IN THE SUPREME COURT OF NEW ZEALAND

SC 64/2015
[2015] NZSC 160

BETWEEN	NICHOLAS PAUL ALFRED REEKIE Applicant
AND	ATTORNEY-GENERAL (SUED ON BEHALF OF THE DEPARTMENT OF CORRECTIONS) First Respondent
	ATTORNEY-GENERAL Second Respondent
	THE DISTRICT COURT AT WAITAKERE Third Respondent

Court:	Elias CJ, William Young and O'Regan JJ
Counsel:	R S Pidgeon and J R S Lewis for Applicant J E Foster and H T N Fong for Respondents
Judgment:	29 October 2015

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B There is no order as to costs.

REASONS

[1] The applicant applies for leave to appeal against a judgment of the Court of Appeal.[1] In that judgment, the Court of Appeal dismissed his application for an extension of time to appeal against a judgment of Wylie J in the High Court dealing with a number of claims made by the applicant against the Attorney-General (sued

[1] *Reekie v Attorney-General* [2015] NZCA 198 (Ellen France P, Harrison and Stevens JJ), [*Reekie* (CA)].

on behalf of the Department of Corrections) in relation to the applicant's treatment in prison.[2] The applicant is serving a sentence of preventive detention with a minimum term of imprisonment of 20 years. Wylie J dismissed most of the applicant's numerous claims, but found that there had been five incidents that involved breaches of the Penal Institutions Act 1954 and that those breaches also constituted breaches of s 23(5) of the New Zealand Bill of Rights Act 1990.

[2] This is not the first time that litigation associated with the applicant's claims against the Department of Corrections has reached this Court.[3] The background to this Court's earlier decision is as follows:

(a) The applicant filed an appeal in the Court of Appeal against the judgment of Wylie J in August 2012. (For reasons which will become apparent we will call this his first appeal).[4] The applicant sought a dispensation from the requirement to pay security for costs in the Court of Appeal, but this was declined by the Registrar of that Court, and her decision was upheld by White J on review.[5]

(b) The applicant applied to this Court for leave to appeal against White J's judgment. Leave to appeal was granted.[6] This Court ultimately dismissed the applicant's appeal. It found that his proposed appeal against the decision of Wylie J was not hopeless, but that there was little of practical moment in the appeal.[7] It found that the exercise in which he wished to embark in his appeal to the Court of Appeal against the decision of Wylie J was one in which no reasonable and solvent litigant would engage, and that it would therefore be unjust to require the respondent to defend the judgment

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2 *Reekie v Attorney-General* [2012] NZHC 1867 (Wylie J) [*Reekie* (HC)].
3 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 [*Reekie* (SC)].
4 He was directed to file an amended notice of appeal and, after an extension of time to do so was granted, the amended notice was filed on 7 December 2012.
5 *Reekie v Attorney-General* [2013] NZCA 131.
6 *Reekie v Attorney-General* [2013] NZSC 74.
7 *Reekie* (SC), above n 3, at [64] and [65].

without the protection of security for costs. It therefore dismissed his appeal.[8]

[3] The applicant did not comply with the requirements of the Court of Appeal (Civil) Rules 2005 in relation to his first appeal to that Court. Because he did not file a case on appeal and apply for a hearing date within the time specified in r 43 of the Court of Appeal (Civil) Rules, his first appeal was deemed to be abandoned under r 43(1). Under r 43(3), any application for an extension of the time for complying with r 43 must be made within three months after the expiry of the period set out in r 43(1). The applicant did not seek an extension within that time period, with the result that his first appeal was abandoned and was not able to be revived.

[4] Faced with that situation, the applicant then applied for an extension of time to commence a fresh appeal under r 29A of the Court of Appeal (Civil) Rules. The respondent opposed that application. The Court of Appeal (by a majority) dismissed the application.[9] It is that decision to which the present application for leave relates.

[5] The majority of the Court of Appeal (Harrison and Stevens JJ) accepted that the grant of an extension of time would not prejudice the respondents.[10] But they found that none of the factual or legal matters which the applicant wished to pursue if an extension of time to appeal were granted were such as to justify the grant of an extension of time. It was thus not in the interests of justice to grant the extension.

[6] In dissent, Ellen France P said she would have extended time because there was no prejudice to the respondents.[11] She said the applicant was now represented by counsel and so his appeal would be a confined one; the proposed appeal was not in the hopeless category; the issues the applicant sought to raise could potentially have broader application; and at least some of the delay in pursuing the earlier appeal was explained.

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8 At [78].
9 *Reekie* (CA), above n 1.
10 At [33].
11 At [36].

[7] The application for leave to appeal is advanced on the basis that the majority of the Court of Appeal erred in its assessment of the merits of the applicant's proposed appeal to the Court of Appeal and, consequently, a miscarriage of justice will occur if leave to appeal to this Court is not granted. There is no suggestion that the Court of Appeal wrongly interpreted the requirements of r 29A or applied the wrong test in determining whether an extension of time should be granted. Nor is it suggested that any point of public importance arises from the application of the r 29A test. Rather, the focus of the application is on the issue that the applicant would raise on appeal to the Court of Appeal if an extension of time to commence a fresh appeal to that Court were granted.

[8] In the Court of Appeal, the applicant argued that three grounds of appeal had merit and that he should be allowed to pursue them. In his application for leave to appeal to this Court, the applicant says he would pursue only one of those grounds of appeal if he were permitted to commence a fresh appeal to the Court of Appeal. That is the applicant's contention that Wylie J had erred in his findings in relation to s 13 of the Prisoners' and Victims' Claims Act 2005 (PVCA).

[9] Section 13 of the PVCA provides that a Court may not award compensation for a claim of the kind brought by the applicant unless it is satisfied that the plaintiff "has made reasonable use of all of the specified internal and external complaints mechanisms reasonably available to him or her to complain about the act or omission on which the claim is based". Wylie J found that the applicant had not complied with this requirement, and that therefore an award of compensation for the breaches of s 23(5) of the New Zealand Bill of Rights Act that Wylie J found had been proven was not available.[12]

[10] Counsel for the applicant, Mr Pidgeon, argues that the interpretation of s 13 (and s 14) of the PVCA is a point of public importance that should be dealt with in an appeal to the Court of Appeal. He argues that Wylie J approached the section as requiring that every available complaint mechanism be followed, rather than by assessing whether the complaints procedures available to the prisoner had been the subject of "reasonable use".

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12 *Reekie* (HC), above n 2, at [286]–[288].

[11] The majority of the Court of Appeal considered that the factual underpinning for this ground of appeal was lacking, because there was no evidence of any specific complaints being made by the applicant in respect of the actions for which he seeks awards of compensation.[13] This led the majority in the Court of Appeal to conclude that the applicant had limited prospects of success in relation to this ground of appeal. We can see no error in the majority's approach to that aspect of the case.

[12] While we accept that the interpretation of s 13 of the PVCA could give rise to a point of public importance, we do not see the present case as an appropriate case for its consideration, given the lack of evidential foundation for the applicant's argument. Nor do we see any real prospect of a miscarriage of justice arising if leave to appeal to this Court is not granted. In those circumstances, we decline leave to appeal.

[13] We make no award of costs.

Solicitors:
ASCO, Auckland for Applicant
Crown Law Office, Wellington for Respondents

[13] *Reekie* (CA), above n 1, at [28].