

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 92/2021
[2021] NZSC 138

BETWEEN MARK ANTHONY WHITTINGTON
Applicant
AND UDC FINANCE LIMITED
Respondent

Court: William Young, Ellen France and Williams JJ
Counsel: Applicant in person
S C D A Gollin and S L Michelsen for Respondent
Judgment: 19 October 2021

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
B The applicant must pay the respondent costs of \$2,500.
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REASONS

Introduction

[1] Mr Whittington seeks leave to appeal against a decision of the Court of Appeal.¹ In that decision, Collins J declined Mr Whittington's application for a review of a decision of the Deputy Registrar not to dispense with security for costs on Mr Whittington's appeal to the Court of Appeal against the decision of the High Court adjudicating him bankrupt on the application of the respondent, UDC Finance Ltd.²

¹ *Whittington v UDC Finance Ltd* [2021] NZCA 362 (Collins J).

² *UDC Finance Ltd v Whittington* [2021] NZHC 627 (Associate Judge Lester).

Background

[2] The background to the current application arises out of proceedings brought by Mr Whittington against the respondent. The proceedings were discontinued and, as a result, an order was made that Mr Whittington pay costs of \$4,590.98 to the respondent. There was apparently some delay in Mr Whittington receiving a copy of the costs order but it was ultimately served on him. He did not comply with the order. The respondent applied for Mr Whittington to be adjudicated bankrupt for non-payment. Mr Whittington filed a notice of opposition and the order adjudicating Mr Whittington bankrupt was made after the Associate Judge had heard from Mr Whittington.

[3] Mr Whittington filed an appeal to the Court of Appeal against that decision. His application for a stay pending appeal was dismissed by the High Court.³

[4] Mr Whittington was required to pay security for costs in relation to his appeal to the Court of Appeal. He unsuccessfully sought dispensation from payment of security. The Deputy Registrar's decision was upheld on review by Collins J. Applying the principles set out in *Reekie v Attorney-General*,⁴ Collins J considered that the Deputy Registrar was correct to find that a solvent appellant would not reasonably pursue the appeal because the appeal was meritless. Collins J said that the High Court had addressed each of the arguments raised in the notice of opposition and explained why they could not succeed. Nor did Collins J consider that the appeal had any public interest. Rather, the effect of the appeal was confined to the immediate parties.

The proposed appeal

[5] Mr Whittington maintains that he should not have been required to pay security for costs because the appeal is one that a solvent litigant would pursue. That is because it raises matters of fact and law and there is evidence that has not been addressed; all of which is of significant public importance. He challenges the correctness of the

³ *UDC Finance Ltd v Whittington* [2021] NZHC 1141. This Court declined an application for a stay of the adjudication (*Whittington v UDC Finance Ltd* [2021] NZSC 106) and dismissed an application for recall of that decision (*Whittington v UDC Finance Ltd* [2021] NZSC 113).

⁴ *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.

reasons given by Collins J and says that only one side of the argument has been considered. His underlying complaint is, essentially, that the adjudication decision is the product of procedural unfairness.

Our assessment

[6] The principles applicable to security for costs set out in *Reekie* were applied in this case. There is no challenge to those principles. Rather, Mr Whittington challenges the way in which those principles have been applied to these facts. No question of general or public importance accordingly arises.⁵

[7] Nothing raised by Mr Whittington gives rise to an appearance of a miscarriage of justice in the assessment of the Court of Appeal.⁶ This is not a case where it is right to require the respondent to defend the judgment under challenge without the usual protection as to costs provided by security. The criteria for leave to appeal are not met.

Result

[8] The application for leave to appeal is dismissed.

[9] The applicant must pay the respondent costs of \$2,500.

Solicitors:
MinterEllisonRuddWatts, Auckland for Respondent

⁵ Senior Courts Act 2016, s 74(2)(a).

⁶ Section 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.