

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA566/2016
[2017] NZCA 44**

BETWEEN MALCOLM EDWARD RABSON
Appellant

AND JUDICIAL CONDUCT
COMMISSIONER
First Respondent

JUSTICES ELIAS, YOUNG,
GLAZEBROOK, ARNOLD AND
O'REGAN
Second Respondents

Counsel: Appellant in Person
C Cross for Respondents

Judgment: 6 March 2017 at 3.00 pm
(On the papers)

JUDGMENT OF BROWN J

- A The application for review of the Deputy Registrar's decision declining to dispense with security for costs is dismissed.**
- B The application to extend time to file the application for dispensation is declined.**
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REASONS

Introduction

[1] On 1 November 2016 Williams J made an order striking out as second respondents the Justices of the Supreme Court. He ruled that an award of costs was appropriate.

[2] The appellant's appeal against that decision was accepted for filing on 8 November 2016. On the following day the standard form letter was sent to the appellant which recorded that security for costs had been fixed at \$13,200 and advising that, under r 35(7) of the Court of Appeal (Civil) Rules 2005 (the Rules), any application for an order in regards to security was required to be made within 20 working days of the filing of the notice of appeal.

[3] On 2 December 2016 Mr Rabson sent an email to the Court inquiring whether security for costs was payable. An email response the same day from the registry to the appellant confirmed that security for costs had been set at \$13,200 and recorded that the appellant was required to pay that sum by Tuesday 6 December 2016 or alternatively file an application for dispensation of security for costs by that date.

[4] On 16 December 2016 the registry received an application from the appellant to dispense with security for costs under r 35(6) of the Rules.

[5] However, processing of the application was overlooked until an email from the appellant to the registry of 20 February 2017 inquiring as to the status of the application for dispensation.

[6] In a decision dated 21 February 2017 the Deputy Registrar declined to consider the application for dispensation as it had been received out of time, that is subsequent to 6 December 2016, and hence the Deputy Registrar had no jurisdiction to consider the application.¹ On 23 February 2017 the appellant filed an application for a review of the decision of the Deputy Registrar under r 7(2) of the Rules.

¹ *Orlov v National Standards Committee No 1 [Security]* [2014] NZCA 182, (2014) 22 PRNZ 120 at [7]; and *White v Lynch* [2015] NZCA 376.

Application was also made for an extension of time for the consideration of the application for dispensation.

Analysis

[7] The time limit for applying for dispensation under r 35(6) of the Rules is set out in r 35(7):

35 Security for costs: general

...

(7) An application under subclause (6)—

- (a) must be made and served within 20 working days after the notice of appeal has been filed in the Registry; and
- (b) may be made on an informal basis.

...

[8] The Registrar does not have any discretion to extend the time for seeking dispensation from the requirement to give security for costs.² The reasons why such a discretion is not conferred were explained by Wild J in *Orlov*.³ It follows that the Deputy Registrar was correct to decline to consider the appellant's out of time application.

[9] Although the Registrar has no discretion to extend the time for seeking dispensation from a payment of security for costs, a Court of Appeal Judge has the power to do so under r 5(2) of the Rules. Whether an extension of time should be granted depends substantially on whether security for costs should be dispensed with if an extension was granted. In *Reekie v The Attorney General*⁴ the Supreme Court held that the Registrar (or a single Judge on review) should only dispense with security if it is right to require the respondent to defend a judgment under appeal without protection as to costs.

² *White v Lynch*, above n 1, at [16].

³ *Orlov v National Standards Committee No 1*, above n 1, at [7]–[8].

⁴ *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.

[10] In my view, the appeal brought by the appellant is not reasonably arguable. The Justices of the Supreme Court should not have been cited as second respondents in the High Court proceeding. The appellant was aware of that as a consequence of the earlier decision of the High Court in *Rabson v Judicial Conduct Commissioner*.⁵ In those circumstances, an award of costs on the application for removal of the Justices of the Supreme Court as second respondents was understandable and appropriate.

[11] I am satisfied that a reasonable and solvent litigant would not pursue the appeal and that it would not be right to require the respondent to defend the judgment under appeal without the usual protection of security for costs. There are no exceptional circumstances and no public interest considerations to justify dispensing with security for costs. It follows that an extension of time to file the application for dispensation is not warranted.

Result

[12] The application for review of the Deputy Registrar's decision declining to dispense with security for costs is dismissed.

[13] The application for an extension of time for consideration of the application to dispense with security for costs is declined.

Solicitors:
Crown Law Office, Wellington for Respondent

⁵ *Rabson v Judicial Conduct Commissioner* [2016] NZHC 884.