IN THE SUPREME COURT OF NEW ZEALAND SC47/2013

BETWEEN	NICHOLAS PAUL ALFRED REEKIE
	Appellant
AND	THE ATTORNEY-GENERAL
	First Respondent
AND	THE ATTORNEY-GENERAL
	Second Respondent
AND	THE DISTRICT COURT AT WAITAKERE
	Third Respondent

SC102/2013

BETWEEN	NICHOLAS PAUL ALFRED REEKIE
	Appellant
AND	THE CHIEF EXECUTIVE DEPARTMENT OF CORRECTIONS
	First Respondent
AND	VISITING JUSTICE TO SPRING HILL CORRECTIONAL FACILITY
	Second Respondent

MEMORANDUM OF COUNSEL FOR THE FIRST AND SECOND RESPONDENTS
4 December 2013

CROWN LAW
TE TARI TURE O TE KARAUNA

PO Box 2858
WELLINGTON 6140
Tel: 04 472 1719
Fax: 04 473 3482

Contact Person:
Cheryl Gwyn / Jane Foster
Email: Cheryl.Gwyn@Crownlaw.govt.nz / Jane.Foster@Crownlaw.govt.nz

MAY IT PLEASE THE COURT:

1. As requested by the Court, in the hearing on 27 November 2013, this memorandum discusses:

   1.1 The history of the rule for security for costs in the Court of Appeal; and

   1.2 The jurisdiction of the Court of Appeal under s 61A of the Judicature Act 1908.

History of security for costs in the Court of Appeal

2. A rule that presumptively requires security for costs in the Court of Appeal, but also provides for a discretion to dispense with or reduce security, has been in existence in New Zealand since 1882.[1] A full list of the rules for security for costs is set out in the Appendix.

3. The rule, and its application, has remained substantively the same, in the following respects:

   3.1 The presumption that security will be paid on appeal;

   3.2 Exceptional circumstances are required to justify a waiver or reduction in security;

   3.3 Impecuniosity, while relevant, will not by itself justify a waiver or reduction; and

   3.4 The interaction between legal aid (or *in forma pauperis*) and security for costs.

Application of the rules on security for costs

Application of current rule

4. Security for costs is currently set by the registrar of the Court of Appeal under r 35 of the Court of Appeal (Civil) Rules 2005. There is a presumption that security for costs will be paid on appeal,[2] but the appellant

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1 Court of Appeal Act 1882, sch, cl 18. This memorandum discusses security for costs from the 1882 rule onwards. There is an earlier rule, the Court of Appeal Act 1862, s 60 (set out in the Appendix), but it is not clear how it applied and there is no case law on its application.

2 Court of Appeal (Civil) Rules, r 35(2).

can apply to the registrar for a reduction or wavier in security.[3] This decision is reviewable by a single Judge of the Court of Appeal.[4]

5. There must be exceptional circumstances to justify the waiver.[5] In identifying exceptional circumstances, relevant considerations include the nature of the proceeding and significance of the matters raised in it; the strength of the appellant's case; and the appellant's impecuniosity.[6] Impecuniosity alone is not enough to justify a waiver.[7]

Application of the rules before 2005

6. The presumption that security for costs will be paid on appeal was first recognised by the Court of Appeal in 1888.[8]

7. Security for costs was set "to the satisfaction" of the registrar of the Court appealed from.[9] The appellant had the ability to apply to the Court appealed from for a reduction or waiver of security.[10] The decision of the High (or Supreme) Court as to dispensation or reduction was not open to review by or appeal to the Court of Appeal.[11] This differs from the current position, as set out in paragraph [5] above.

8. As with the current rule, security was reduced or dispensed with only in special or exceptional circumstances.[12] The onus was on the appellant to

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3 Court of Appeal (Civil) Rules, r 35(6).

4 Judicature Act 1908, s 61A(3).

5 *Fava v Zaghoul* [2007] NZCA 498, (2008) PRNZ 943 at [9].

