

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 133/2019
[2020] NZSC 31**

BETWEEN NICHOLAS PAUL ALFRED REEKIE
 Applicant

AND CHIEF EXECUTIVE OF THE
 DEPARTMENT OF CORRECTIONS
 First Respondent

 VISITING JUSTICE TO SPRING HILL
 CORRECTIONAL FACILITY
 Second Respondent

Court: Glazebrook and O'Regan JJ

Counsel: Applicant in person
 D J Perkins and H F Brockway for First Respondent

Judgment: 9 April 2020

JUDGMENT OF THE COURT

- A The application for an extension of time to apply for leave to appeal is granted.**
- B The application for leave to appeal is dismissed.**
- C The applicant must pay costs of \$250 to the first respondent.**
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REASONS

[1] The applicant, Mr Reekie, applies for leave to appeal against a decision of the Court of Appeal striking out his appeal to that Court under r 44A(1)(b) of the Court of

Appeal (Civil) Rules 2005.¹ That provision empowers the Court of Appeal to strike out or stay an appeal if “the appellant has failed to prosecute the appeal with due diligence and dispatch”.

[2] The application was filed a few days after the period for applying for leave had expired.² The applicant has explained the reasons for the delay and there is no prejudice to the respondent. We therefore grant the extension of time.

[3] The background to the Court of Appeal decision is lengthy. A summary follows.

Background

[4] In 2012, the applicant applied for judicial review of decisions relating to his treatment in prison and the decisions of the Visiting Justice at Spring Hill Prison in respect of four disciplinary charges. Rodney Hansen J dismissed the application for judicial review on 20 February 2013.³

[5] The applicant filed a notice of appeal in the Court of Appeal on 17 March 2013. An application for waiver of security for costs was filed on 15 April 2013. The Registrar declined to dispense with security for costs. Miller J upheld the Registrar’s decision on 9 September 2013.⁴

[6] This Court granted the applicant leave to appeal against a judgment of White J⁵ upholding another decision of the Registrar declining to dispense with security for costs in relation to another appeal commenced by the applicant in the Court of Appeal.⁶ This Court considered the application for leave to appeal against the decision of Miller J at the same time, ultimately dismissing the application for leave to appeal.⁷

¹ *Reekie v Chief Executive of the Department of Corrections* [2019] NZCA 557 (Kós P, Brown and Clifford JJ) [CA judgment].

² Supreme Court Rules 2004, r 11.

³ *Reekie v Chief Executive Officer of the Department of Corrections* [2013] NZHC 271.

⁴ *Reekie v Chief Executive of the Department of Corrections* [2013] NZCA 422.

⁵ *Reekie v The Attorney-General (sued on behalf of the Department of Corrections)* [2013] NZCA 131.

⁶ *Reekie v Attorney-General* [2013] NZSC 74.

⁷ *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 [*Reekie* (SC)] at [1] and [76]–[78].

That judgment was issued on 29 May 2014. An application for recall was also declined.⁸

[7] Security for costs was never paid. The applicant received a grant of interim legal aid in September 2014, but legal aid was ultimately refused.

[8] On 9 August 2019, Clifford J issued a minute warning the applicant that the Court intended to consider whether to strike out his appeal pursuant to r 44A of the Court of Appeal (Civil) Rules for failing to prosecute it with due diligence. The parties were invited to file memoranda in accordance with r 44A(2).

[9] The Court of Appeal ultimately struck out the applicant's appeal on 14 November 2019. The Court concluded:⁹

[7] This appeal has seen no progress for far too long. Whatever difficulties Mr Reekie may have faced in obtaining resources to pursue the appeal, they do not adequately explain the point that years have passed without him progressing matters. We are satisfied that he has failed to prosecute the appeal with due diligence and dispatch.

