IN THE SUPREME COURT OF NEW ZEALAND

SC 47/2013
[2014] NZSC 63

BETWEEN	NICHOLAS PAUL ALFRED REEKIE Appellant
AND	ATTORNEY-GENERAL First Respondent
	DISTRICT COURT AT WAITAKERE Second Respondent

SC 102/2013

BETWEEN	NICHOLAS PAUL ALFRED REEKIE Appellant
AND	DEPARTMENT OF CORRECTIONS AND VISITING JUSTICE TO SPRING HILL CORRECTIONAL FACILITY Respondents

Hearing:	27 November 2013 and 5 December 2013
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	Appellant in person via video link C R Gwyn and J Foster for Respondents on 27 November 2013 C R Gwyn and R D Garden for Respondents on 5 December 2013 A S Butler and O C Gascoigne as Amicus Curiae
Judgment:	29 May 2014

JUDGMENT OF THE COURT

The appeal in SC 47/2013 and the application for leave to appeal in SC 102/2013 are dismissed.

REASONS

(Given by William Young J)

An appeal and an application for leave to appeal against orders for security for costs

[1] Nicholas Reekie was the plaintiff in two sets of proceedings that resulted in judgments – one delivered by Wylie J[1] and the other by Rodney Hansen J[2] – which he now wishes to challenge in the Court of Appeal. In both cases, he is faced with orders for security for costs which he cannot satisfy and which will therefore prevent his appeals being heard. These orders were made by the Registrar of the Court of Appeal and the appellant's subsequent challenges to them were dismissed in judgments issued by single judges of the Court of Appeal.[3] We granted him leave to appeal against one of these judgments – relating to the case heard by Wylie J – and directed that the application for leave to appeal against the other be dealt with at the same time as this appeal.[4]

The security for costs regime in the Court of Appeal

Security for costs – an overview

[2] Security for costs can be required in the High Court and District Court when it appears that an order for costs against the plaintiff might not be able to be enforced (either because of the plaintiff's foreign residence or impecuniosity).[5] The jurisdiction to require security poses something of a conundrum for the courts. The poorer the plaintiff, the more exposed the defendant is as to costs and the greater the apparent justification for security. But, as well, the poorer the plaintiff, the less likely it is that security will be able to be provided and thus the greater the risk of a worthy claim being stifled.

[3] Applications for security for first instance proceedings call for careful consideration and judges are slow to make an order for security which will stifle a claim.[6] A somewhat different approach has, however, been taken in respect of

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1 *Reekie v Attorney-General* [2012] NZHC 1867.
2 *Reekie v Chief Executive Officer of the Department of Corrections* [2013] NZHC 271.
3 *Reekie v Attorney-General* [2013] NZCA 131 (White J); *Reekie v Chief Executive of the Department of Corrections* [2013] NZCA 422 (Miller J).
4 *Reekie v Attorney-General* [2013] NZSC 74.
5 High Court Rules, r 5.45; and District Court Rules 2009, r 4.20.
6 This jurisdiction was reviewed in *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

appeals. It was explained, rather bluntly, in *Cowell v Taylor*, where Bowen LJ observed:[7]

> The general rule is that poverty is no bar to a litigant, that from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts but only prevented, if he cannot find security, from dragging his opponent from one Court to another.

The same point was made more recently by Davies JA in the Queensland Court of Appeal, when he commented:[8]

> … an impecunious plaintiff who has lost at trial on the merits will have greater difficulty in relying on apparent merits as a factor against the making of an order for security the effect of which might stifle an appeal than would have been the case in respect of a similar reliance in opposition to an application for security of costs before trial. That is especially so where, as may have been the case here, the decision on the merits involved findings of fact based on credit.

[4] The underlying approach still has considerable currency[9] and was relied on by the European Court of Human Rights in *Tolstoy Miloslavsky v United Kingdom.*[10] In that case, the applicant had appealed against a defamation judgment for £1,500,000 but was ordered by the English Court of Appeal to provide £124,900 as security for costs within 14 days of the order being made. The European Court rejected the applicant's contention that this was a breach of art 6(1) of the European Convention on Human Rights, the right to a fair and public hearing. In doing so, the Court placed considerable weight on the fact that the applicant had had "full access" to the first instance court.[11]

[5] There is obvious potential for orders for security for costs to operate unfairly against appellants of limited means. It was for this reason that in the United Kingdom, the Report of the Review of the Court of Appeal (Civil Division) (the Bowman Report) in September 1997 recommended that the rules for fixing security

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7 *Cowell v Taylor* (1885) 31 Ch D 34 at 38.

8 *Natcraft Pty Ltd v Det Norske Veritas* [2002] QCA 241 at [3].

9 See, for instance, *Tait v Bindal People* [2002] FCA 322; and New South Wales Law Reform Commission *Security for costs and associated costs orders* (Report 137, December 2012) at [5.41]–[5.54].

10 *Tolstoy Miloslavsky v United Kingdom* [1995] ECHR 25, (1995) 20 EHRR 442.

11 At [63].

for costs in respect of appeals should be similar to those which apply at first instance, a recommendation which was implemented by r 25.15 of the Civil Procedure Rules 1998 (UK).[12] There is a diversity of approach in Australia with the rules in some jurisdiction requiring special circumstances before security is ordered, whereas in others there is no such limitation.[13]

[6] In New Zealand, the default position has always been that security for costs should be provided in relation to appeals. This has been so, as we will explain, in relation to the Court of Appeal since 1882.[14] The situation is broadly the same for appeals from the District Court to the High Court and from the Court of Appeal to this Court, albeit that in respect of appeals to the Supreme Court, practice is affected by the fact that security for costs is only considered after leave to appeal has been granted.

[7] The requirement to provide security has not, in practice, been a significant bar to appeals. At least since 1939, orders for security for costs on appeal in New Zealand have been modest with the result that such orders are well within the means of most appellants.[15] As well, as we will explain, appellants with apparently meritorious appeals have been able to proceed without providing security, in the past, under the *in forma pauperis* procedure and, in more recent times, with the assistance of legal aid.[16]

The rules as to security for costs on appeal prior to 2005

[8] The relevant history is as follows:

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12 *Report to the Lord Chancellor by the Review of the Court of Appeal (Civil Division)* (Lord Chancellor's Department, London, 1997) at [134]–[136].