6 See [18.3] of the respondent's submissions, dated 8 November 2013.

7 *Fava v Zaghoul* [2007] NZCA 498, (2008) PRNZ 943 at [9]. See also *Brown v Attorney-General* HC Auckland CIV-1998-404-181, 12 May 2003, raised by the Court during the hearing. In *Brown* the Court was prepared to waive security for an impecunious appellant but noted at [12]: "I would accept that even in the case of impecuniosity, waiver might properly be refused where an appeal clearly has no prospects of success. But to deny the right of at least one appeal in a case where appropriate grounds for appeal are put forward, solely on the basis that the appellant could not provide security for that appeal, seems to me contrary to justice." The Court then went on to (at [13]-[19]) to consider the prospects of success of the appeal.

8 *Young v Harper* (1888) 7 NZLR 180 (CA). See also Wilfred Sim *Practice and Procedure* (10th ed, Butterworths, Wellington, 1966) at 458.

9 This is the position in all rules pre-2005. Only under the 2005 rule is security set by the registrar of the Court of Appeal. It appears the initial decision on security was made by the registrar, although see *Robertson v Howden* (1891) 10 NZLR 471 (CA), where security for costs was ordered by Williams J in chambers.

10 *Orford v Moore (No 2)* (1908) 27 NZLR 727 (HC) at 728.

11 See *Taitumu Marangataua v Patena Kerehi* (1911) 30 NZLR 1049 (CA) at 1052, 1055; *James v Mabin (No 1)* [1929] NZLR 401 at 404 and *McGechan on Procedure* (looseleaf ed, Brookers, updated to 8 October 2003) at [CA11.12].

12 *Hamilton v Bank of New Zealand* (1903) 7 GLR 276 (CA) at 277; *Official Assignee v Harding* (1914) 16 GLR 597 at 598; *Russell v Stainton Company Ltd* [1922] GLR 422 (SC) at 423: "I think that these cases [*Hamilton* and *Official Assignee*] establish that the discretion to entirely dispense with security should be exercised only under very exceptional circumstances". See also *Bernard v Space 2000 Ltd* (2001)15 PRNZ 138 (HC) at [32]: "It is well established that security for costs should not be dispensed with except in exceptional circumstances" and *Fava v Zaghoul* [2007] NZCA 498, (2008) PRNZ 943 at [9].

satisfy the Court that those circumstances existed.[13] Special circumstances included:

8.1 Whether the point was novel and important;[14]

8.2 Whether the appeal was not frivolous "but raised a substantial and very arguable question of law" and the appellant was unable to pay the full amount of security;[15] and

8.3 Impecuniosity, which while relevant, was not in itself enough to justify a waiver, although it could be a reason to reduce the quantum of security.[16]

9. Other relevant considerations included the potential cost to the respondent in the event of the appeal being unsuccessful.[17]

Impecuniosity and legal aid

10. As well as the discretion to reduce or dispense with security for costs there has always been provision for some form of legal aid. Before 1969, an appellant could bring the appeal *in forma pauperis*.[18] In 1969, a legislative scheme for legal aid was introduced.[19]

11. The interaction between security for costs and *in forma pauperis* and legal aid respectively is similar.

12. Under the *in forma pauperis* regime, if the appellant was impecunious but had sufficient assets to prevent him or her from appealing *in forma pauperis*,[20] the

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13 *Russell v Stainton & Co Ltd* [1922] GLR 422 (SC) at 423.

14 *Hamilton v Bank of New Zealand* (1903) 7 GLR 276 (CA) at 277.

15 *Orford v Moore (No 2)* (1908) 27 NZLR 727 (HC) at 278; *Wright v Wright* [1953] NZLR 6.

