

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 135/2019  
[2020] NZSC 29**

BETWEEN                      NICHOLAS PAUL ALFRED REEKIE  
   Applicant

AND                              ATTORNEY-GENERAL (SUED ON  
   BEHALF OF THE DEPARTMENT OF  
   CORRECTIONS)  
   First Respondent

   ATTORNEY-GENERAL  
   Second Respondent

   DISTRICT COURT AT WAITAKERE  
   Third Respondent

Court:                      Glazebrook and Ellen France JJ

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

Judgment:                      6 April 2020

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**JUDGMENT OF THE COURT**

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- 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 one set of costs of \$250 to the first and second respondents.**
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**REASONS**

**Introduction**

[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.<sup>1</sup> The Court struck out the applicant's appeal under r 44A(1)(b) of the Court of Appeal (Civil) Rules 2005, which empowers the Court to strike out or stay an appeal if "the appellant has failed to prosecute the appeal with due diligence and dispatch".

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

### **Background**

[3] The applicant commenced proceedings in the High Court alleging that he had been unlawfully detained and mistreated in prison in breach of the New Zealand Bill of Rights Act 1990. The applicant had some success in that litigation, obtaining declarations to the effect that the Department of Corrections had acted in breach of s 23(5) of the New Zealand Bill of Rights Act (right of a person deprived of liberty to be treated with humanity and with respect for the inherent dignity of the person).<sup>3</sup>

[4] The preliminary view of the High Court Judge, Wylie J, was that costs should lie where they fall.<sup>4</sup> Nevertheless, the applicant sought costs of \$5,762. In a judgment issued on 24 October 2012, Wylie J awarded the applicant costs of \$1,000.<sup>5</sup> Unsatisfied, the applicant appealed the costs decision to the Court of Appeal.

[5] The applicant also applied for security for costs to be dispensed with. The application was declined by the Registrar. That decision was upheld on review by O'Regan P.<sup>6</sup> O'Regan P considered that no matter of principle arose<sup>7</sup> and that the benefits the applicant sought to obtain via the appeal were "substantially outweighed by the costs of the exercise".<sup>8</sup> O'Regan P ordered the applicant to pay security for

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<sup>1</sup> *Reekie v Attorney-General (sued on behalf of the Department of Corrections)* [2019] NZCA 554 (Kós P, Brown and Clifford JJ) [CA judgment].

<sup>2</sup> Supreme Court Rules 2004, r 11.

<sup>3</sup> *Reekie v Attorney-General* [2012] NZHC 1867 at [290].

<sup>4</sup> At [293].

<sup>5</sup> *Reekie v Attorney-General (sued on behalf of the Department of Corrections)* [2012] NZHC 2786.

<sup>6</sup> *Reekie v Attorney-General* [2014] NZCA 374.

<sup>7</sup> At [7].

<sup>8</sup> At [8].

costs no later than 4 September 2014.<sup>9</sup> That deadline was extended to 26 September 2014. The applicant applied to the Supreme Court for leave to appeal against O'Regan P's judgment. Leave was declined on 11 November 2014.<sup>10</sup>

[6] Security for costs was never paid. 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(1)(b) of the Court of Appeal (Civil) Rules for failing to prosecute it with due diligence and dispatch. The applicant opposed strike-out. He acknowledged that the appeal had been "regrettably overlooked" in the handover from his former counsel but emphasised the merits of the appeal.<sup>11</sup> He also blamed the delay in part on the conduct of the Registrar of the Court of Appeal.

[7] The Court of Appeal ultimately struck out the applicant's appeal on 13 November 2019. The Court concluded:<sup>12</sup>

[7] This appeal has seen no progress for far too long. The issue of security for costs was fully litigated in this Court and the Supreme Court, and Mr Reekie was required to pay security in order to progress the appeal. He did not do so. The merits of Mr Reekie's various claims and what has happened in his other appeals are not relevant: the simple fact is years have passed without Mr Reekie taking any steps. We are satisfied that he has failed to prosecute the appeal with due diligence and dispatch.