13 See the position as reviewed by the New South Wales Law Reform Commission, above n 9, at [5.41]–[5.54].

14 The Court of Appeal was first constituted by the Court of Appeal Act 1862. Its establishment and jurisdiction are discussed in *Siemer v Heron* [2011] NZSC 133, [2012] 1 NZLR 309 at [53]. Appeals to that Court required the leave of the Judge whose decision was appealed against. The earliest rule to be found dealing with security for costs is contained in the rules annexed to the Court of Appeal Act 1882 (which replaced the Court of Appeal Act 1862). The provisions of the Judicature Act 1908 which govern the current jurisdiction of the Court of Appeal are derived from the 1882 Act.

15 See [8](b) below.

16 See below at [9] and [12].

(a) The first rules for the Court of Appeal were provided for in the schedule to the Court of Appeal Act 1882. Rule 18 provided:

> Due security for costs, and for the performance of the judgment of the Court of Appeal, shall, within six days after the notice of appeal has been given, be given to the satisfaction of the Registrar of the Court appealed from, unless the Court of first instance otherwise orders; and if no such security be given the notice of appeal shall be deemed abandoned.

(b) Rule 22 of the Rules of the Court of Appeal which formed the third schedule to the Judicature Act 1908 was to the same effect. These rules were amended in 1939 so as to remove the requirement to give security for the performance of the judgment and to provide that security was in general to be fixed by reference to costs allowable for the first day of the hearing in the Court of Appeal.[17] The time for provision of security was extended from six to 14 days in 1953.[18]

(c) Rules 34 of the Court of Appeal (Civil) Rules 1955 and 11 of the Court of Appeal (Civil) Rules 1997 were to the same effect as Rule 22 of the 1908 Rules, as amended.

[9] The Court of Appeal also exercised a jurisdiction to allow appeals *in forma pauperis,*[19] a jurisdiction which was formalised by additional Court of Appeal Rules made on 7 November 1903.[20] This procedure was carried through into the 1908 Rules and, under the heading "Poor Persons' Appeals", into rr 50–68 of the Court of Appeal Rules 1955. These last rules were repealed by s 40 of the Legal Aid Act 1969. Security for costs was never required of an appellant who appealed *in forma pauperis* or "as a poor person".[21] A party wishing to take advantage of this procedure was required to obtain an opinion from counsel certifying that the case

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17 Court of Appeal Amendment Rules 1939, r 5.

18 Court of Appeal Amendment Rules 1953, r 4.

19 See *Young v Harper* (1889) 8 NZLR 179 (CA); and *Robertson v Howden* (1891) 10 NZLR 471 (CA).

20 See "Additional Rules under 'The Court of Appeal Act, 1882.' – Appeals by Paupers" (12 November 1903) 86 *New Zealand Gazette* 2388.

21 See *Clifton v Dexter & Crozier Ltd* [1923] NZLR 1042 (CA); and *Yeatts v Ruapekapeka Sawmill Co Ltd* [1958] NZLR 739 (CA) at 743. The expression "as a poor person" was used in the Court of Appeal Rules 1955.

was "a proper case for appeal".[22] The Court would not grant leave to appeal *in forma pauperi*s unless independently satisfied that there were reasonable grounds for appeal.[23] Further, if the party who was granted leave to appeal on this basis conducted the appeal in "a vexatious or improper manner", the order granting leave to appeal could be discharged.[24] The Court would usually assign solicitors and counsel to act for an appellant appealing *in forma pauperis*.[25] Such an appellant was not required to pay court fees.[26] Orders for costs were not usually made against someone suing *in forma pauperis*[27] unless an indulgence had been sought.[28] The state-funded legal aid system introduced under the Legal Aid Act 1969 replaced the *in forma pauperis* procedure.

[10] Under the rules as they were between 1882 and 2005, it was not open to the registrar of the court appealed from to dispense with security.[29] So there was no requirement for that registrar to address the likely merits of the appeal. Dispensation was for a judge of the court appealed from. The time period for provision of security was rigid. If security was not provided, the appeal was abandoned. It was distinctly arguable that any decision by a judge had to be given within that period.[30] There was no right of appeal from a decision of a judge as to security.[31] And even if there had been a right of appeal,[32] procedural constraints (particularly the tight timetable and the likely requirement to provide additional security) would have precluded its exercise in most cases.

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22 This was provided for in r 55 of the Court of Appeal Rules 1955.

23 See r 58 of the Court of Appeal Rules 1955. In *Clifton*, above n 21, this was seen as turning on whether the appeal was arguable.

24 See r 64 of the Court of Appeal Rules 1955.

25 See r 61.

26 See r 60.

27 See *Halsbury's Laws of England* (2nd ed, 1937) vol 26 Practice and Procedure at [196].

28 See, for instance, *Jacobs v Crusha* [1894] 2 QB 37 (CA) at 39.

29 See *Brennan-Hodgson v Brennan* [1979] 2 NZLR 270 (CA) at 271.

30 A point discussed in *Bernard v Space 2000 Ltd* (2001) 15 PRNZ 138 (HC) where conflicting lines of authority are reviewed.

31 See *Potemkin v Protector Safety Ltd* CA77/87, 7 December 1987; *James v Mabin (No 1)* [1929] NZLR 401 (CA) at 404; and *Taitumu Marangataua v Patena Kerehi* (1911) 30 NZLR 1049 (CA) at 1052 per Williams J and 1055 per Edwards J.

32 On the approach taken in *Siemer v Heron* [2012] NZSC 91 there probably was a right of appeal.

[11] Security was sometimes dispensed with,[33] albeit that an appellant who was able to appeal *in forma pauperis* was expected to utilise that procedure.[34] Security might also be dispensed with where it was unlikely that costs would be awarded against the appellant if unsuccessful.[35] The rule, however, was that security was the norm and was dispensed with only in exceptional circumstances.[36]

[12] Just as the rules governing the *in forma pauperis* procedure provided for assessment of the merits of the proposed appeal, so too has the legal aid system.[37] Although the 1955 Rules did not make express provision for cases where legal aid had been granted, the corollary of a grant of legal aid was (a) the likely inability of the appellant to provide security and (b) the improbability of a substantial order for costs if the appeal were unsuccessful. Accordingly, a grant of legal aid was likely to result in security being waived.[38]

[13] In *Brown v Attorney-General*, security was waived on grounds of impecuniosity where the High Court Judge treated impecuniosity as itself "an exceptional circumstance".[39] That case, however, was exceptional for other reasons, in that the Attorney-General was being sued on behalf of those responsible for the provision of legal aid and for this reason the appellant did not wish to apply for legal aid. The Judge addressed the merits of the appeal and rejected what seems to have been the argument for the Attorney-General that it had no prospects of success.

The Court of Appeal (Civil) Rules 2005 and s 61A of the Judicature Act 1908

[14] The rules relevant to this case are rr 35–37 of the Court of Appeal (Civil) Rules 2005. Of these, it is r 35 which is primarily significant:

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33 See *Hamilton v Bank of New Zealand* (1903) 23 NZLR 550 (SC); and *Official Assignee of Harding v Harding (No 2)* (1914) 33 NZLR 1551 (SC).

