applied for a reassessment of the decision to decline legal aid. His application is on hold pending the outcome of this application.

Applicable legal principles

[11] There is no dispute that this Court has jurisdiction under r 29A to grant an extension of time despite the deemed abandonment of an appeal under r 43. Neither is it disputed that the overall test is whether the grant of an extension would "meet the overall interests of justice".[15] As this Court said in *Robertson v Gilbert*, the overarching consideration in determining whether to grant an extension is where the interests of justice lie.[16]

[12] This Court in *Sexton v Rice Craig* held it will be rare in deemed abandonment cases for it to exercise its discretion in the interests of justice.[17] The case will need to be compelling and the hurdle is a high one. The discretion should not be exercised in a way that undermines the objectives of r 43, those being to promote

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14 *Reekie v Attorney-General* CA532/2012, 24 November 2014 (per Ellen France P).

15 *Havanaco Ltd v Stewart* (2005) 17 PRNZ 622 (CA) at [5], citing *State Insurance Ltd v Brooker* (2001) 15 PRNZ 493 (CA) at [9] and *French v Public Trust* CA197/04, 25 November 2005 at [14].

16 *Robertson v Gilbert* [2010] NZCA 229 at [24], noting the affirmation of that principle by this Court in *My Noodle Ltd v Queenstown-Lakes District Council* [2009] NZCA 224, (2009) 19 PRNZ 518 and *Barber v Cottle* [2010] NZCA 31.

17 *Sexton v Rice Craig* [2007] NZCA 200 at [31].

reasonable expedition in bringing appeals for hearing, which assists in the efficient operation of the Court and promotes fairness to respondents.[18] Writing for the Court, Arnold J said:

> [31] … the Court's discretion under r 29(4) should not be exercised in a way that undermines the objectives of r 43. As a consequence, it will be rare in deemed abandonment cases that the Court will exercise its r 29(4) discretion. The case for the exercise of the discretion will need to be compelling. The Court must reach an overall assessment in the light of all relevant considerations. These will include the explanation for the delay and for the failure to apply for an extension under r 43, and the merits of the proposed appeal. Other factors will also be relevant, for example, prejudice to the respondent. The hurdle is a high one.

[13] An overall assessment must, therefore, be made in this case in light of these relevant considerations.[19]

Revised grounds for application for leave to extend time

[14] The essential bases on which Mr Reekie seeks leave to extend time to file his appeal are:

(a) It would not prejudice the respondents.

(b) The delay caused by the deemed abandonment (due to the failure to file the case on appeal and seek a hearing date in time) was due to inadvertence.

(c) The appeal is not meritless.

(d) It would be in the interests of justice to hear the appeal as it has wider implications for other prisoners and would properly vindicate Mr Reekie's rights.

[15] Mr Reekie's counsel, Mr Pidgeon, has since proposed new grounds of appeal, limited to alleging the following errors in the High Court judgment:

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[18] At [28].

[19] See further discussion and application of these principles in *Siemer v Stiassny* [2009] NZCA 624 at [25]–[27] and *Orlov v Chief Executive of the Ministry of Social Development* [2010] NZCA 587 at [13].

(a) The failure to grant compensation for the established breaches.

(b) The failure to find there was false imprisonment during the period of 9–25 September 2002 on the basis:

(i) there was no warrant of commitment; and

(ii) the applicant did not consent to an adjournment in excess of eight days;

(c) The finding Mr Reekie's containment in isolation was not a breach of ss 9 and 23(5) of Bill of Rights Act ,in particular in light of this Court's decision in *Vogel v Attorney-General*.[20]

(d) Finding that the applicant had not attempted to use any of the specified internal and external complaint mechanisms.

[16] At the hearing of the application, Mr Pidgeon candidly accepted that ground (b) had no realistic prospects of success. He contended however that grounds (a), (c) and (d) were at least arguable and the appeal should be allowed to proceed. He advised the Court that if he remained instructed as counsel only these three grounds would be pursued.

