IN THE SUPREME COURT OF NEW ZEALAND **SC /2016**
Wellington

UNDER **The Common Law, Equity, The New Zealand Bill of Rights Act 1990** and **s 59 of the Legal Services Act 2011**

IN THE MATTER OF **A Civil Appeal**

BETWEEN

MALCOLM EDWARD RABSON as TRUSTEE of the MALCOLM RABSON FAMILY TRUST
House 10, 618 Maungatautari Road
CAMBRIDGE
Appellant

AND

IAN BRUCE SHEPHERD AND CHRISTINE MARGARET DUNPHY
Respondents

APPLICATION FOR LEAVE TO APPEAL AND SUBMISSIONS AGAINST JUDGMENT CA51/2016 [2016] NZCA 446

5 October 2016

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The above named Appellant now comes before this Honourable Court seeking leave to appeal the Court of Appeal judgment CA51/2016 [2016] NZCA 446, dated 19 September 2016 in this matter ("**The Judgment**"):

UPON THE GROUNDS:

1. The Court of Appeal, by the Judgment, terminated the appeal despite accepting legal aid was actively being pursued and thereby denied access to the Court contrary to Common Law.

2. The Judgment failed altogether to consider the merits of the appeal it barred from reaching a hearing, and this error in law was fatal.

SPECIFIC LEGAL QUESTIONS of GENUINE PUBLIC INTEREST

A. ***In appeals where legal aid is actively being sought does it violate the right of access to justice for the Court of Appeal to prevent the appeal a hearing without any analysis of the merits of the appeal grounds being prevented?***

B. ***In what circumstances if any can the Court of Appeal lawfully prevent a first instance appeal despite expressly recognising that legal aid funding is still a live and unresolved issue?***

IN SUPPORT

3. At [6] of the Judgment, the Court of Appeal accepted Legal Aid approval and funding was still a live issue.

4. Having accepted the legal aid approval process to be a live one, to refuse to allow an extension of time for that purpose denies access to the Court and justice.

5. At [7] the Judgment gave as the Court's reason for denying the appeal that Legal Aid had not been immediately applied for but the Court failed to appropriately recognise that legal aid must be applied for by a client and be supported by a lawyer approved by Legal Services who must then certify the prospects of success. Notably, this all was done in this appeal.

6. Adding to the necessities of time this process demands, there are currently only 199 lawyers in the entire of New Zealand approved to take this appeal on Legal Aid and many

of those will not be available depending on the subject matter of the appeal and other commitments. It was impractical if not impossible for a party to "immediately" find one of these few lawyers who was willing and able to act and to then brief and instruct that lawyer. The "needle in a legal haystack" analogy of finding a legal aid lawyer was expressly raised at the Court of Appeal but ignored.

7. At [8] the Judgment gave as the Court's reason that "legal aid application was unsuccessful at the initial consideration". This has never before been a lawful requirement for an extension of time to accommodate the legal aid process and, moreover, few legal aid applications are being approved "at the initial consideration". Materially, the Court of Appeal improperly and altogether ignored ***New Zealand Law Society*** statistics[1] showing legal aid has become woefully sparse, complicated and difficult to obtain, as well as public commentary by retired Justice Sir Ron Young which included anecdotal evidence His Honour had been compelled to phone Legal Services in the middle of trial to obtain an overdue decision which threatened to disrupt the trial and a clarion call for reform with Sir Ron adding ***"In summary legal aid payments are at rock bottom."***[2]

8. At [9] of the Judgment, the Court of Appeal inexplicably relied upon the ethereal conclusion "Mr Rabson evinces no intention of paying security for costs" in circumstances where Appellants who obtain legal aid are not required to pay security for costs. "Evincing" is also far from solid ground for basing a definitive conclusion, particularly where security might alternatively be paid (in the event pursuit of Legal Aid proves unsuccessful) by creditors leapfrogged by the Respondents whose assigned unsecured debt was unlawfully granted priority by the appealed High Court judgment over secured and other unsecured creditors of the Appellant trust.