34 See *Hellyar v Morrison* [1932] NZLR 321 (SC). However, security was dispensed with in *Official Assignee of Harding*, above n 33, despite the fact that it was open to the appellant to apply for leave to appeal *in forma pauperis*.

35 As in *Wright v Wright* [1953] NZLR 6 (SC).

36 See, for instance, *In re Donner (deceased)* [1958] NZLR 141 (SC). Reference can also be made to *Russell v Stainton & Co Ltd* [1922] GLR 422 (SC).

37 As to the procedure, see [9] above. In the case of legal aid, this was initially provided for under ss 23(1)and 23(2)(e) of the Legal Aid Act 1969.

38 As in *Morrison v Upper Hutt City Council* (1997) 10 PRNZ 584 (HC).

39 *Brown v Attorney-General* HC Auckland CIV-1998-404-181, 12 May 2003, at [12] per Salmon J.

35 Security for costs: general

(1) This rule applies to every appeal except—

(a) an appeal to which rule 36 applies; and

(b) an appeal where the Court has fixed security for costs under rule 27(2)(a).

(2) The appellant in an appeal to which this rule applies must, within the time specified in subclause (3), pay to the Registrar security for the respondent's costs in the Court.

(3) The time is 20 working days after the notice of appeal has been filed in the Registry.

(4) If there is more than 1 respondent, each of them is entitled to security for their costs in the Court (unless they have the same solicitor, in which case they must be treated, for the purposes of calculating the amount of security, as a single respondent).

…

(6) However, the Registrar may, on application, if satisfied that the circumstances warrant it, make an order—

(a) increasing the amount of security:

(b) reducing the amount of security:

(c) dispensing with security:

(d) deferring the date by which security must be paid.

…

By way of explanation, r 27(2)(a) addresses appeals for which leave has been granted, meaning that the Court will have made some assessment of the merits. Where leave is granted, the Court decides whether security is required and, if so, how much.

[15] Rule 36 stipulates that legally aided appellants need not provide security and r 37 provides that where there is non-compliance with an order for security, the Court may strike out the appeal and the appellant may not apply for a hearing date. Non-compliance with an order for security for costs does not automatically result in the deemed abandonment of the appeal. However, under r 43 of the Rules, an appellant must apply for a hearing within three months of lodging an appeal. If this is not complied with, the appeal is deemed to be abandoned. An extension of time

for doing so may be obtained either within that period or the following three months. As noted, an appellant who is in default of an order to pay security for costs may not apply for a fixture. So unless such an order extending the time for applying for a hearing is obtained, non-compliance with an order for security for costs will eventually result in the deemed abandonment of the appeal.

[16] Section 61A of the Judicature Act provides:

> **61A Incidental orders and directions may be made and given by 1 Judge**
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> (1) In any civil appeal or in any civil proceeding before the Court of Appeal, any Judge of that court, sitting in chambers, may make such incidental orders and give such incidental directions as he thinks fit, not being an order or a direction that determines the appeal or disposes of any question or issue that is before the court in the appeal or proceeding.
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> (2) Every order or direction made or given by a Judge of the Court of Appeal under subsection (1) may be discharged or varied by any Judges of that court who together have jurisdiction, in accordance with section 58A or section 58B or section 58D, as the case may be, to hear and determine the proceeding.
>
> (3) Any Judge of the Court of Appeal may review a decision of the Registrar made within the civil jurisdiction of the court under a power conferred on the Registrar by any rule of court, and may confirm, modify, or revoke that decision as he thinks fit.
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> …

These provisions all antedate the 2005 Rules but tie into rr 7(1) and (2), which provide:

> **7 Judge may exercise certain powers under rules**
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> (1) A Judge may exercise—
>
> (a) a power conferred on the Court by these rules to give directions or to decide a matter, except the determination of an application for leave to appeal or an appeal:
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> …
>
> (2) A Judge may, on application, review any decision of the Registrar under these rules.
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> …

[17] For present purposes, the most significant of the changes between the 1997 and 2005 Rules were:

(a) the transfer of the function of dispensing with security from Judges of the High Court to the Registrar of the Court of Appeal; and

(b) conferring on single Judges of the Court of Appeal a power to review dispensation decisions.

The key issues

[18] Before us are issues as to:

(a) the basis upon which the discretion to dispense with security on grounds of impecuniosity should be exercised; and

(b) the role of the Registrar and the nature and extent of rights of review.

We address those issues in reverse order.

The role of the Registrar and the nature and extent of rights of review

The Registrar's role

[19] An application to dispense with security is likely to be based on one of two broad grounds:

(a) costs are unlikely to be ordered against an appellant and, for this reason, security should not be required; or

(b) the appellant either cannot pay or will suffer severe hardship if payment is required.

It is only the second of these grounds which is presently material.

[20] It is clear that impecuniosity does not, in itself, warrant an order dispensing with security. The more impecunious the appellant, the greater the risk for the respondent as to costs. It would be perverse to apply the rule so as (a) to require security only from appellants who, by reason of solvency, could meet an order for costs if unsuccessful, but (b) to dispense with security from appellants who will not be able to meet such an order. As well, such an approach is not consistent with the approach of the courts under the pre-2005 regime.

[21] The Registrar should only dispense with security if of the view that it is right to require the respondent to defend the judgment under challenge without the usual protection as to costs provided by security. We will discuss shortly the factors which bear on this question. As will become apparent, the Registrar will not always be well-placed to carry out the required exercise but will simply have to do the best that he or she can.

[22] In the years preceding the 2005 Rules, the requirement for security and the exercise of the discretion to dispense with security do not appear to have given rise to difficulty. This is because most appellants who could not afford security nonetheless retained access to the Court of Appeal through the legal aid system. The decision to vest the dispensing power in the Registrar may therefore have been premised on the assumptions that the cases in which dispensation would be sought would be comparatively few and such cases would be within the expertise of the Registrar. But, as more recent experience has shown, any such assumptions were misplaced. For this reason, we consider that the rules warrant reconsideration by the Rules Committee.

The role of the judge

[23] The review function of the judge in relation to security for costs under r 7(2) of the 2005 Rules and s 61A(3) of the Judicature Act is to be exercised de novo. This is for two reasons:

(a) the relevant power corresponds to that historically exercised by High Court judges which, in the case of a proposed dispensing with security, was an original jurisdiction; and

(b) the judge is better placed than the Registrar to decide whether dispensing with security is appropriate, particularly when this involves an assessment of the merits of the appeal.