## **Submissions**

[8] The applicant acknowledges that it is unfortunate that his appeal was overlooked in the handover from his former counsel. But, he says, the appeal is "far from forgotten" and is not without merit.

[9] The applicant initially appealed against the substantive decision of Wylie J on the ground that the Judge erred in declining to award compensation. The Registrar declined to dispense with security for costs in relation to that appeal. That decision was upheld by White J on review and, ultimately, this Court on appeal.<sup>13</sup> The day after

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<sup>9</sup> At [9].

<sup>10</sup> *Reekie v Attorney-General (sued on behalf of the Department of Corrections)* [2014] NZSC 161.

<sup>11</sup> CA judgment, above n 1, at [5].

<sup>12</sup> CA judgment, above n 1, (footnote omitted).

<sup>13</sup> *Reekie v The Attorney-General (sued on behalf of the Department of Corrections)* [2013] NZCA 131; and *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [68].

this Court released its judgment, the Registrar deemed his appeal abandoned pursuant to r 43 of the Court of Appeal (Civil) Rules.<sup>14</sup> The applicant says the substantive appeal was the focus at that time.

[10] The applicant says that his costs appeal raises standalone matters of principle and law, “if not indeed public importance”. These issues are as follows: whether Wylie J’s findings were of such a serious nature that full costs should have been awarded against the Crown; whether it is fair that a victim of serious abuses is left out of pocket; and whether Wylie J should have applied a more liberal approach. The applicant also says that the engineer’s report obtained at a cost of \$1,822 proved the Crown’s allegations against him “false beyond reproach”.<sup>15</sup> Next, the applicant takes issue with Wylie J’s substantive decision and says that if Wylie J had made other findings in his favour, a greater award of costs would have followed.

[11] The applicant also notes that in 2014, he was represented by counsel and believed security for costs had been waived or legal aid granted. He submits that he was not informed that security for costs remained an issue, or that leave to appeal against O’Regan P’s decision had been declined by this Court.

[12] Finally, the applicant says that he has been approached by senior counsel to take his case to the United Nations. Once that occurs, he intends to progress his appeal. For bringing this and other claims against the state, he has been harassed and interfered with such that his ability to conduct his legal affairs expediently has been undermined.

[13] The first and second respondents (the respondents) point to the fact that the underlying appeal sat dormant for five years. The respondents say that the applicant has not advanced any sufficient explanation for that significant delay. The respondents also note that this Court held in 2014 that the costs decision of Wylie J was not attended by any risk of a substantial miscarriage of justice.<sup>16</sup> They say that nothing is put forward by the applicant to suggest that the position has changed since then.

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<sup>14</sup> See *Reekie v Attorney-General (sued on behalf of the Department of Corrections)* [2015] NZCA 198 at [6]–[7].

<sup>15</sup> Wylie J did not accept this cost was personally incurred by Mr Reekie.

<sup>16</sup> *Reekie v Attorney-General*, above n 10, at [5].

## **Analysis**

[14] The appeal to the Court of Appeal has not been advanced since this Court declined leave to appeal against the Court of Appeal's refusal to dispense with security for costs on 11 November 2014. The appeal itself relates to a dispute in relation to the quantum of costs awarded, where the amount in dispute was less than \$5,000. The decision to strike out the appeal was based on the specific facts of the case and gives rise to no point of principle.<sup>17</sup> Nor does there appear to be any appearance of a miscarriage in striking out the appeal.<sup>18</sup> As the respondents say, the reasons advanced by the applicant do not adequately explain a delay of this extent. There is also nothing in the applicant's submissions to suggest that security for costs will soon be paid.

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

[16] The respondents have filed submissions in response to the application and so have incurred costs. However, in all the circumstances, a reduced costs award is appropriate. The applicant must pay one set of costs of \$250 to the first and second respondents.

Solicitors:

Crown Law Office, Wellington for First and Second Respondents

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<sup>17</sup> Senior Courts Act 2016, s 74(2)(a).

<sup>18</sup> Section 74(2)(b).