The Law of Equity

9. Collins J at the High Court gave priority to an unsecured debt assigned to the lawyer Respondents without regard to the Appellant trust's other creditors of equal or greater status, with those creditors excluded from the proceeding and no attempt made by the Court to hear from any of them. This fact is not in dispute. This High Court approach and

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[1] Lawsociety.org.nz, *Falls in family and criminal legal aid provider*, 25 August 2016
[2] *The 25th annual Harkness Henry Lecture, Waikato University, 7 September 2016*

ruling was a plain and fundamental breach of the law of equity and this forms a primary legal ground of appeal.

10. The Judgment – in preventing appeal against this evidently unlawful Collins J's ruling – failed fundamentally to address this meritorious legal ground. This was a fatal failing in a ruling issued to prevent the appeal a hearing. It is left to this Court as a last resort to determine whether long established and resolute laws of Equity can be inexplicably ignored by the highest appellate court by right in New Zealand in barring a first instance appeal right.

Taito v R déjà vu

11. The Court of Appeal, having recognised the pursuit of legal aid was ongoing and unresolved in this appeal, nonetheless thwarted the Appellant's right to obtain legal aid or to advance his appeal on the spurious basis legal aid was not granted "at the initial consideration".

12. This Honourable Court needs no reminding that the Privy Council determined in *Taito v R [2002] 3 NZLR 577* that the New Zealand Court of Appeal had acted unlawfully over many years to deny countless criminal appellants access to justice and that the Court of Appeal's wrong interpretation of the legal aid regime and its own powers at the time lay at the core.

13. After the Privy Council finding in *Taito*, compensation was sought in the domestic courts, with the Court of Appeal ruling public law damages were available to those victims unlawfully deprived their rights by the New Zealand courts under the Taito-era regime.[3] In the split decision of this Court which overturned this ruling, *Attorney General v Chapman [2011] NZSC110*, a majority concluded the subsequent establishment of the Supreme Court of New Zealand now provided a level of protection not available in the era of *Taito* legal aid deficits and relied upon this new safeguard ensuring access to justice as a reason to exempt NZ judges from remedial compliance with the New Zealand Bill of Rights Act 1990 as Parliament had enacted.[4]

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[3] *Attorney-General v Chapman* [2009] NZCA 552
[4] At [195]

14. September 2016. The following statistics and empirical evidence made available to the Court of Appeal demonstrates the profound extent to which access to justice under the current civil legal aid regime and the Court of Appeal's impatient views combined to cause an effective denial to access to justice:

14.1 In the four years since the *Legal Services Act 2011* took force the number of lawyers approved to take civil legal aid appeals has fallen from 433 to 199 (out of more than 12,000 lawyers in New Zealand).[5]

14.2 In the past five years, civil legal aid applications have dropped 56.0% and only 63.6% of these have been approved.

14.3 The Ministry of Justice announced six of the eight legal aid offices in New Zealand will be closed,[6]

14.4 Sir Ron Young publicly announced, "In summary, legal aid is at rock bottom".[7]

15. Faced with this evidence, along with the legal ground of appeal that the High Court Judgment violated a basic principle of Equity in granting an assigned and unsecured debt priority status over all other creditors (without hearing or attempting to hear from any other creditors), it is clear the Judgment prevented appeal without considering the two essential criteria - which caused a denial of access to justice and self-evidently a gross miscarriage of justice.

16. It is relevant to again refer to this Court's split decision in *Chapman* as solid support for leave in this case on the proposed legal questions.

First from the Majority opinion of McGrath and Young JJ:

> "[195] Since the Law Commission reported there have been two further developments in remedial protection. The most significant systemically is the establishment of the Supreme Court of New Zealand and a right of appeal with leave to that Court on the grounds that it is necessary in the interests of justice to hear and determine a proposed appeal.283 This provides accessibility to appellate review of the Court of Appeal that was not available at the time of the respondent's first appeal. There is accordingly now a much greater likelihood that judicial error in the Court of Appeal will be more speedily corrected on appeal."