Can decisions of a single judge as to security for costs be reviewed by a panel of three Court of Appeal judges?

[24] The appellant contends that a decision by a judge under s 61A(3) may be reviewed under s 61A(2) by a panel of three judges. That view has not been accepted by the Court of Appeal, which has declined to hear applications to review such decisions, and this Court has, in leave decisions, taken the same view.[40] If this is a correct interpretation of s 61A, a challenge to decisions made under s 61A(3) can only be made by way of application for leave to appeal to this Court.[41] This is why the present appeal and application for leave to appeal are in relation to decisions by White J and Miller J under s 61A(3) which have not been the subject of further determination by a panel of three Court of Appeal judges.

[25] The current status of dispensation decisions of judges of the Court of Appeal in respect of appeals would be less awkward if decisions under s 61A(3) were subject to review under s 61A(2). This, however, is not in accordance with the structure of the section. If this had been intended, s 61A(1) would have read:

> (1) In any civil appeal or in any civil proceeding before the Court of Appeal, any Judge of that court, sitting in chambers, may:
>
> (a) make such incidental orders and give such incidental directions as he thinks fit, not being an order or a direction that determines the appeal or disposes of any question or issue that is before the court in the appeal or proceeding; and
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> (b) review a decision of the Registrar made within the civil jurisdiction of the court under a power conferred on the Registrar by any rule of court, and may confirm, modify, or revoke that decision as he thinks fit.

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[40] See, for example, *Siemer v Stiassny* [2013] NZSC 114 at [4]; *Siemer v Judicial Conduct Commissioner* [2013] NZSC 113 at [5]–[6]; *Siemer v Judicial Conduct Commissioner* [2013] NZSC 112 at [3]; *Siemer v Heron* [2013] NZSC 111 at [20]; *Rabson v Chapman* [2013] NZSC 65 at [4]; and *Siemer v Stiassny* [2013] NZSC 11 at [4].

[41] As to this, we are satisfied that such judgments are decisions which are susceptible to appeal under s 7 of the Supreme Court Act 2003.

Section 61A(3) would then have been redundant. Alternatively, the order of s 61A(2) and (3) would have been reversed and the power of review by three judges would have been expanded to include orders made under the new s 61A(2). This latter drafting technique was adopted in s 28 of the Supreme Court Act 2003, a section which broadly corresponds to s 61A(2). It should be borne in mind that, as we have explained, the decision of a High Court judge refusing to dispense with security was not subject to further review.

[26] We are accordingly of the view that review decisions of a single judge under s 61A(3) are not subject to further review under s 61A(2).

The discretion to dispense with security on grounds of impecuniosity

The current problem

[27] Under the principles which the judges of the Court of Appeal currently apply when reviewing dispensation decisions:[42]

(a) it is for the appellant to show impecuniosity;

(b) impecuniosity is not in itself enough to warrant dispensing with security;

(c) security is the norm and security should be dispensed with only in exceptional circumstances;

(d) a reduction in the amount of security required may, in some cases, meet the justice of the case; and

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[42] See, for instance, *RIG v Chief Executive of the Ministry of Social Development* [2010] NZCA 370, (2010) 20 PRNZ 703; *Creser v Official Assignee* CA196/05, 12 June 2006; *Fava v Zaghloul* [2007] NZCA 498, (2008) 18 PRNZ 943; *Easton v Broadcasting Commission* [2009] NZCA 252, (2009) 19 PRNZ 675; *Clarke v Watts* [2010] NZCA 221, (2010) 20 PRNZ 474; *Jong v Yang* [2010] NZCA 343; *Hills v Public Trust* [2010] NZCA 401, (2010) 20 PRNZ 707; *Ibrahim v Associate Minister of Immigration* [2012] NZCA 229; *Seager-Buckle v Hurrell* [2013] NZCA 21; and *Patterson v Commissioner of Inland Revenue* [2013] NZCA 153, (2013) 26 NZTC 21-015.

(e) some assessment of the merits of the case is required, along with an assessment of whether the appeal raises issues of public interest.

In most cases, security has not been dispensed with.[43] In such cases, the judge has usually seen the appeal to the Court of Appeal as being hopeless[44] or of doubtful merit.[45]

[28] In the vast majority of cases security is either not required (because the appellant is legally aided) or, alternatively and more commonly, provided. For this reason, cases where security is dispensed with are necessarily exceptional. But this does not mean that an impecunious appellant must show an exceptionally strong case – or anything of that sort – to warrant dispensation. Subject to that possible caveat, the principles as they have been applied since 2005 generally appear unexceptionable. As well, they are consistent with the jurisprudence under the pre-2005 rules. But despite this – and in contradistinction to the position which obtained prior to 2005 – the exercise of the discretion to dispense with security for costs has become controversial, so much so that since 2007 there have been no less than 37 applications for leave to appeal to this Court against decisions of single judges of the Court of Appeal.

[29] Nearly all the single judge dispensation decisions have involved unrepresented litigants.[46] All leave applications to this Court challenging dispensation decisions have been by litigants in person. Court of Appeal judges have generally insisted on the provision of security (albeit sometimes reduced). To date, and with the exception of the present case, applications for leave to appeal to this Court have all been refused.

[30] The appellant's appeal against the judgment of Wylie J and his challenge to the refusal to dispense with security provided a good opportunity for us to reconsider the basis upon which the discretion to dispense with security should be exercised. In

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43 *Fava*, above n 42, is an exception.

44 As in *Patterson*, above n 42, at [8]–[15]; *Seager-Buckle*, above n 42, at [13]; *Easton*, above n 42, at [7]; *Jong*, above n 42, at [13]; and *Clarke*, above n 42, at [16].

45 As in *Creser*, above n 42, at [28]; *Ibrahim*, above n 42, at [17]; *RIG*, above n 42, at [5]; and *Hills*, above n 42, at [28].

46 Exceptions are *Jong*, above n 42; *RIG*, above n 42; and *Hills*, above n 42.

the succeeding sections of this part of the judgment, we will set out the approach to be adopted in the future. This approach is not substantially inconsistent with the principles which have hitherto been applied (subject perhaps to the comment made already about "exceptional circumstances"), but it is more elaborate and more closely focused on the types of case which have given rise to difficulty.

General principles

[31] As we have indicated, the Registrar should dispense with security if of the view that it is right to require the respondent to defend the judgment under challenge without the usual protection as to costs provided by security.

