IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA571/2017
CA572/2017
[2019] NZCA 246

BETWEEN	DERMOT NOTTINGHAM Appellant
AND	MALTESE CAT LIMITED First Respondent
	CLYDE ALEXANDER MACLEAN Second Respondent
	ELIZABETH MAY CURRIE Third Respondent
	JOHN DOE AND/OR JANE DOE Fourth Respondent

Counsel: Appellant in person
D M Connor for Respondents

Judgment: (On the papers) 24 June 2019 at 10.30 am

JUDGMENT OF BROWN J
(Review of Deputy Registrar's decision)

A The application to review the Deputy Registrar's decision declining to dispense with security for costs in CA571/2017 is declined. Security for costs of $6,600 is payable by 15 July 2019.

B The application to review the Deputy Registrar's decision declining to dispense with security for costs in CA572/2017 is granted. Security for costs is dispensed with in respect of CA572/2017.

REASONS

Introduction

[1] Mr Nottingham is a defendant in a defamation proceeding in the High Court at Auckland being CIV-2016-404-1805. In that proceeding the plaintiffs seek judgment that certain published websites contain content defaming them. It is unclear who published that content and therefore the first defendant, John Doe, is fictional. Mr Nottingham is also a defendant because the plaintiffs suspect he is the author of the defamation. The proceeding was commenced by originating application since only declaratory relief, and not damages, is sought.

[2] On 14 July 2017 and 25 July 2017 Fogarty J delivered judgments on interlocutory aspects of that litigation.[1] On 17 August 2017 Mr Nottingham filed notices of appeal against those decisions, being CA571/2017 and CA572/2017 respectively.[2] Security for costs was set at $6,600 for each appeal. He filed an application for dispensation from security for costs under r 35(6)(c) of the Court of Appeal (Civil) Rules 2005. In a decision dated 16 April 2019 the Deputy Registrar declined the applications for security for costs and directed that security in each appeal be paid by 17 May 2019. Mr Nottingham seeks a review of that decision.

Relevant principles

[3] The principles applicable to dispensation from security for costs were reviewed by the Supreme Court in *Reekie v Attorney-General*.[3] The Court stated that the Registrar should dispense with security if of the view that it is right to require the respondent to defend the judgment under challenge without the usual protection as to costs provided by security.[4] The Court explained:

> [35] … we consider that the discretion to dispense with security should be exercised so as to:

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1 *Maltese Cat Ltd v Doe* [2017] NZHC 1634 and *Maltese Cat Ltd v Doe* [2017] NZHC 1728 respectively.

2 On 2 October 2017 Cooper J directed that the appeals were accepted for filing as at 17 August 2017.

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

4 At [31].

(a) preserve access to the Court of Appeal by an impecunious appellant in the case of an appeal which a solvent appellant would reasonably wish to prosecute; and

(b) prevent the use of impecuniosity to secure the advantage of being able to prosecute an appeal which would not be sensibly pursued by a solvent litigant.

A reasonable and solvent litigant would not proceed with an appeal which is hopeless. Nor would a reasonable and solvent litigant proceed with an appeal where the benefits (economic or otherwise) to be obtained are outweighed by the costs (economic and otherwise) of the exercise (including the potential liability to contribute to the respondent's costs if unsuccessful). As should be apparent from what we have just said, analysis of costs and benefits should not be confined to those which can be measured in money.

[4] The Court also ruled that the review function of the judge in relation to security for costs is to be exercised de novo.[5]

Deputy Registrar's decision

[5] Having correctly recited the relevant principles from *Reekie*, the Deputy Registrar concluded that Mr Nottingham was impecunious and unable to obtain funds to pay security. Turning to address the merits of the proposed appeals she noted that the defamation proceeding was brought by way of an originating application under pt 18 of the High Court Rules 2016 on the basis that the plaintiffs sought only declaratory relief under the Declaratory Judgments Act 1908.[6]

[6] The Deputy Registrar could see no error in the first decision. She also considered there was no basis for challenging the finding in the second decision that declaratory relief, not being a money claim, was not barred by the Limitation Act 2010, noting the definition of money claim in s 12 and the preservation in s 43 of the underlying right in respect of which declarations may be sought. With reference to the merits she concluded:

[19] It may be arguable that the multiple publication rule no longer applies in New Zealand. However, I see little prospect of that question requiring determination in the second appeal. This Court would first need to find that the claim for declarations and/or costs constitutes a money claim, which seems very unlikely. I therefore consider there is very little merit in the second appeal.

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5 At [23].