16 *Orford v Moore (No 2)* (1908) 27 NZLR 727 (HC) where impecuniosity and a strong case justified reducing security; *Russell v Stainton Company Ltd* [1922] GLR 422 (SC) at 423: "The fact that the plaintiff is impecunious and cannot find the security fixed by this rule is not sufficient ground for dispensing with all security". See also *Bernard v Space 2000 Ltd* (2001) 15 PRNZ 138 (HC) at [34] and *Fava v Zaghoul* [2007] NZCA 498, (2008) PRNZ 943 at [9].

17 *Hellyar v Morrison* [1931] GLR 661; [1932] NZLR 321 (SC) at 328.

18 *In forma pauperis* was the first statutory provision for state-funded legal aid. It was first enacted by Henry VII in 1495, *Statutes of the Realm*, Champter XII at 578. It applied only to civil proceedings. The first New Zealand rules for appealing *in forma pauperis* were gazetted in 1903 (*New Zealand Gazette* 1903 at 2388). The Court of Appeal Rules 1955, rule 50, also provided for leave to appeal *in forma pauperis*. If the person was entitled to appeal *in forma pauperis* (see below, at footnote 21), he or she was entitled to court-appointed counsel and could bring the civil litigation free of charge.

19 Legal Aid Act 1969. This was followed by the Legal Services Act 1991, Legal Services Act 2000 and the current Legal Services Act 2011.

20 Under the 1903 rules, a person could appeal *in forma pauperis* on the proof that he or she did not have more than £25, his wearing-apparel and the subject of the cause or matter expected. Under the 1955 rules, a

proper course was to apply to have security waiver or reduced.[21] If an appeal was brought *in forma pauperis*, an order for security for costs would not be made.[22]

13. After the introduction of legal aid, a grant of legal aid was an important consideration in reducing or waiving security.[23] Following the introduction of the Court of Appeal (Civil) Rules 2005, a legally aided appellant is not required to pay security for costs.[24]

Judicature Act 1908, section 61A

14. Under the current rules, the registrar's decision on security for costs is reviewable by a single Judge of the Court of Appeal under s 61A(3) of the Judicature Act 1908. In the hearing on 27 November 2013, the question was raised whether the reviewing Judge's decision under s 61A(3) could be reviewed by a panel of Court of Appeal Judges under s 61A(2).

15. Section 61A was introduced in 1977 and has remained substantively the same. Since then, there is little case law on the extent of the Court of Appeal's review powers under s 61A(2). The only case counsel has been able to find on point is *Siemer v Stiassny*,[25] where this Court considered, *obiter*, that s 61A(2) is expressly limited to orders make by a single Judge pursuant to s 61A(1). There is no power for the Court to review decisions of a single Judge under s 61A(3).[26]

16. Counsel for the respondents respectfully agrees with this Court's approach to s 61A(3) in *Siemer* and considers that this reading is plain on the face of the section:

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person could not be worth more than £50, his wearing-apparel and the subject of the cause or matter expected.

21 *Keenan v Auckland Harbour Board* [1947] NZLR 185; [1947] GLR 401 (CA).

22 *Hellyar v Morrison* [1931] GLR 661; [1932] NZLR 321 (SC) at 325-326.

23 'The grant of legal aid is an important consideration as it indicates an assessment of the worth of the appeal, the likely inability of the appellant to give security and the risk the appeal right would be rendered nugatory. See *Bernard v Space 2000 Ltd* (2001)15 PRNZ 138 (HC). See also *Morrison v Upper Hutt City Council* (1997) 10 PRNZ 584 (HC) at 587: "the requirement that security for costs be given, in view of the applicant being legally aided, seems to be to be impracticable". See also *McGechan on Procedure* (looseleaf ed, Brookers, updated to 8 October 2003) at [CA11.12].

24 Court of Appeal (Civil) Rules 2005, r 36.

25 *Siemer v Stiassny* [2013] NZSC 11.