[32] The orders for security for costs made in the present cases were both less than $6,000. The cost to the respondents of defending the appeals will be substantially more. So irrespective of whether security is provided or not, the respondents will, if successful, incur costs which they will not recover. In this respect, their situation is not unusual. All defendants (at first instance) and respondents (on appeal) have the near certainty of being out of pocket as to costs, given that:

(a) the opponent of a litigant who is legally aided has no expectation of being awarded costs if successful;[47]

(b) costs regimes do not operate on the basis that a successful party is entitled to an indemnity for all costs actually incurred; and

(c) an appellant who manages to put up security may not later meet an order for costs which exceeds the security provided.

[33] Although an order dispensing with security is therefore, in itself, of limited economic significance, the costs regime, including the usual requirement for appellants to provide security for costs, imposes some discipline on litigants. The liability to pay costs if unsuccessful is a disincentive to the commencement of

[47] Legal Services Act 2011, ss 45 and 46. Section 45(2) provides that "[n]o order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances".

frivolous proceedings. As well, most litigants will not commence proceedings if the costs of the exercise, including those they must pay if unsuccessful, exceed the likely benefits. So the costs system discourages litigation which is disproportionate to the occasion. Increased costs may be ordered where proceedings have been conducted vexatiously, and this serves as a disincentive to vexatious conduct. An appellant who will not be able to meet a subsequent order for costs is free of constraints that affect other litigants and this freedom carries with it the potential for injustice to the respondent.

[34] As we have noted, a litigant whose opponent is legally aided is usually unable to obtain an order for costs if successful. The same was true of those on the other side of a litigant suing or appealing *in forma pauperis*. But a grant of legal aid is subject to independent merits and cost/benefit assessments of the proceedings for which legal aid is sought[48] and legal aid can be withdrawn if the legally aided person acts unreasonably.[49] The position was similar under the rules governing the *in forma pauperis* process which involved an independent merits assessment and provided for an order granting leave to appeal *in forma pauperis* to be discharged if the litigant acted vexatiously or improperly. These mechanisms are (or were) partly the correlatives of the positive benefits conferred on those who (a) receive legal aid (in the form of state-provided funding) or (b) sued *in forma pauperis* (in the form of non-payment of court fees and the assignment of solicitors and counsel). But they also provided – and in the case of the legal aid system, still provide – substitutes for the discipline usually provided by the costs regime.

[35] Against that background, we consider that the discretion to dispense with security should be exercised so as to:

(a) preserve access to the Court of Appeal by an impecunious appellant in the case of an appeal which a solvent appellant would reasonably wish to prosecute; and

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48 Legal Services Act, s 10.

49 Legal Services Act, s 30(2)(c).

(b) prevent the use of impecuniosity to secure the advantage of being able to prosecute an appeal which would not be sensibly pursued by a solvent litigant.

A reasonable and solvent litigant would not proceed with an appeal which is hopeless. Nor would a reasonable and solvent litigant proceed with an appeal where the benefits (economic or otherwise) to be obtained are outweighed by the costs (economic and otherwise) of the exercise (including the potential liability to contribute to the respondent's costs if unsuccessful). As should be apparent from what we have just said, analysis of costs and benefits should not be confined to those which can be measured in money.

[36] A litigant who is unable to provide security for costs usually finds it necessary to apply for legal aid. The availability of legal aid is subject to criteria which proceed very much along the lines of how a reasonable and solvent litigant would approach the decision whether or not to appeal. Security for costs will not be required where legal aid is granted. The respondent to an appeal which is funded on legal aid will not be able to recover costs if successful. Such a respondent will, however, have the consolation of knowing that the appeal has been subject to independent assessment and, because the lawyers involved will be subject to professional obligations to the Court, the proceedings should be conducted efficiently and fairly.

[37] Sometimes impecunious appellants secure legal representation from lawyers who are willing to act without remuneration or on deferred or conditional remuneration arrangements. Such arrangements are likely to entail some assessment that the case is a proper one for appeal. Providing the case is of the kind which would be appropriate for a grant of legal aid, an impecunious litigant who is privately represented should be able to obtain a dispensation from the requirement to provide security.

[38] Where the appellant is a litigant in person, it may be legitimate to inquire into whether legal aid has been sought. If legal aid has been sought and declined on the basis of merits or cost/benefit assessments, the appellant may not be well placed to

obtain dispensation. The same may be true of an appellant who is not prepared to submit the proposed appeal to such assessment.

[39] Protecting respondents from vexatious appeals is a legitimate purpose of the security for costs regime. This is consistent with the approaches (a) taken in relation to legal aid and (b) formerly taken in respect of appeals *in forma pauperis*. It is also consistent with Australian authority as to first instance proceedings.[50] An appeal, or its conduct, may be vexatious even though it raises some issues which are arguable. Vexatiousness might be manifested, for instance, by the unreasonable and tendentious conduct of litigation, extreme claims made against other people involved in the case or perhaps a history of unsuccessful proceedings and unmet costs orders.[51]

[40] A litigant in person does not incur the expense of legal representation and, if impecunious, will obtain a fee waiver and will not be in a position to pay costs if unsuccessful. All costs associated with litigation so prosecuted fall on other parties. This means that litigants in person may be more prepared to engage in litigation which, when viewed in light of the costs that others must incur, is disproportionate to the occasion and which therefore would not be prosecuted by a solvent litigant. In such circumstances, the Registrar or reviewing judge may conclude that it is unjust to require the respondent to defend the judgment without the protection of security.

[41] As we have made clear, cost and benefit are not to be assessed in purely financial terms. An appeal may raise issues of public interest which are not measurable in economic terms. As well, considerations which are personal to an appellant (for instance, considerations affecting reputation) may legitimately fall to be considered as part of the cost/benefit assessment. Proceedings relating to the vindication of rights under the New Zealand Bill of Rights Act 1990 may have both personal and public non-financial benefits. In the end, what is called for is an exercise of judgment.

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50 See, for instance, the comments of Heydon J in *Jeffrey & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, (2009) 239 CLR 75 at [91]; and Applegarth J in *Mbuzi v Hall* [2010] QSC 359 at [70].

51 See for instance the remarks of Applegarth J in *Mbuzi v Hall*, above n 50, at [70].

Establishing impecuniosity

[42] Those seeking dispensation from the requirement to provide security often proceed on the basis that waiver of fees granted by the Registrar is conclusive evidence of impecuniosity. This is incorrect. A waiver of fees granted by the Registrar may be indicative of impecuniosity but is not conclusive, as security for costs is an inter parties issue.

[43] An appellant without liquid assets may be required to borrow money to provide security.[52] It might be appropriate to investigate whether it is reasonable for another party (such as a related family trust or a close relative) to provide funding. If a trust associated with the appellant or a close relative has the resources but is unwilling to provide security, it may suggest that dispensation is inappropriate. Proof that security cannot be provided may require full disclosure of financial circumstances and the sources of funding relied on by the appellant to support his or her general lifestyle.

