

IN THE SUPREME COURT OF NEW ZEALAND

SC 7/2011
[2011] NZSC 30

BETWEEN	JANE CHAPMAN SIEMER Applicant
AND	KATE FARDELL AS EXECUTRIX OF THE ESTATE OF ROBERT FARDELL Respondent

Court: Elias CJ, McGrath and William Young JJ

Counsel: G J Thwaite for Applicant
M C Harris for Respondent

Judgment: 31 March 2011

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with costs of \$2,500 to the respondent.

REASONS

[1] This is an application for leave to appeal against a decision of a Court of Appeal Judge refusing to overrule an order made by the Registrar of that Court that the applicant give security for costs.

[2] The applicant appealed to the Court of Appeal against a judgment of the High Court¹ which had dismissed proceedings for professional negligence brought by her and others because of their failure to comply with court orders to give security for costs in the amount of \$100,000. The applicant sought from the Registrar of the Court of Appeal an order dispensing with security for costs in the appeal. The application was refused and the applicant ordered to pay security of \$5,560. The Registrar's decision was upheld on review by Chambers J.²

¹ *Siemer v Fardell* HC Auckland CIV-2003-404-5782, 21 June 2010.

² *Siemer v Fardell* [2010] NZCA 586.

[3] The applicant submitted to Chambers J that requiring security was likely to prevent her access to justice as she is impecunious. Chambers J held that the supporting affidavits did not establish that payment of security for costs, in the sum ordered, would prevent her from bringing the appeal. He referred to an affidavit filed in the High Court in which the applicant had deposed that she and her husband had “significant assets” in the United States which were “almost entirely tied up in property and long term securities”. As well, the applicant had chosen not to give evidence of assets she owns in New Zealand and overseas. The applicant filed an affidavit in the Court of Appeal seeking reconsideration in which she disputes the financial position is as Chambers J found.

[4] On behalf of the applicant, Mr Thwaite, in his written submissions to this Court seeking leave to appeal, repeats the arguments of principle that were advanced to Chambers J. Mr Thwaite contends that the proposed appeal meets the interests of justice test for granting leave to appeal because of the general importance of an accessible system of justice, and the general impediment to access to the court system where poor persons involved in commercial disputes are subjected to security for costs orders. He also argues that the effect is to deprive the applicant of the right to bring a claim against a defendant who is a “state actor”.

[5] We are satisfied that the proposed grounds of appeal are not arguable. Chambers J applied settled criteria. The Judge was entitled to decide that the lack of precise evidence concerning the applicant’s financial situation meant that the access to justice considerations were not engaged. An affidavit she filed subsequently does not alter that position and the sum ordered as security for the appeal was not inordinate. The separate contention that the deceased respondent, a practising barrister, was a “state actor” does not give rise to an arguable point.

[6] For these reasons, leave to appeal is refused.

Solicitors:
Gregory J Thwaite, Auckland for Applicant.
Gilbert Walker, Auckland for Respondent