

IN THE SUPREME COURT OF NEW ZEALAND

[2016] NZSC 152

BETWEEN

**MALCOLM EDWARD RABSON AND
RICHARD JOHN CRESER AS
TRUSTEES OF THE MALCOLM
RABSON FAMILY TRUST
Applicants**

AND

**IAN BRUCE SHEPHARD AND
CHRISTINE MARGARET DUNPHY
Respondents**

Counsel: Applicant M E Rabson in person

Judgment: 21 November 2016

JUDGMENT OF ELLEN FRANCE J

**The applications for review of the Registrar's decisions declining to
waive the payment of filing fees are dismissed.**

REASONS

Introduction

[1] Mr Rabson has sought reviews of two decisions by the Registrar refusing to waive payment of filing fees each of \$1,100 payable on applications for leave to appeal to this Court. The applications are made under s 40 of the Supreme Court Act 2003 and I have approached them by way of rehearing. I have determined that the applications should be dealt with on the papers.

Background

[2] The applicants have filed applications for leave to appeal against two decisions of the Court of Appeal (the first and second decisions).

The first decision of the Court of Appeal

[3] In the first decision, the Court declined to grant an application for an extension of time under r 43(2) of the Court of Appeal (Civil) Rules 2005 to apply for a hearing date and file the case on appeal.¹ The extension of time was sought in relation to the Trustees' appeal from a decision of Collins J issuing judgment against Mr Rabson for the sum of \$782,531.²

[4] Mr Rabson was adjudicated bankrupt in March 2013. The judgment of Collins J had its genesis in the assignment of all claims and causes of action in Mr Rabson's bankrupt estate to Mr Shephard and Ms Dunphy as liquidators of two companies associated with Mr Rabson. Collins J found the Malcolm Rabson Family Trust (the Trust) owed Mr Rabson \$782,531 and the liquidators were entitled to claim that sum from Mr Rabson.

[5] The decision of Collins J turned on deeds of acknowledgment of debt from the Trust to Mr Rabson and his former partner. Before Collins J, Mr Rabson's case was that the deeds of acknowledgment of debt were an error and that the Trust had repaid the debt. The first point arose from Mr Rabson's claim the deeds were in error because the money recorded as advances (the proceeds of a Lotto prize win) was that of the Trust. Collins J noted this argument had been rejected in earlier litigation involving Mr Rabson by the High Court³ and the Court of Appeal.⁴ The Judge found the further evidence he heard on this point fell "well short of raising any basis for revisiting the conclusions" reached by the High Court and the Court of Appeal, "even if it were legally possible to do so".⁵

[6] For a number of reasons, Collins J rejected the claim the debt had been repaid. The Judge relied, in part, on the fact that neither the financial records for the Trust nor those for the company involved supported this claim.⁶

¹ *Rabson v Shephard* [2016] NZCA 446 [*Rabson* (first CA decision)].

² *Shephard v Rabson* [2015] NZHC 3137 [*Rabson* (HC)].

³ *LG v MER* [2010] NZFLR 1001.

⁴ *R v G* [2011] NZCA 459, [2011] NZFLR 1040; and *Rabson v Gallagher* [2011] NZCA 669.

⁵ *Rabson* (HC), above n 2, at [78].

⁶ At [87]–[88].

[7] The decision of Collins J was appealed to the Court of Appeal. Mr Rabson unsuccessfully sought legal aid in that respect, was unsuccessful on reconsideration and on further review by the Legal Aid Tribunal. By the time the application for an extension of time came before the Court of Appeal, Mr Rabson had sought judicial review of the legal aid decision and security for costs had not been paid.

[8] The Court of Appeal dismissed the application for an extension of time in part because of delays in relation to the legal aid application. The other reason for declining the application was that it would serve no purpose. That was because Mr Rabson evinced “no intention of paying security for costs” and, absent payment, under the Court of Appeal (Civil) Rules, no application for a hearing date could be made.⁷

The second decision of the Court of Appeal

[9] The second decision is the decision of Wild J⁸ declining to recall a judgment in which Wild J had upheld on review a decision of the Deputy Registrar declining to dispense with security for costs.⁹ The application for dispensation with security had been made by Mr Creser who sought to challenge the costs order made against him by Collins J in the High Court proceedings discussed above. It appears that challenge was brought on the basis Mr Creser had resigned as trustee some time earlier and so should not have been liable for costs.

[10] In upholding the Deputy Registrar’s decision on security for costs, Wild J agreed with her application of the principles in *Reekie v Attorney-General*.¹⁰ The Judge noted he initially considered the award of costs may have been in error. But, having considered a memorandum from counsel for the liquidators as to Mr Creser’s role in the proceedings, the Judge said there was support for the view Mr Creser was “substantially involved” in the High Court proceedings.¹¹

⁷ *Rabson* (first CA decision), above n 1, at [9].