[44] In cases in which an appellant cannot meet what would otherwise be an appropriate order for security but is able to come up with some money, a reduction in the amount of security may be appropriate. For this reason, it may be sensible for the Registrar or reviewing judge to make inquiries as to what, if any, security the appellant can provide.

The appeal against the judgment of Wylie J

The background

[45] The appellant was sentenced to three years imprisonment on 16 March 2000 and was released on parole on 10 December 2001. He was arrested on 13 February 2002 on a number of serious charges in relation to a single complainant. In the months that followed, further charges involving another three complainants were laid. Eventually, on 15 July 2003, he was sentenced to preventive detention.[53] The sentencing Judge specified a minimum period of imprisonment of 25 years which

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52 As in *Hills*, above n 42.

53 *R v Reekie* HC Auckland T021833, 15 July 2003 (Harrison J).

was later reduced on appeal to 20 years.[54] From his arrest until his sentencing, the appellant had been in custody either in Auckland Prison or the Auckland Central Remand Prison. At the time of his sentencing he was in the latter institution. He was then shifted to Auckland Prison and initially placed in the High Care Unit. He was transferred out of that unit on 20 August 2003.

[46] In the proceedings heard by Wylie J, the appellant advanced claims related to what happened between 13 February 2002 – the date of his arrest – and 20 August 2003, when he was transferred out of the High Care Unit. He contended that he was held unlawfully between 9 September and 25 September 2002. He also alleged that his treatment throughout the period was in breach of the requirements stipulated by the legislation and regulations then in force and the New Zealand Bill of Rights Act.

The unlawful detention claim

[47] As explained, the appellant was on parole at the time of his arrest. Subsequent to his arrest, the appellant's parole was terminated and a direction was made by the Parole Board that he not be released until his final release date, which was 9 September 2002.

[48] On 22 July 2002, the charges against the appellant were to be called in the District Court before Judge Thorburn. By this stage he was facing charges in relation to three complainants. On the morning of 22 July, the appellant refused to clean his cell, threw his breakfast at the staff and was generally abusive and confrontational.[55] As well, he had been on a hunger strike and was not well. The prison staff considered that his emotional and medical condition meant that he was not fit to attend court. This was apparently brought to the attention of either or both of the Registrar of the District Court and the appellant's counsel.[56]

[49] No direct evidence was given as to what transpired at the hearing on 22 July. From the notations on the court record, the Judge directed that the preliminary hearing take place on 7 October 2002 and the appellant was remanded in custody

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54 *R v Reekie* CA339/03, 3 August 2004 (William Young, John Hansen & Doogue JJ).
55 *Reekie v Attorney-General*, above n 1, at [19].
56 At [23].

until that date. But no warrant of commitment was issued and there is no record of the remand being by consent. There is note on the information saying "(deft excused 1 week) Deps", which Wylie J took to be a reference to the appellant not being required to attend the first week of the proposed preliminary hearing.[57] The appellant's interpretation is that "deft excused" refers to his non-appearance on 22 July and that the "1 week" is an indication that the Judge – conscious of the eight day limitation on remands in custody under s 45(3) of the Summary Proceedings Act 1957 – intended that the case be called again on 29 July. That is a plausible interpretation of the notation but is not particularly congruent with the order made by the Judge that the appellant be remanded in custody until 7 October 2002. The reality is that on the limited evidence which was adduced, what happened in court on 22 July 2002 is uncertain.

[50] As noted, the appellant's release date under the sentence imposed in March 2000 was 9 September 2002. Internal prison records suggest that on this day his status then reverted to that of a remand prisoner. He was transferred from Auckland Prison to the Auckland Central Remand Prison on 11 September 2002. On the same day, a District Court Judge purporting to act on behalf of Judge Thorburn issued a warrant of commitment ordering that the appellant be detained until 7 October 2002. This was not sent through to the prison until 26 September.

[51] On 23 September 2002, further charges, involving a fourth complainant, were laid against the appellant and on 25 September, he appeared in Court and was remanded in custody until 7 October. A warrant of commitment was issued.

[52] To complete this narrative, we note that on 1 October 2002, the Chief District Court Judge issued a warrant of commitment for the period 22 July 2002 to 7 October 2002.

[53] Leaving aside conspiracy allegations advanced by the appellant and rejected by the Wylie J, there are two possible problems with the validity of the appellant's detention between 9 to 25 September 2002: first, that it exceeded the eight day limit under s 45(3) of the Summary Proceedings Act and, secondly, that a warrant of

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[57] At [41].

commitment was not issued in a timely way despite the mandatory language of s 47 of the Summary Proceedings Act.

[54] As to the first point, Wylie J was of the view that it was quite possible that counsel for the appellant had consented to the remand and that, in any event, the presumption of regularity applied.[58] On this basis, he held that it had not been established on the balance of probabilities that the appellant had not consented. As well, he held that the remand in custody was valid even if the appellant had not consented to a remand in custody for more than eight days.[59] On the second point, the Judge held that the failure to issue a warrant of commitment in close proximity to the 16 July 2002 remand in custody did not affect the validity of the order made in court by Judge Thorburn.[60] For these reasons, which he discussed elaborately by reference to both the facts and the law, Wylie J was of the view that the appellant's detention between 9 and 25 September 2002 was authorised by the order made in court by Judge Thorburn. The Judge also expressed the view that it was inconceivable that the appellant would have been granted bail in respect of the period between 9 and 25 September given the number and seriousness of the charges he faced and his previous history.[61]

Mistreatment in prison claims

[55] From the time he was remanded in custody in February 2002, the appellant posed a number of challenges for the prison staff. This was associated with his variable and unstable mood, self-harming behaviour (including attempts at suicide), non-communication with staff, and refusals to eat and drink. On one occasion, on the findings of the Judge, he was found with items capable of being used as a weapon concealed in his shoes.

[56] The complaints made by the appellant and reviewed by the Judge involved:

(a) an incident on 8 July 2002 when the appellant was placed on a tie-down bed;

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58 At [51].
59 At [52].
60 At [46].
61 At [49].

(b) the appellant being held in an isolation cell;

(c) eating utensils allegedly not being made available to him;

(d) the appellant not being permitted to smoke cigarettes;

(e) the appellant being held in cells with inadequate lighting and ventilation;

(f) availability (or otherwise) of water;

(g) inadequate lavatory facilities (including toilet paper);

(h) night lights;

(i) limited access to reading material and radio and television facilities;

(j) requirements to wear modesty gowns;

(k) substandard bedding;

(l) insufficient laundering of towels, bedding and clothing;

(m) salt being put on the appellant's food;

(n) inadequate recreation time and facilities;

(o) allegedly degrading conditions in which he was held and treatment he received;

(p) poor hygiene practices;

(q) showering arrangements;

(r) strip searching practices;

(s) difficulties with legal visits; and

(t) allegations that he was threatened and assaulted by other prisoners and did not receive assistance from the staff.