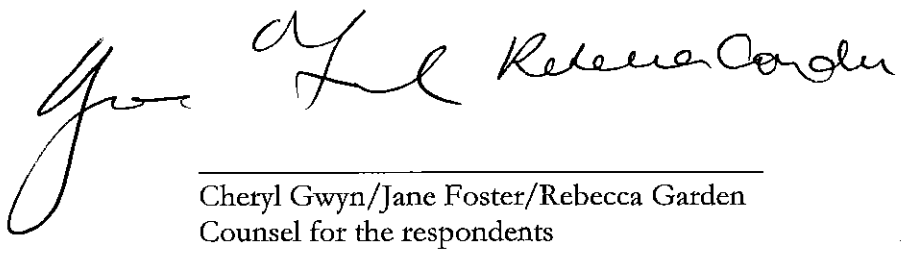
26 *Siemer v Stiassny* [2013] NZSC 11 at [4]. See also *McGechan* at J61A.03, citing *Siemer v Stiassny*.

16.1 Section 61A(2) is expressly limited to decisions under s 61A(1). Further, decisions under s 61A(1) are limited to "incidental orders" or "incidental directions" made by a Judge, which are of a different character to a decision made under s 61A(3) that is a "review of a decision of the Registrar".

16.2 The intention of s 61A appears to be to provide for a single review of the applicable orders or decisions made by a Judge or registrar. A direction or order of a Judge under s 61A(1) can be varied or discharged under s 61A(2), while a decision of a registrar can be reviewed under s 61A(3).

17. Counsel notes this interpretation aligns with the approach to reviewing security for costs under previous forms of the rules, where only one review of the registrar's decision was available. Under the old rules, the appellant could apply to the High Court to review the registrar's decision on security for costs. The decision of the High Court as to dispensation or reduction was not open to appeal to the Court of Appeal.[27]

4 December 2013



Cheryl Gwyn/Jane Foster/Rebecca Garden
Counsel for the respondents

TO: The Registrar of the Supreme Court of New Zealand.
AND TO: The appellant
AND TO: The amicus curiae

[27] See *Taitumu Marangataua v Patena Kerehi* (1911) 30 NZLR 1049 (CA) at 1052, 1055; *James v Mabin (No 1)* [1929] NZLR 401 at 404 and *McGechan on Procedure* (looseleaf ed, Brookers, updated to 8 October 2003) at [CA11.12].

APPENDIX

Court of Appeal Act 1862 – Part VI Appeals from District Courts

> Section 60 It shall be lawful for any party against whom any order of the Supreme Court shall have been made under the 102nd section of the last mentioned Act on an appeal from any District Court to give notice within six days after such order shall have been made to the other party or his Solicitor and to the Registrar of the Supreme Court of his wish to appeal to the Court of Appeal on some ground or grounds to be specifically alleged by him in such notice and if the Judge who made such order shall certify in writing that in his opinion the ground or grounds alleged in such notice are or that someone ground is fit to be argued in the Court of Appeal and if such party so wishing to appeal shall within four days after the granting of such certificate *give security for the costs of such appeal* and for the amount of the judgment if he be the defendant to the satisfaction of the Registrar of the Supreme Court then on proof of notice that such certificate and security have been given having been served upon the party appealed against the said Registrar shall transmit to the Registrar of the Court of Appeal the case agreed upon or settled under the 103rd section of the last mentioned Act along with a memorandum of the order of the Supreme Court thereon certified by the Judge who pronounces the same and the said Court of Appeal on hearing the parties or their Counsel or such party or the Counsel of such party as shall appear shall proceed to adjudicate upon such case and its judgment thereon shall be final.

Court of Appeal Act 1882 – Schedule

> 18. Due security for costs, and for the performance of the judgment of the Court of Appeal, shall, within six days after the notice of appeal had been given, be given to the satisfaction of the Registrar of the Court appealed from, unless the Court of first instance otherwise orders; and if no such security be given the notice of appeal shall be deemed abandoned.

Judicature Act 1908 – Third Schedule, Rules of the Court of Appeal

> 22. Due security for costs, and for the performance of the judgment of the Court of Appeal, shall, within six days after the notice of appeal had been given, be given to the satisfaction of the Registrar of the Court appealed from, unless the Court of first instance otherwise orders; and if no such security be given the notice of appeal shall be deemed abandoned.