⁸ *Rabson v Shepherd* [2016] NZCA 359 [*Rabson* (second CA decision)].

⁹ *Rabson v Shepherd* [2016] NZCA 283 [*Rabson* (security for costs decision)].

¹⁰ *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.

¹¹ *Rabson* (security for costs decision), above n 9, at [9].

[11] Wild J declined to recall the judgment on the ground this was not a situation where for “some very other special reason justice requires” recall.¹²

[12] Leave to appeal both the first and second decisions of the Court of Appeal is now sought. In relation to these applications waiver of the filing fees in this Court was sought. By letters dated 26 August and 14 October 2016, the Registrar declined these applications.¹³

Evaluation

[13] The principal basis of the application against the second decision is that the Trust is unable to pay the fees and, if required to pay, would suffer financial hardship. Mr Rabson says the Trust had no income over the 2015/2016 tax years and both tax returns for those years will result in a small loss. He also says the money owed to the Trust by virtue of an earlier Court of Appeal judgment, but never paid, is the Trust’s only asset. Finally, it is submitted in support of both applications that the proposed appeals raise issues of genuine public interest.

[14] Regulation 5(2) of the Supreme Court Fees Regulations 2003, relevantly, provides for waiver of fees if the Registrar is satisfied,—

- (a) on the basis of one of the criteria specified ... that the applicant is unable to pay the fee; or
- (b) that the appeal,—
 - (i) on the basis of one of the criteria specified in ... concerns a matter of genuine public interest; and
 - (ii) is unlikely to be commenced or continued unless the fee is waived.

[15] Regulation 5(3) relevantly provides that an applicant is unable to pay the fee if the applicant:

- (iii) would otherwise suffer undue financial hardship if he or she paid the fee.

¹² Citing *Horowhenua County v Nash (No 2)* [1968] NZLR 632 at 633.

¹³ There is a dispute about when Mr Rabson was notified of these decisions. I have treated the dates when the decisions were emailed to Mr Rabson as the relevant dates under s 40.

[16] On the question of ability to pay the fee, the Registrar was provided with a copy of the Trust's tax return for April 2015–March 2016 and a copy of the statement from the Trust's bank recording an overdraft of just under \$400. I consider the Registrar was right to conclude he was not satisfied the Trust does not have sufficient means to pay the filing fees. The tax return records some cash in hand and it is not at all clear the Trust would have no ability to raise the two sums involved.

[17] In the application for review arising out of the Registrar's decision on the application for leave against the first decision, Mr Rabson is critical of the process followed by the Registrar and contrasts his decision with that of the Registrar of the Court of Appeal who, it is said, granted an equivalent application in that Court.

[18] Nothing turns on these matters. The Registrar was simply giving Mr Rabson ample opportunity to substantiate the claim of financial hardship. The decision of the Court of Appeal Registrar is not binding.

[19] I turn to the other limb of Reg 5, that is, whether the applications for leave concern matters of genuine public interest.

[20] In relation to the first decision, the argument will be that the Court of Appeal was wrong to effectively terminate the appeal when the legal aid issue was still live. It is also said the Court of Appeal was wrong not to consider the merits of the appeal from the High Court thereby barred. On the review application, the criticism of the Registrar is that his letter records the matter concerned a genuine public interest but then, inconsistently, found against the application. It is also said the Registrar did not address whether the questions of law raised a genuine public interest.

[21] It is clear the Registrar's letter contains a mistake, the omission of the word "not". On the material before me, the proposed application for leave appears to focus on factual matters particular to the situation facing the Trustees. Absent further information about the basis for the legal aid judicial review proceedings, it is hard to see that there is a matter of genuine public interest. Further, the underlying issues have been the subject of earlier litigation. The merits have been considered in that litigation.

[22] In relation to the second decision, on the information before me, it has not been shown that the application raises a matter of genuine public interest. The recall judgment applies well-settled principles to the particular facts. Mr Rabson emphasises the importance of considering what he describes as deception by counsel for the liquidators. The Judge assessed this matter which was a factual question.¹⁴ Further, some support is provided for the approach of Wild J in the judgment of Collins J which records that Mr Creser presented evidence.¹⁵

[23] In any event, I am not satisfied the applications could not be continued absent a fee waiver.

Decision

[24] The applications for review of the Registrar's decisions declining to waive the payment of the filing fees are dismissed.

¹⁴ *Rabson* (security for costs decision), above n 9, at [8]–[10].

¹⁵ *Rabson* (HC), above n 2, at [84] and [89].