

IN THE SUPREME COURT OF NEW ZEALAND

SC 6/2011  
[2011] NZSC 151

BETWEEN                      VINCENT ROSS SIEMER  
   Applicant

AND                              MICHAEL RICHARD HERON  
   First Respondent

AND                              RUSSELL MCVEAGH  
   Second Respondent

AND                              FORCE 1 SECURITY  
   Third Respondent

AND                              SIONE TANAKI  
   Fourth Respondent

AND                              PIO SAMI  
   Fifth Respondent

Court:                      Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel:                      Applicant in Person  
   T L Clarke and S P H Elliott for First and Second Respondents

Judgment:                      9 December 2011

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**JUDGMENT OF THE COURT (RECALL AND COSTS)**

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**A     The application for recall of the judgment of the Court dated 8 November 2011 [2011] NZSC 133 is dismissed.**

**B     Both applications for costs are dismissed.**

**REASONS**

[1]     On 8 November 2011 the Court dismissed an appeal by Mr Siemer but reserved costs. The appeal concerned whether Mr Siemer had an appeal to the Court of Appeal as of right, or only by leave, against a decision of the High Court made in

respect of an interlocutory issue (security for costs) in his appeal to the High Court against an order made in the trial Court (the District Court at Auckland). By majority, we determined that s 66 of the Judicature Act 1908 conferred an appeal as of right. So the argument for Mr Siemer on the point on which leave was granted was successful.

[2] In their written submissions, and again in oral argument, however, the respondents had raised another procedural issue which, if not determined, would inevitably have needed to be resolved were the matter to be sent back to the Court of Appeal for further consideration. The factual material being fully before us, we therefore heard argument upon and addressed in our reasons that further issue. It was whether, before Mr Siemer had actually brought any appeal, his right to do so had ceased because by operation of s 74(2) of the District Courts Act 1947 the underlying appeal – that is, from the District Court to the High Court – was deemed abandoned. We concluded unanimously that the respondents were correct on this point: that no appeal to the Court of Appeal had validly been instituted. Accordingly we dismissed the appeal to this Court.

[3] Mr Siemer now applies for recall of the judgment. Both parties are seeking costs.

[4] Mr Siemer's ground for recall is that because he succeeded in establishing that there was a right of appeal under s 66, the Court's order of dismissal was not an accurate disposition of the appeal. But, as we have explained, the appeal was dismissed because the right to appeal to the Court of Appeal had not been validly exercised. Following that conclusion, the Court's order was inevitable.

[5] As both parties had some success, costs and disbursements on the appeal to this Court should lie where they fall. Mr Siemer, additionally, faces the difficulty that a litigant in person is ordinarily not entitled to an award of costs.<sup>1</sup> The respondents, for their part, face the practical difficulty that Mr Siemer is an undischarged bankrupt.

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<sup>1</sup> *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 and *Commissioner of Inland Revenue v Chesterfields Preschools Ltd (No 2)* [2010] NZCA 400, (2010) 24 NZTC 24,500 at [162].

[6] Neither party sought costs in respect of the present applications and they too must lie where they fall.

Solicitors:  
Bell Gully, Auckland for First and Second Respondents