Supreme Court assessment

[17] When the Supreme Court considered the appeal from this Court seeking to review the Registrar's decision ordering for security for costs, the merits of the proposed appeal were discussed. Giving judgment for the Court, William Young J said this:

> [64] The appellant's appeal is not hopeless. There is, for instance, considerable uncertainty about what happened in 22 July 2002 in the District Court and for this reason, along with others, there is scope for argument as [to] the legality of the appellant's detention between 9 and 25 September 2002. As well, the general treatment claims covered so much ground and deal with such unusual circumstances that it is possible that there might be

[20] *Vogel v Attorney-General* [2013] NZCA 545, [2014] NZAR 67.

some revision of some aspects of the Judge's findings of fact. There could also be argument as to whether the Judge was right in respect of remedies.

[65] On the other hand, there is little of practical moment in the appeal:

(a) Contrary to the appellant's submissions to us, there was no prospect of his being allowed bail in the period between the expiry of his prison sentence on 9 September 2002 and his appearance on 25 September 2002. So if the complexities associated with his custodial status in the period between the expiry of his sentence of imprisonment on 9 September and his appearance in court on 25 September had been appropriately addressed, it is inevitable that he would have stayed in custody. The appellant has thus suffered no perceptible prejudice. As well, what happened is not of continuing public significance given the very particular circumstances of the case and changes in the legislative scheme.

(b) The likelihood of the Court of Appeal interfering in a substantial way with the findings of fact made by the Judge in respect of the mistreatment claims is at best remote. Most of the findings made by the Judge were of fact and credibility. Nothing the appellant has put up suggests that there is any probability of those findings being subject to substantial revision. Similar considerations apply to the Judge's conclusions as to remedy.

(c) The events which give rise to the appellant's mistreatment claims took place so long ago as to be of largely historic interest and of little or no practical significance to the appellant. This consideration also bears significantly on the issue whether prosecution of the appeal would have associated public benefits in terms of the vindication of the rights of the appellant (and of other prisoners) under the New Zealand Bill of Rights Act.

[18] As the false imprisonment ground is no longer pursued, the observations at [65](a) are not relevant. We discuss the conclusions at [65](b) and (c) in our evaluation below.

Our evaluation

[19] We are satisfied that the three remaining grounds Mr Reekie wishes to advance have extremely limited prospects of success. Given the high threshold for on a successful application under r 29A, we do not consider it is in the interests of justice to grant an extension of time in which to appeal. We address each ground in turn.

Compensation

[20] In the High Court, Wylie J found the Department of Corrections had breached Mr Reekie's rights under s 23(5) of the Bill of Rights Act in four respects. In respect of these breaches, Wylie J held compensation was precluded by s 13 of the Prisoners' and Victims' Claims Act 2005.[21] The following declarations were made:[22]

> … the Department of Corrections' actions in:
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> (a) restraining Mr Reekie's ankles on the tie-down bed in the High Care Unit at Auckland Prison between 3 May 2002 and 11 September 2002;
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> (b) holding Mr Reekie in isolation cells without windows in the High Care Unit at Auckland Prison between 3 May 2002 and 11 September 2002;
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> (c) denying Mr Reekie recreation time which enabled him to undertake physical exercise while he was being held in the High Care Unit at Auckland Prison between 3 May 2002 and 11 September 2002; and
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> (d) strip searching Mr Reekie on a routine basis when he was taken in or out of his cell, in either Auckland Prison or Auckland Central Remand Prison, between 3 May 2002 and 20 August 2003, without considering the necessity for each search, or available alternatives other than a strip search,
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> were in breach of s 23(5) of the New Zealand Bill of Rights Act 1990.
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> [291] I do not extend the declarations in (a), (b) and (c) above to the time that Mr Reekie spent in the High Care Unit in 2003, because there was little or no evidence given in relation to that period.