Next, dissenting Justice Anderson –

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[5] Lawsociety.org.nz, *Falls in family and criminal legal aid provider*, 25 August 2016
[6] Ministry of Justice, 8 September 2016
[7] *the 25th annual Harkness Henry Lecture*, at Waikato University, *7 September 2016*

"[218] Their Lordships indicated that only procedural error, amounting to a failure to observe one of the fundamental rules of natural justice, could constitute a relevant infringement of rights. It is, I think, implicit in their Lordships' reasons that even such an error would not found liability if it were one capable of correction by an appellate court. The Judicial Committee also indicated that an error giving rise to public law liability would be a rare event. I believe that will be and should be the case in New Zealand, with the establishment of the Supreme Court and the greatly improved access to justice that entails. Further, the administration of legal aid at appellate levels has been much improved since the time when Mr Chapman first tried to appeal to the Court of Appeal."

Finally, Chief Justice Elias, also dissenting:

> "[93] Whatever the difficulties with cases at the margin, I consider that Mr Chapman's claim is within the scope of the direct public law liability of the State for breach of rights. In *Maharaj*, the damages remedy was appropriate because correction on appeal (except through special petition of the Privy Council) was not available within the legal system of Trinidad and Tobago. In respect of the appellants subject to the *Taito* procedures, rights of appeal and fundamental natural justice were held by the Privy Council to have been effectively denied by the judicially-adopted processes followed."

17. Despite this Honourable Court's split in *Chapman* on the legal availability of public law damages for breaches of rights to justice by New Zealand judges, there was unanimity that access to justice on appeal is essential, that it is a primary role of this Court to provide it where the Court of Appeal fails to do so, and that the misuse of the legal aid system which gave rise to the judicial abuses in the *Taito* era are an affront to natural justice which this Court has publicly committed to ensuring are not repeated.

18. This remedy, asserted by all members of this Court as their significant duty, is simply what this application seeks in an appeal where the parallels with systemic court abuses of criminal law the Privy Council found to have been committed in New Zealand's recent history are submitted to be now occurring in the civil system and this is plainly evident.

Leave is justified under Section 13 of the Supreme Court Act 2003 as:

19. Preventing appeal against a High Court authority which gives an unsecured assigned creditor who happen to be NZ lawyers priority over all other unsecured and secured creditors without any attempt to hear from or consider those creditors is a matter of general commercial importance because it violated firmly established Equity Law upon which the commercial sector particularly relies and assesses domestic commercial risk.

20. In a society reliant upon financial credit, with well-established legal principles to govern, it is a matter of general or public importance for the New Zealand Court of Appeal to ensure access to justice and to not prevent a first instance appeal against a High Court ruling which violates fundamental doctrines of Equity and is therefore unsafe on broadly applied law.

21. The substantial miscarriage of justice to disaffected creditors by preventing the appeal is certain and cannot be overstated.

Leave is justified under Section 14 of the Supreme Court Act 2003 as:

22. The Court of Appeal was not simply wrong in law, but its reasoning suggests a lack of openness if not rudimentary unwillingness to properly consider the important public and commercial issues raised, thereby requiring this Supreme Court grant the appeal.

Judgment sought from the Supreme Court:

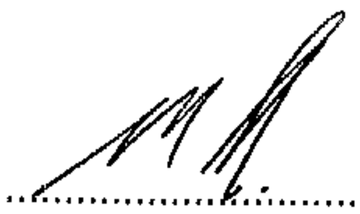
23. An order that the Judgment be set aside.

24. A grant of leave for this Supreme Court to hear the appeal on the proposed grounds,

OR, alternatively,

25. A direction expanding the timetable at the Court of Appeal to accommodate the Legal Aid process, accompanied by a direction that extension of time applications must consider the prima facie legal merits of the appeal, namely that the High Court judgment –

    a. Violated a central tenet of Equity by granting the Second Respondent priority (of the unsecured and assigned debt of one of the Applicant's creditors) over the Applicant's general creditors and secured creditors
    b. Conflicted with uncontested accounting evidence, not cross-examined or alternatively challenged at the hearing.
    c. Unlawfully varied orders of a higher court (CA507/2010 CA726/2010 [2011] NZCA 669)
    d. Was at odds with general accounting practices applied by three major accounting firms and Inland Revenue to the relevant accounts.



Malcolm Edward Rabson, appellant in person

Cc: Howard Thompson, for Respondent
Richard John Creser