IN THE SUPREME COURT OF NEW ZEALAND

SC 26/2013
[2013] NZSC 27

BETWEEN	BARRY JOHN HART Applicant
AND	ANZ BANK NEW ZEALAND LIMITED Respondent

Court: Elias CJ, McGrath and Glazebrook JJ

Counsel: Applicant in Person
L A O'Gorman and A L Williams for Respondent

Judgment: 11 April 2013

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs of $2500 together with all reasonable disbursements to be fixed if necessary by the Registrar.

REASONS

[1] This is an application for leave to appeal against a judgment of the Court of Appeal striking out an appeal against an order adjudicating the applicant bankrupt.[1]

[2] The Associate Judge's order was made on 17 December 2012 on the application of the respondent bank.[2] On the same day the applicant filed a notice of appeal and sought an urgent fixture. The Court of Appeal allocated a hearing date on 13 February 2013.

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1 *Hart v ANZ Bank New Zealand Limited* [2013] NZCA 10 and [2013] NZCA 20 (Reasons).
2 *ANZ Bank of New Zealand Ltd v Hart* [2012] NZHC 3464.

[3] The applicant next applied to the Registrar of the Court of Appeal for waiver of security for costs on the appeal, which had been set at $5,880.00. That application was refused and, on 12 February 2013, Harrison J dismissed an application for review of the Registrar's decision, ordering that security be given before the hearing of the appeal the following day. The applicant immediately sought an adjournment of the fixture, which the Court refused.

[4] At the hearing in the Court of Appeal on 13 February, the respondent applied to strike out the appeal. The Court heard counsel for both parties and, in an oral judgment, granted the application. In reasons given subsequently, the Court examined the merits of the applicant's grounds of appeal against his bankruptcy adjudication and relied on its analysis in its reasons for striking out the appeal. The Court concluded that the Associate Judge, in exercising a discretion, had appropriately balanced all relevant factors and saw no error in the approach that was taken. Nor in the Court of Appeal's view was there any evidential basis for the applicant's contention that the respondent had used the bankruptcy process oppressively.

[5] In his application for leave to appeal to this Court, the applicant raises three grounds. The first concerned the decision of Harrison J to uphold the Registrar's decisions regarding security for costs, and the decision of the Court not to adjourn the fixture and to strike out the applicant's appeal. The applicant said he had not received a fair hearing "which required appropriate rulings and directions regarding security for costs". The applicant had, however, put great reliance on his impecuniosity. Setting security for costs addresses the risk for a respondent that the appellant will not be able to meet an order for costs because of impecuniosity and the strength of an appellant's case is accordingly very relevant to whether security is reasonably required and in what sum.[3] The applicant must have appreciated that he was at risk of having to face a strike-out application at the hearing if he did not give security. It was for the applicant to demonstrate merit or other circumstances that might bear on whether he was required to give security and to argue the point in

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[3] *Easton v Wellington City Council* [2010] NZSC 10, (2010) 20 PRNZ 360 at [9] and *Re Whimp* (1998) 12 PRNZ 365 (HC) at 369–370, quoting *Reedy v Winstone Ltd* [1976] 2 NZLR 690 (CA).

responding to the application. In these circumstances we are not persuaded that the applicant's claim of an unfair hearing gives rise to an arguable question.

[6] Nor are we persuaded that the Court's refusal to waive security or adjourn the hearing on 13 February involved an arguable error of law, which is the second proposed ground for appeal to this Court. The applicant had failed to meet security requirements set by an order of the Court. The Court then evaluated the merits of the applicant's appeal and its assessment of lack of merit was the foundation of its judgment striking out the appeal. In those circumstances, we also have no concern as to an error or that a substantial miscarriage of justice has occurred in the decision to strike out the appeal.

[7] The third ground is that, by sitting on the appeal after he had refused the application for waiver of security, Harrison J created a situation of apparent bias. We do not agree that this is the case and we have no concern about the involvement of Harrison J in both interlocutory and substantive determinations. The matter was addressed firmly and expeditiously in the Court of Appeal but also fairly. In the end the outcome reflected the weakness of the applicant's proposed appeal and the proper need for security for costs if it were to proceed.

[8] For these reasons, we dismiss the application for leave to appeal.

Solicitors:
Buddle Findlay, Auckland for Respondent