[57] The Judge rejected most of the appellant's complaints but made some findings in his favour: in particular, that (a) during the tie-down bed incident, ankle straps were used in breach of the applicable regulations,[62] (b) the appellant was at times held in cells without windows,[63] (c) he was not always given the opportunities for recreation required by the regulations,[64] and (d) he was routinely stripped-searched without consideration being given to the necessity for each individual search.[65] On the basis of these findings, the Judge found infringement of the appellant's rights under s 23(5) of the New Zealand Bill of Rights Act.

[58] The Judge concluded that the appropriate relief was by way of declaration.[66]

[59] We note that the hearing in front of Wylie J was in February and April 2012, around a decade after the events in question occurred. The trial took eight days and the judgment Wylie J delivered contained an extensive discussion of each of the appellant's complaints and an extensive analysis of the regulatory regime then in force. The Judge also visited and inspected the prisons in which the appellant was held.

The notice of appeal

[60] The current version of the appellant's notice of appeal against the judgment of Wylie J runs to 66 pages. As far as we can see, every finding of fact made by the Judge on a disputed issue is challenged. This includes many findings made by the Judge on the basis of credibility. The notice of appeal makes it clear that the appellant wishes to relitigate the entire case in the Court of Appeal.

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62 At [141].
63 At [171].
64 At [228].
65 At [265].
66 At [285].

The judgment of White J

[61] The relevant passage from the judgment of White J reviewing the Registrar's decision not to dispense with security for costs is as follows:[67]

> **Security for costs – general principles**
>
> [8] In the normal course, appellants in civil proceedings in this Court are required to pay security for costs. If an appellant wishes to apply to the Registrar for a waiver of security, he or she must do so within 20 days of filing the appeal. The Registrar may vary or waive security "if satisfied that the circumstances warrant it".
>
> [9] Security for costs will be waived where it is in the interests of justice to do so. There must be some exceptional circumstances to justify waiver. The appellant must honestly intend to pursue the appeal and it must be arguable, as respondents should not face the threat of hopeless appeals without provision for security. The importance of the issues raised in the appeal will be significant, as will the question of whether there is any public interest in having them determined. Impecuniosity alone is not usually sufficient to justify a waiver, but may be reason to reduce the quantum of security.
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> **Discussion**
>
> [10] I consider that the Registrar was right to refuse to dispense with the requirement to pay security for costs in this case.
>
> [11] Mr Reekie has provided no evidence of his financial hardship. On the assumption that he is impecunious, however, that alone would not be a sufficient reason to dispense with security. Exceptional circumstances are required.
>
> [12] The appeal does not raise issues of public importance nor contain any matter of significant legal principle, justice or public interest that requires reconsideration by this Court. Rather, as submitted for the respondents, it involves matters of historic interest only, the relevant legislation no longer being in force and the old High Care Unit in Auckland prison having been closed since 2006.
>
> [13] The appeal has little prospect of success. In Mr Reekie's lengthy notice, no specific errors of law are identified, rather the appeal is based on the sole ground that Wylie J's assessment of the evidence was unreasonable. Nothing raised in Mr Reekie's notice or subsequent submissions reaches the threshold necessary to throw into question the trial Judge's assessment of the evidence.

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67 *Reekie v Attorney-General*, above n 3.

Discussion

[62] Impecuniosity has been established. The appellant appears to have no resources at all and although he has some support in the community, it was not suggested that this support is financial in nature.

[63] The judgment of White J was an orthodox application of the relevant principles as they stood at the time of his decision. But given our reconsideration and restatement of those principles, we should address the issue of dispensation afresh in light of the principles as we have restated them.

[64] The appellant's appeal is not hopeless. There is, for instance, considerable uncertainty about what happened in 22 July 2002 in the District Court and for this reason, along with others, there is scope for argument as the legality of the appellant's detention between 9 and 25 September 2002. As well, the general treatment claims covered so much ground and deal with such unusual circumstances that it is possible that there might be some revision of some aspects of the Judge's findings of fact. There could also be argument as to whether the Judge was right in respect of remedies.

[65] On the other hand, there is little of practical moment in the appeal:

(a) Contrary to the appellant's submissions to us, there was no prospect of his being allowed bail in the period between the expiry of his prison sentence on 9 September 2002 and his appearance on 25 September 2002. So if the complexities associated with his custodial status in the period between the expiry of his sentence of imprisonment on 9 September and his appearance in court on 25 September had been appropriately addressed, it is inevitable that he would have stayed in custody. The appellant has thus suffered no perceptible prejudice. As well, what happened is not of continuing public significance given the very particular circumstances of the case and changes in the legislative scheme.

(b) The likelihood of the Court of Appeal interfering in a substantial way with the findings of fact made by the Judge in respect of the mistreatment claims is at best remote. Most of the findings made by the Judge were of fact and credibility. Nothing the appellant has put up suggests that there is any probability of those findings being subject to substantial revision. Similar considerations apply to the Judge's conclusions as to remedy.

(c) The events which give rise to the appellant's mistreatment claims took place so long ago as to be of largely historic interest and of little or no practical significance to the appellant. This consideration also bears significantly on the issue whether prosecution of the appeal would have associated public benefits in terms of the vindication of the rights of the appellant (and of other prisoners) under the New Zealand Bill of Rights Act.

[66] The appellant has chosen not to apply for legal aid. We appreciate that he had difficulties over legal aid in relation to the proceedings at first instance, but there would have been no impediment to him applying for aid on the appeal. Indeed, it is apparent from what he told us that he gave consideration to doing so. Had he applied for legal aid, there would have been independent merits and cost/benefit assessments. As well, had legal aid been granted, the appeal would have been conducted by counsel and almost certainly would have been subject to conditions as to its permitted scope. Conceivably, legal aid might have been granted in relation to the unlawful detention claim or perhaps as to remedy. But it is most improbable that legal aid would have been granted on terms which enabled the appellant, through counsel, to advance the allegations of perjury and cover-up which are made in the notice of appeal or to relitigate in the Court of Appeal all issues which were addressed by Wylie J.

[67] Whatever limited merits there might be in some individual aspects of the appellant's case, the exercise on which he wishes to embark – the relitigation of the entire case – is one in which no reasonable and solvent litigant would engage. It

follows that to allow the appellant to proceed without security for costs would be to allow him to use his impecuniosity to obtain advantage.

