IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 81/2021
[2021] NZSC 115

BETWEEN	PAULINE JANICE HARRISON Applicant
AND	ADRIENNE HARRISON AND GRAEME ROSS HARRISON First Respondents
	NICOLAS HAMILTON BIRDSEY Second Respondent
	RAYMOND OWEN PARMENTER Third Respondent
	CHILDFUND NEW ZEALAND LIMITED Fourth Respondent
	ASB BANK LIMITED Fifth Respondent

Court:	William Young, O'Regan and Ellen France JJ
Counsel:	Applicant in person P M Webb for First Respondents M J Francis and M A Karlsen for Second Respondent Third Respondent in person R A Rose for Fourth Respondent S C D A Gollin for Fifth Respondent
Judgment:	13 September 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, Ms Harrison, wished to be able to proceed with an appeal to the Court of Appeal without putting up security for costs. The mechanism by which her argument came before the Court of Appeal was an ex parte application by her to that Court for a "declaration of inconsistency" between the rules as to security for costs in the Court of Appeal and ss 145 and 148 of the Senior Courts Act 2016.

[2] The Court of Appeal dismissed the application.[1] This was for two reasons: (a) the issue which Ms Harrison wished to raise was not able to be appropriately dealt with on an interlocutory ex parte application;[2] and (b) the application was not within the jurisdiction of the Court of Appeal and should have been brought in the High Court.[3]

[3] She now seeks leave to appeal to this Court from that decision.

[4] This application raises the question of whether the requirements of the Court of Appeal (Civil) Rules 2005 as to security for costs are ultra vires.

[5] As advanced, her argument focuses on s 145 of the Senior Courts Act, which provides that:

> **145 Purpose of rules of practice and procedure**
>
> The purpose of rules of practice and procedure is to facilitate—
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> (a) the just, speedy, and inexpensive dispatch of the business of the High Court, the Court of Appeal, and the Supreme Court; and
>
> (b) the administration of justice.

Section 148 permits the making of rules relating to the Court of Appeal.

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1 *Harrison v Harrison* [2021] NZCA 301 (Cooper and Brown JJ).
2 At [6].
3 At [8].

[6] Ms Harrison's argument is that requiring security for costs is inconsistent with the purpose of facilitating the "inexpensive dispatch of the business of … the Court of Appeal" and that the rules requiring such security are therefore invalid.

[7] The Court of Appeal (Civil) Rules were made under s 51C of the Judicature Act 1908, which permitted the making of rules "regulating the practice and procedure … of the Court of Appeal", for the "purposes of facilitating the expeditious, inexpensive, and just dispatch of the business of the court, or of otherwise assisting in the due administration of justice". An argument broadly similar to that advanced by Ms Harrison could be advanced as to ultra vires in relation to s 51C.

[8] We agree with the Court of Appeal that it did not have jurisdiction to deal with the application in the form in which it was advanced. It is, however, arguable that the Court could have dealt with the point which Ms Harrison wished to argue. In essence: Ms Harrison wishes to be able to proceed with her appeal without paying security for costs; standing in her way are the security for costs rules; but if they are invalid, she is (or may be, see [10]) entitled to proceed without putting up security. In deciding whether Ms Harrison could proceed with her appeal without putting up security, it may have been within the Court of Appeal's jurisdiction to address her challenge to the rules. But, for the reasons we are about to give in relation to the substance of Ms Harrison's argument, we need not determine the jurisdiction issue.

[9] As will be apparent, we consider that the challenge to the validity of the rules has insufficient prospects of success to justify the granting of leave. This is for the following reasons:

(a) The High Court Rules 2016 (which have statutory effect under s 147(1) of the Senior Courts Act) provide for security for costs in relation to appeals to the High Court.[4] These requirements are not open to challenge as ultra vires by reason of s 147 and they might be thought to establish that rules as to security for costs are within the statutory purposes.

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4 High Court Rules 2016, r 5.45.

(b) The validity of the security for costs rules should be assessed against s 51C of the 1908 Act rather than s 145 of the 2016 Act but, in any event, the legislative history represented by s 51C is that a rule can be justified by reference to either (a) or (b) of s 145. As well, there is inevitably some tension between the different elements of the statutory purposes. Promotion of the just and speedy dispatch of court business may impose expense. Debate over the proper scope of discovery illustrates this. Those making the rules must balance competing considerations. That a procedural requirement imposes expenses on litigants is not in itself a basis for concluding that it is invalid.

(c) The security for costs rules in relation to appeals are not inconsistent with the inexpensive dispatch of court business. In this context, expense of litigation must be looked at in the round rather than from the point of view of particular litigants. If there was no requirement for security for costs, the proposed appeal would be less expensive from the point of view of Ms Harrison at this point but could be more expensive for the respondents, if they are later awarded costs which she is unlikely to pay; this given that she is bankrupt. The key policy issue in respect of security for costs rules is not expense but rather access to justice, as is discussed in the judgment of this Court in *Reekie v Attorney-General*.[5]

(d) Ms Harrison's argument is inconsistent with the result in *Reekie*, which Ms Harrison says was decided per incuriam.

[10] We are also doubtful, to say the least, that the jurisdiction to order security for costs comes from the security for costs rules. Rules of court do not confer jurisdiction

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5 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [35].

which does not otherwise exist. Rather, they regulate how jurisdiction which independently exists is to be exercised.

[11] The application for leave to appeal is dismissed. As Ms Harrison is bankrupt, we make no order as to costs.

Solicitors:
Denham Bramwell, Manukau for First Respondents
Wotton + Kearney, Auckland for Second Respondent
Bell Gully, Auckland for Fourth Respondent
MinterEllisonRuddWatts, Auckland for Fifth Respondent