6 High Court Rules 2016, r 18.1(b)(v).

[7] The Deputy Registrar observed that success in the first appeal would mean Mr Nottingham would benefit from one or more orders ranging from document discovery to a strike-out of the defamation proceeding while success in the second appeal would provide Mr Nottingham with the benefit of a limitation defence. She was satisfied that those potential benefits to Mr Nottingham outweighed the potential costs. However in her view there was only a small chance of an issue of public interest being raised which was limited to the second appeal.

[8] The Deputy Registrar concluded:

> [26] Mr Nottingham is impecunious. The appeals involve greater potential benefits to Mr Nottingham than potential costs. However, the likelihood of those benefits being realised seems remote because the appeals have little or no merit. I am therefore not satisfied that a reasonable and solvent litigant would proceed with the appeals. Further, I note that no issue of public interest is raised in the first appeal, and there is only a small chance that an issue of public interest will be raised in the second appeal.

She was not satisfied that those circumstances taken together were exceptional. In her view it would not be right for the respondents to defend the judgments under appeal without security for their costs.

Discussion

[9] Mr Nottingham's submission commenced with a vigorous attack on the Deputy Registrar's decision, contending it usurped the role of this Court. In particular it was submitted that in the conclusion that the appeals had little or no merit the Deputy Registrar had exceeded her jurisdiction.

[10] That argument is misconceived. The Court of Appeal (Civil) Rules 2005 (the Rules) confer on the Registrar the authority to determine applications to dispense with security for costs.[7] A decision by the Registrar is reviewable by a single Judge under r 5A(3) of the Rules. Both the Registrar and a Judge on review are required to consider applications for dispensation by reference to the *Reekie* principles noted above. In making an assessment whether an appeal is hopeless it will be necessary to

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7 Court of Appeal Civil Rules 2005, s 35(6)(c).

address the merits to some degree. Plainly the Registrar and the Judge will not exceed their jurisdiction in discharging that function.

[11] Mr Nottingham then contended that the Deputy Registrar's decision both as to the merits and on the issue of public interest was wrong. He submitted that both appeals, but particularly the second, were not hopeless. He placed reliance on statements in this Court's judgment of 24 September 2017 declining his application for an extension of time under r 43[8] and the minute of the Supreme Court of 18 March 2019.[9]

[12] In the former judgment this Court said:

> [6] Before us Mr Nottingham argued that his appeal has merit. We accept that the limitation point is arguable, but limitation is ordinarily a trial issue because it turns on the facts, and the limitation defence remains available to him in an appeal after trial on the merits.

[13] In its minute the Supreme Court stated that the interests of justice might be better served if there was a recall of the Court of Appeal's judgment on the basis that an extension of time was appropriate. With reference to the subject matter of Mr Nottingham's second appeal the Court observed:

> [3] On the second aspect the Court accepted the limitation point raised by the appeal was arguable but said the issue was "ordinarily a trial issue because it turns on the facts" and this defence remained open to Mr Nottingham in an appeal after trial. Fogarty J disposed of the defence on the basis the relief sought was confined to declaratory relief which, on its face, gives rise to a question of law, not fact. It also appears that the Judge dealt with this matter as a stand-alone issue albeit the initial application was to strike out the claim. If that is the proper characterisation of the decision, the decision is not interlocutory in nature but rather would be binding on the parties unless overturned on appeal prior to trial.

[14] Given the way in which the limitation issue has evolved, I consider that a solvent appellant would reasonably wish to pursue the issue because if successful it would provide a defence to the respondents' claim. Consequently I consider that the discretion should be exercised to dispense with the requirement to provide security in respect of appeal CA572/2017.

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8 *Nottingham v Maltese Cat Ltd* [2018] NZCA 387.
9 *Nottingham v Maltese Cat Ltd* SC90/2018, 18 March 2019.

[15] However I reach the same conclusion as the Deputy Registrar concerning appeal CA571/2017. I do not consider that there is merit to this appeal and no issue of public interest arises. In my view a reasonable and solvent litigant would not wish to proceed with that appeal.

[16] I infer from his submissions that Mr Nottingham recognised that the argument in favour of waiver of security in relation to the first appeal was significantly less strong than in relation to the second appeal. He advanced the submission that the appeals would be heard together describing them as "likely … somewhat interdependent of each other". However I do not consider there is any sufficient connection between the two that would warrant granting a dispensation of security in respect of CA571/2017 despite its failure to satisfy the established *Reekie* criteria.

Result

[17] The application to review the Deputy Registrar's decision declining to dispense with security for costs in CA571/2017 is dismissed. Security for costs of $6,600 is payable by 15 July 2019.

[18] The application to review the Deputy Registrar's decision declining to dispense with security for costs in CA572/2017 is granted. Security for costs is dispensed with in respect of CA572/2017.