Submissions

[10] The applicant explains that he applied, unsuccessfully, for a reconsideration of the decision declining legal aid pursuant to s 51 of the Legal Services Act 2011. He then sought review of the reconsideration by the Legal Aid Review Panel, unaware that the Panel had been disestablished and replaced by the Legal Aid Tribunal. He asked his Principal Corrections Officer for the postal address for the Panel and was provided with the old address. His letter was returned to the prison, but there was a further delay in him ultimately receiving the returned letter and obtaining the correct address from a lawyer. The application for review was eventually sent to the correct address, but it was declined as being out of time. Section 53(2) provides that the Tribunal must not accept an application more than 60 working days out of time.

[11] The applicant says he then applied for judicial review of the decision of the Tribunal rejecting his application for review. The application for judicial review was

⁸ *Reekie v Attorney-General* [2014] NZSC 98.

⁹ CA judgment, above n 1 (footnote omitted).

dismissed by Simon France J on 1 November 2017.¹⁰ The applicant says he intended to appeal out of time to the Court of Appeal, but the Court gave him notice that it would consider striking out his substantive appeal before this occurred.

[12] The applicant says his substantive appeal to the Court of Appeal has not gone unheard because of a lack of interest or effort on his part. He again seeks dispensation with security for costs. He argues there is substance to the appeal and he should be permitted to pursue it. While he acknowledges the focus must be the Court of Appeal's decision to strike out his appeal, he says the correctness of the Court of Appeal's decision cannot be viewed in isolation.

[13] In terms of the criteria for leave in s 74 of the Senior Courts Act 2016, the applicant says the proposed appeal raises matters of importance to prisoners and wider society. He also says there is a risk of a substantial miscarriage of justice if the underlying appeal is not able to proceed. In support of this submission, he says two reports from independent lawyers submitted as part of his application for legal aid were positive as to his prospects of success.

[14] The respondent says that the applicant's appeal lay dormant for five years and he has not advanced a sufficient explanation for that significant delay. And as this Court noted in its 2014 leave decision, while some of the applicant's substantive complaints are "not completely hopeless, none appear to be particularly cogent and the prospects of the appellant achieving substantial success are remote".¹¹

Analysis

[15] We do not accept the respondent's submission that the applicant has done nothing in relation to the appeal for five years. But it is true that, at the time the Court of Appeal decided to strike out the applicant's appeal, more than two years had passed since Simon France J's decision was issued. This left the applicant in the position where, absent a successful appeal against the decision of Simon France J, he had no alternative to meeting the requirement for security for costs if he wanted to pursue the

¹⁰ *Reekie v Legal Services Commissioner* [2017] NZHC 2677, [2017] NZAR 1781.

¹¹ *Reekie* (SC), above n 7, at [77(b)].

appeal. He did not appeal against the decision of Simon France J and, given the very clear terms of s 53(2) of the Legal Services Act, he would not have succeeded if he had.

[16] While the applicant has taken some steps to advance his application for legal aid so he could pursue the appeal without having to meet the requirement for security for costs, those steps were fruitless and ended in 2017. The practical reality is that he has exhausted all alternative options for paying security for costs. He is clearly unable or unwilling to pay security and his appeal can proceed no further unless and until he does. That is the only step that can break the current stalemate and advance the appeal. The applicant has failed to take that step and the appeal has not progressed since 2017.

[17] We do not consider the criteria for leave in s 74 of the Senior Courts Act are met in this case. We do not see this case as giving rise to any point of public importance, given the decision is specific to the facts of this particular case. Nor do we see any appearance of a miscarriage of justice.

Result

[18] The application for an extension of time to apply for leave to appeal is granted but the application for leave to appeal is dismissed.

Costs

[19] The applicant must pay costs to the respondent. Normally the amount of costs awarded in relation to an application for leave of this kind would be \$2,500. But given the applicant's position as a serving prisoner, we award a reduced amount of \$250 only to the first respondent.

Solicitors:
Crown Law Office, Wellington for First Respondent