[68] Accordingly, we are the view that it would not be just to require the respondents to defend the judgment without security for costs and his appeal is accordingly dismissed.

The appeal against the judgment of Rodney Hansen J

The judgment of Rodney Hansen J

[69] On 28 February 2012, the appellant was transferred from Auckland Prison to Spring Hill Correctional Facility, where he remained until 17 August 2012. He was then returned to Auckland Prison. In judicial review proceedings before Rodney Hansen J, the appellant challenged the decision to transfer him to Spring Hill, his management at that prison and the conduct of disciplinary proceedings against him while he was there.

[70] The Judge concluded that there were irregularities in respect of the transfer. The appellant was not given seven days notice of it as required under s 55(1)(a) of the Corrections Act 2004. As well, he was not given in a timely way the reasons for the transfer and the reasons which were given were inadequate. The Judge, however, was satisfied that the transfer decision was made for proper reasons and was not unreasonable.[68]

[71] The Judge dismissed the appellant's challenge to his security classification at Spring Hill, which he concluded was carried out in accordance with the prescribed procedures and by reference to the relevant criteria.[69] He likewise rejected challenges to decisions made by the prison manager that the appellant be segregated from other prisoners for two periods of 14 days.[70] These decisions were made on the basis of fears for the appellant's safety. On the other hand, he concluded that the appellant was not given timely notice of the reasons for the decisions.[71]

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68 *Reekie v Chief Executive Officer of the Department of Corrections*, above n 2, at [36].
69 At [41].
70 At [48].
71 At [50].

[72] The Judge reviewed at length the background to the disciplinary charges faced by the appellant, the procedures which were followed, the decisions of the Visiting Justice and the appellant's challenges. He concluded that the charges were properly dealt with.[72]

[73] The Judge held that the deficiencies in respect of the transfer to Spring Hill and his change of classification were of no significance to the substantive decisions and were not of continuing significance.[73] For this reason, he dismissed the application for review.

The notice of appeal

[74] The notice of appeal in respect of the judgment of Rodney Hansen J is 33 pages in length – distinctly longer than the judgment under challenge. Again, the apparent purpose of the appellant is a complete relitigation in the Court of Appeal of the case which he advanced in the High Court.

The judgment of Miller J in the Court of Appeal

[75] The relevant passage from the judgment of Miller J reviewing the Registrar's decision is as follows:[74]

> **General principles of security for costs**
>
> [8] Security for costs is waived where it is in the interests of justice to do so. To justify waiver there must be exceptional circumstances. As set out in *Jong v Yang*:
>
> > [8] In the normal course, appellants in civil proceedings in this Court are required to pay security for costs. If an appellant wishes to apply to the Registrar for a waiver of security, he or she must do so within 20 days of filing the appeal. The Registrar may vary or waive security "if satisfied that the circumstances warrant it". A party who is dissatisfied with the Registrar's decision may apply to a Judge for a review of the Registrar's decision. Such an application must be made within 10 working days after the decision, although a Judge may extend that time limit.
> >
> > [9] Security for costs will be waived where it is in the interests of justice to do so. Given that the normal rule is that security must be provided, there will need to be some exceptional circumstances to justify waiver. The circumstances of the appeal are relevant, in the sense that the

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72 At [61], [63], [66]–[68], [79]–[80].

73 At [81].

74 *Reekie v Chief Executive of the Department of Corrections*, above n 3 (citations omitted).

> appellant must honestly intend to pursue it and it must be arguable – respondents should not face the threat of hopeless appeals without provision for security. The importance of the issues raised in the appeal will be significant, as will the question whether there is any public interest in having them determined. Impecuniosity alone is not usually sufficient to justify a waiver, but may be reason to reduce the quantum of security.

Discussion

[9] I consider that the Registrar was right to refuse to dispense with the requirement to pay security for costs.

[10] I observe that Mr Reekie's application provides no evidence of financial hardship, although that is the basis upon which the application was filed. I am prepared to assume for present purposes that he may be able to show that he cannot pay security, such that without a waiver his appeal will not proceed. But while impecuniosity is an important consideration, it is not enough in itself to require a waiver.

[11] Mr Reekie also submits that his circumstances are exceptional because he is a long-serving prisoner presently subject to preventive detention, and is self-represented. I do not agree that these matters justify a waiver in the interests of justice.

[12] It might be otherwise if the appeal, which concerns his management within the prison system, raised any issue of general or public importance that merit examination by this Court. It does not. I accept that a declaration can vindicate a right and that prisoners' rights matter, but the breaches of prison regulations which the Judge identified were not serious and the issues are now all moot. I echo the comments of Hansen J set out above at [6]. There is no reason to suppose that, as Mr Reekie would have it, he needs a remedy here to ensure similar incidents do not happen in future.

[13] Mr Reekie contends that, the respondents having behaved badly, they should not get the protection normally afforded by security for costs. I do not agree. Hansen J found that the substantive decisions made in relation to Mr Reekie were lawful and justified. The few breaches that the Judge identified were procedural in nature, and the authorities acted in good faith.

[14] Nor does the appeal appear to have any substantive merit. The notice of appeal complains about almost every aspect of the High Court judgment and the decisions under review, but without identifying any strongly arguable grounds. The theme is that the High Court decision was in every respect unreasonable.

Discussion

[76] Given that we have heard full argument in relation to the application for leave to appeal, we will deal with it as if it were an appeal and, for the reasons already

given in relation to the appeal against the judgment of White J,[75] do so on the basis of a fresh consideration of the question whether security should be dispensed with.

[77] Relevant to this consideration are the following considerations:

(a) Once again every finding of the Judge on a disputed issue is challenged and the appellant has been free with allegations of perjury and cover-up.

(b) While some of the challenges are not completely hopeless, none appear to be particularly cogent and the prospects of the appellant achieving substantial success are remote.

(c) Legal aid has not been sought. Assuming a grant of legal aid, it is inconceivable that counsel for the appellant would conduct the case on the basis proposed by the appellant.

(d) Although the events of concern to the appellant are more recent than the corresponding events in the other litigation, the effect of the decisions in question is spent and the proposed appeal is of little or no practical moment for the appellant and of no public significance in terms of a vindication of rights.

[78] For the reasons just given, we are of the view that a reasonable and solvent litigant would not wish to appeal on the basis of the appellant's notice of appeal and would not conduct the appeal in the manner foreshadowed in that notice. It follows that it would not be just to require the respondents to defend the judgment without security for costs and his application for leave to appeal is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington for Respondents

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[75] See [63] above.