[21] Wylie J correctly held that the grant of a remedy for breach of a provision of the Bill of Rights Act is discretionary.[23] The Court's task in the exercise of its remedial discretion is to provide an effective remedy in respect of the right breach.[24] The purpose of appropriate remedial relief is threefold: to vindicate rights, to deter the authorities from future breaches and to denounce the breaches concerned. It is

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21 At [289], finding specifically the claim was precluded by s 13(1)(a) of the Prisoners' and Victims' Claims Act 2005.

22 At [290].

23 At [283]. See *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [368] per McGrath J and *Attorney-General v Van Essen* [2015] NZCA 22 at [84]–[86].

24 *Taunoa v Attorney-General*, above n 23, at [255]–[259] per Blanchard J.

not to punish the State for the breach.[25] Thus the Court should strive to find a remedy that is effective, appropriate and proportionate.[26]

[22] Wylie J applied the correct legal principles as set out by the Supreme Court in *Taunoa v Attorney-General*. He rightly acknowledged a declaration of breach is a remedy of considerable potency.[27] While the Supreme Court accepted there might be some argument as to the correctness of the remedies granted, Wylie J was engaged in a strongly discretionary area. He sat through an eight-day trial where all facts material to relief were comprehensively canvassed. The Supreme Court also emphasised there was "little of practical moment" in the appeal and the likelihood of interference in a substantial way on appeal with the Judge's conclusions as to remedy were, like with other factual findings, "at best remote".[28]

[23] We agree and consider the merits of this aspect of the proposed appeal would not justify an extension of time. We add that even if compensation were to be considered, the respondents' liability would be subject to the provisions of the Prisoners' and Victims' Claims Act. This topic is addressed below. We conclude that the case for an extension of time to argue for an expanded remedy in respect of the breaches acknowledged is not compelling.

Alleged confinement in isolation

[24] With this proposed ground of appeal Mr Reekie first faces the difficulty of overturning the Judge's factual findings.[29] Second, as the Supreme Court observed, any mistreatment claims arose "so long ago as to be of largely historic interest and of little or no practical significance".[30] Mr Pidgeon did not draw our attention to any specific evidential material to demonstrate that the trial Judge fell into error on these particular factual determinations.

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25 At [284]. See also *Attorney-General v Van Essen*, above n 23, at [82]–[83].
26 *Vogel v Attorney-General*, above n 20, at [71].
27 At [285].
28 Supreme Court judgment, above n 4, at [65].
29 At [150]–[157], specifically the findings that his isolation was reassessed on regular occasions and that on numerous occasions he requested and forcibly insisted he remain in isolation in the High Care Unit.
30 At [64].

[25] Even if Mr Reekie were able to point to some minor point of factual difference from the Judge's findings, we see no realistic prospect of this Court interfering in a substantial way. In any event, the outcome would likely be a further declaration of rights in respect of events that now took place many years ago. Further, in terms of obtaining compensation for any such breach, Mr Reekie's prospects must also be assessed in the light of our analysis of the Prisoners' and Victims' Claims Act, to which we now turn.

Prisoners' and Victims' Claims Act

[26] Mr Pidgeon placed considerable emphasis on the contention that there is a genuine question of law as to how s 13 of the Prisoners' and Victims' Claims Act applies to Mr Reekie. In the High Court, Wylie J seems to have approached s 13 by concluding the Court may not award any compensation unless it is satisfied that the prisoner has made reasonable use of all of the specified internal and external complaint mechanisms reasonably available to him, to complain about the act or omission on which the claim is based, and has not obtained the redress that the Court considers effective.[31] Mr Butler, amicus in the Supreme Court, submitted that a close reading of the Act suggested that the reference to complaint mechanisms were alternatives and only one avenue needs to have been used, rather than "all" avenues.