Amendments:

Court of Appeal Amendment Rules 1939 – cls 4 and 5, "court of first instance" is substituted for "court appealed from", and the following is added:

> The amount for which security is to be given shall, unless the Court appealed from otherwise orders, be fixed without reference to costs allowable for any day of hearing after the first. An application to the Court appealed from may be made under this rule before or after notice of appeal has been given. Security under this rule shall not be required for the performance of the judgment appealed from, but this provision is without prejudice to the power of the Court appealed from or Court of first instance to require security on granting a stay of execution.

Court of Appeal Amendment Rules 1953 – cl 4, the time for giving security is extended from 4 to 14 days.

Court of Appeal (Civil) Rules 1955

34 Security for Costs

(1) Within 14 days after the appeal has been brought as prescribed by rule 27, due security for costs in the Court of Appeal shall be given to the satisfaction of the Registrar of the Court appealed from, unless the Court appealed from otherwise directs.

(2) If security is not so given, the notice of motion of appeal shall be deemed abandoned:

Provided that a fresh notice of motion may be given if rule 27 can be and is complied with.

(3) Unless the Court appealed from otherwise orders, the amount for which security is to be given shall be fixed without reference to costs allowable for any day of hearing after the first.

(4) An application to the Court appealed from may be made under this rule before or after notice of the motion of appeal has been served, and shall be made on notice to all parties directly affect by the appeal.

(5) Security shall not be required for the performance of the judgment or order appealed from. This subclause is without prejudice to any power of the Court appealed from or Court of first instance to require security on granting a stay of execution.

Second Schedule – Rules revoked

(1) The rules of the Court of Appeal, set out in the Third Schedule to the Judicature Act 1908

Court of Appeal (Civil) Rules 1997

11 Security for costs

(1) Unless the Court below otherwise directs,—

(a) An appellant must give security for the respondent's costs in the Court of Appeal; and

(b) The Registrar of the Court below must be satisfied with the security; and

(c) The security must be given within 14 days after the appeal has been brought.

(2) If security is given in accordance with this rule, the Registrar of the Court below must confirm to the Registrar of the Court of Appeal that the security has been given.

(3) If security is not given in accordance with this rule, the notice of appeal or application for special leave to appeal is to be treated as having been abandoned but a fresh notice of appeal may be given if rule 5 can be and is complied with.

(4) Unless the Court below otherwise orders, security may not be required to be given for costs allowable for any day of hearing after the first day.

(5) An application to the Court below—

(a) May be made under this rule before or after the notice of appeal has been served:

(b) Must be made on notice to all parties directly affected by the appeal.

(6) Security is not required for the performance of the judgment or order appealed from; but this subclause does not limit any power of the Court below or the Court of first instance to require security on granting a stay of execution.

Rule 28(a) revokes the Court of Appeal Rules 1955

Court of Appeal (Civil) Rules 2005 – current

35 Security for costs: general

(1) This rule applies to every appeal except—

(d) an appeal to which rule 36 [legal aid] applies; and

(e) an appeal where the Court has fixed security for costs under rule 27(2)(a).

(2) The appellant in an appeal to which this rule applies must, within the time specified in subclause (3), pay to the Registrar security for the respondent's cost in the Court.

(3) The time is 20 working days after the notice of appeal has been filed in the Registry.

...

(6) However, the Registrar may, on application, if satisfied that the circumstances warrant it, make an order—

(a) increasing the amount of security:

(b) reducing the amount of security:

(c) dispensing with security:

(d) deferring the date by which security must be paid.

(7) An application under subclause (6)

(a) must be made and served with 20 working days after the notice of appeal has been filed in the Registry; and

(b) may be made on an informal basis

...

R 55 revokes the Court of Appeal (Civil) Rules 1997.