

IN THE SUPREME COURT OF NEW ZEALAND

SC 1/2017
[2017] NZSC 97

BETWEEN MALCOLM EDWARD RABSON AS
TRUSTEE OF THE MALCOLM
RABSON FAMILY TRUST
Applicant

AND IAIN BRUCE SHEPHARD AND
CHRISTINE MARGARET DUNPHY
Respondents

Court: Elias CJ, Glazebrook and O'Regan JJ

Counsel: Applicant in person
H L Thompson for Respondents

Judgment: 23 June 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal against a decision of the Court of Appeal in which it declined to extend time under r 43(2) of the Court of Appeal (Civil) Rules 2005 for the applicant to apply for a hearing date and file the case on appeal in relation to an appeal he had filed in the Court of Appeal.¹

[2] The applicant's appeal to the Court of Appeal was against a decision of the High Court which found him liable, in his capacity as a trustee of the Malcolm Rabson Family Trust, to the respondents for sums owed by the trust to the applicant's

¹ *Rabson v Shephard* [2016] NZCA 446 (Wild, French and Brown JJ).

bankrupt estate (the Official Assignee having assigned the benefit of the claim to the respondents as liquidators of companies associated with the applicant).²

[3] The applicant's appeal to the Court of Appeal was filed on 28 January 2016. Security for costs was set at \$6,600. An application to dispense with security for costs made by Mr Creser, the other trustee of the Malcolm Rabson Family Trust, was declined. The applicant did not seek a dispensation, but did not pay security.

[4] Under r 43(1) of the Court of Appeal (Civil) Rules, an appeal is treated as abandoned if the appellant does not apply for the allocation of a hearing date and file the case on appeal within three months after the appeal is brought. However, the Court may extend this period under r 43(2).

[5] On 22 April 2016, just before the three month period elapsed, the applicant applied for legal aid and, on the same day, applied for an extension of the three month period under r 43(2). His application for legal aid was declined on 18 May 2016 and an application for reconsideration of that decision was dismissed on 15 June 2016. An appeal to the Legal Aid Tribunal was declined on 17 August 2016.

[6] The applicant's application for extension of time under r 43(2) came before the Court of Appeal on 12 September 2016. On the same day, he filed in the High Court an application for judicial review of the decision of the Legal Aid Tribunal.³

[7] The Court of Appeal dismissed the application for an extension of time giving three reasons, namely:⁴

- (a) No application for legal aid had been lodged when the applicant's appeal to the Court of Appeal was brought on 28 January 2016, as envisaged by r 36(1) of the Court of Appeal (Civil) Rules.

² *Shephard v Rabson* [2015] NZHC 3137.

³ The Court of Appeal judgment records that Mr Rabson advised the Court at the hearing on 12 September 2016 that he had filed a proceeding seeking judicial review of the Legal Aid Tribunal's decision: *Rabson v Shephard*, above n 1, at [5]. In a memorandum filed in this Court by counsel for the Legal Services Commissioner, it is stated that Mr Rabson's proceeding was an appeal (on a question of law) rather than an application for judicial review. Nothing turns on this. We will refer to it as the judicial review application.

⁴ *Rabson v Shephard*, above n 1, at [7]–[9].

- (b) The legal aid application was unsuccessful, his application for reconsideration was unsuccessful, and his appeal to the Legal Aid Tribunal was also unsuccessful. There had been no appeal against the decision of the Legal Aid Tribunal, and the Court was not informed of the basis on which judicial review was sought.
- (c) Rule 37(2) of the Court of Appeal (Civil) Rules requires that security for costs must be paid as a prerequisite to the application for a hearing date. There would be no purpose in granting the extension of time when the applicant evinced no intention of paying the security for costs.

[8] After the Court of Appeal decision, the High Court deferred consideration of Mr Rabson's appeal against the decision of the Legal Aid Tribunal until the present application for leave to appeal was dealt with. This was done on the basis that, as the applicant's appeal to the Court of Appeal was deemed to be abandoned, there was no extant proceeding for which legal aid could be granted.

[9] This Court issued a minute on 26 April 2017 asking the High Court to consider and resolve the judicial review application before this Court dealt with the application for leave. However, the applicant filed a memorandum on 1 May 2017 indicating that he sought the resolution of the present application for leave before the application for judicial review was dealt with by the High Court. In response to a further minute from the Court the applicant indicated that he did not intend to pursue the judicial review application prior to the resolution of the present application for leave.

[10] The Court, therefore, will deal with the application for leave to appeal to this Court on the basis that the application for judicial review has not been heard but Mr Rabson could revive it if this Court were to grant leave to appeal.

[11] The applicant seeks leave on the basis that the decision of the Court of Appeal to refuse an extension of time, in circumstances where his application for legal aid was still a live issue, amounts to a denial of access to the Court.

[12] In a case where a timely application for legal aid was still under consideration when an application under r 43(2) of the Court of Appeal (Civil) Rules was made, it could be expected that the three month period would be extended to allow for any delays in the processing of a legal aid application. But, in this case, the application for legal aid was made just before the three month period elapsed. It had been dealt with and declined by the time the application for extension of time was dealt with by the Court of Appeal. In addition, an application for reconsideration had failed and an appeal to the Legal Aid Tribunal had also failed. A judicial review application was filed in the High Court only on the day of the hearing of Mr Rabson's application for an extension of time. We have no information before us, as the Court of Appeal had no information before it, on the basis of the judicial review application. Our offer to defer consideration of this application pending the determination of the appeal has been rejected.

[13] We do not see any point of public importance arising from the present application: rather it is the exercise of judgment by the Court of Appeal in the unusual factual situation arising from the applicant's delayed pursuit of legal aid. Nor do we consider that there is any risk of a miscarriage, given the delay in applying for legal aid and the reality that no award was made.

[14] The applicant submitted that a difficulty in engaging a lawyer may delay the making of an application for legal aid and that it is now more difficult than in the past to obtain legal aid. Whether that is so or not, the position that confronted the Court of Appeal in the present case was that when it heard the application for extension of time, the legal aid process had run its course, with no award had been made to the appellant. By then nearly eight months had passed since the appeal had been commenced.

[15] In those circumstances we dismiss the application for leave to appeal.