[27] Even if this were the correct interpretation of s 13, Mr Reekie faces further difficulties with the facts. Wylie J held as follows:

> [287] Here, Mr Reekie did complain to the inspector about his restraint on the tie-down bed on 8 July 2002. He did not specifically complain about the fact that he was restrained by his ankles. Nor did he complain about being restrained by his ankles on any other occasion. He did not make any complaints about being held in isolation cells without windows, about being denied appropriate recreational time, or about being strip searched.
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> [288] It was clear from the evidence that Mr Reekie was very familiar with the prison's internal complaints system, the inspectorate and the Ombudsman. Indeed, it was clear he was a frequent complainant. Further, he had the opportunity to complain to the inspector in person when the inspector visited the High Care Unit in August 2002, and to the Ombudsman in person, when he saw the Ombudsman in the unit on 5 June 2002.

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[31] At [286].

[28] Mr Pidgeon has suggested in his written submissions that Mr Reekie did make reasonable use of certain available specified internal and external complaint mechanisms. He referred to a complaint to a nurse regarding certain abuse and another complaint made to a guard, Mr Karl Manning. However, at the hearing Mr Pidgeon fairly accepted that he could not point to any evidence of specific complaints made by Mr Reekie to either the nurse or Mr Manning in relation to the matters in respect of which declarations were granted and in respect of which compensation is now sought. Thus there exists a factual deficit, which is critical to removing the bar (in s 13) on the Court's ability to award compensation. It would therefore follow that Mr Reekie's prospects of securing a right to compensation under the Prisoners' and Victims' Claims Act are negligible. This outcome is consistent with the conclusions of this Court in *Vogel v Attorney-General*.[32]

Other matters

[29] Mr Pidgeon referred to the absence of prejudice to the respondents. Counsel for the respondents accepts there is no prejudice arising from the delays. Mr Reekie has explained the delays by reference to his choosing to act for himself until recently. Undoubtedly this, and his unwillingness to apply for legal aid, has contributed to the delays.

[30] Next Mr Pidgeon pointed to the fact that this Court in its judgment granting an application for an extension of time to appeal in July 2013 stated "[e]ither way, if Mr Reekie is able to progress the appeal, he can expect this Court to give directions to ensure that it is heard as soon as possible, and in a focussed manner".[33] Mr Pidgeon submitted that Mr Reekie's affidavit suggests he misunderstood the position: he was expecting some further directions to be made. Hence any relevant time limits under the Rules would be preserved.

[31] We do not agree that the direction of Wild J contemplated further directions being made. Any further directions would still require Mr Reekie to comply with the relevant time limits. For various reasons this did not occur.

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[32] *Vogel v Attorney*-General above n 20, at [82].
[33] Extension of time judgment, above n 3, at [12].

[32] Finally, Mr Pidgeon contended the appeal has wider implications for other prisoners. We do not see this as a valid consideration in cases concerned with vindication of rights under the Bill of Rights Act and it is inconsistent with the authorities we have cited in this judgment.[34] The present focus should be on Mr Reekie's claims. If other prisoners have concerns about their treatment, a claim under Bill of Rights Act may be brought by them before the Courts.

Concluding comments

[33] We accept the respondents cannot point to any prejudice from the delays that have occurred in bringing this appeal. However, we are satisfied that none of the factual or legal matters raised by Mr Reekie warrants the grant of an extension of time to appeal. The merits do not support that course. For the reasons set out above, as well as those identified earlier by the Supreme Court, we consider it is not in the interests of justice to grant the application.

Result

[34] The application for an extension of time to appeal pursuant to r 29A of the Court of Appeal (Civil) Rules 2005 is dismissed.

[35] Although Mr Reekie has failed in his application we consider the fairest course on costs is to let costs lie where they fall. There is no order as to costs.

ELLEN FRANCE P

[36] I do not consider that granting an extension of time in this case will undermine the objectives of r 43. I would extend time because:

(a) There is no prejudice to the respondent in doing so.

(b) Mr Reekie is now represented and, as a result, the appeal would be a confined one.

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[34] See above at [20]–[23].

(c) The proposed appeal, as now advanced, is not in the hopeless category and the issues about the appropriate remedy for breaches of prisoners' rights under the Bill of Rights Act potentially have broader application.

(d) Some of the delay is explained.

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