

[2] The application to the Registrar was made under r 35(6) of the Court of Appeal (Civil) Rules 2005 (the Rules). I have personally considered the application to review the Registrar's decision, and the submissions of Mr Beresford on behalf of the appellant under r 7(2) of the Rules and s 61A(3) of the Judicature Act 1908. I note that the submissions were filed by Mr Beresford personally despite the clear direction from this Court in the leave judgment that it expected the appellant's legal representative to be engaged in all aspects of the appeal.² The appellant is required to comply strictly with the earlier directions of this Court.

The Registrar's decision

[3] The decision under review was dated 4 September 2012. In the letter declining to dispense with security for costs the Registrar stated:

It must be in the interests of justice for security for costs to be waived and there must be exceptional circumstances to justify waiver. You have stated your financial situation means you can't afford to pay security for costs. However, impecuniosity alone does not mean that security for costs should be dispensed with.

After also considering the Courts judgments in *Fava v Zaghloul* [2007] NZCA 498, and the more recent decision of *Vincent Ross Siemer v Chief Justice* [2011] NZCA 183, it is my view this is not an appropriate case for waiver of security for costs.

Security is necessary to protect the respondents in this case in terms of any costs that could be awarded against you should this appeal be unsuccessful.

Applicable principles

[4] Appellants in civil cases in this Court are in the normal course required to pay security for costs.³ The Registrar may dispense with security for costs "if satisfied that the circumstances warrant it".⁴

[5] Security for costs will be dispensed with where it is in the interests of justice to do so. There must be some exceptional circumstance to justify dispensing with

² At [23(f)].

³ Court of Appeal (Civil) Rules 2005, r 35(2).

⁴ Rule 35(6)(c).

security for costs.⁵ The importance of the issues raised in the appeal will be relevant, as will the question whether there is any public interest in having the appeal determined.⁶ Impecuniosity alone is not usually sufficient to justify a waiver, but may be a reason to reduce the quantum of security.⁷

[6] It is to be observed that two of the leading authorities in support of the above principles were referred to by the Registrar in her decision of 4 September 2012.

Discussion

[7] I consider that the Registrar was right to refuse to dispense with the requirement to pay security for costs in this case.

[8] Mr Beresford has provided no persuasive evidence to demonstrate financial hardship on the part of the appellant. What he said in his letter to the Court dated 1 October 2012 was that he “probably can’t pay this at moment, due to debts etc and cash shortage, unless a bank business loan comes through this week. It probably will, though.” He stated that the security sum could definitely be paid by 23 October 2012.

[9] In a follow up communication to the Court by email on 2 October 2012 Mr Beresford stated “Well, I’m not getting a bank loan, so please add the following ...”. However he acknowledged in the same email that he could pay the security sum “later this month – eg beyond the 23rd October”.

[10] The fact that financial hardship has not been established is evident from Mr Beresford’s affidavit sworn in support of an application for stay of execution sworn on 12 July 2012. Mr Beresford stated:

5. The Applicant company is solvent and is moving into the most profitable part of the year for its business. The Applicant can pay the judgment and will have the means to pay any order for costs in the future (costs are currently reserved) ideally in instalments once it enters the more profitable portion of the year. The company produces

⁵ *Fava v Zaghloul* [2007] NZCA 498, (2007) 18 PRNZ 943 at [9].

⁶ See *Creser v The Official Assignee* CA196/05, 12 June 2006 at [29].

⁷ *Siemer v Chief Justice Sian Elias of the New Zealand Supreme Court* [2011] NZCA 183 at [10].

postcards, primarily aimed at tourists. This market picks up from September onwards and sales are strongest in October and November, but it would take some time to build up surplus to pay the expected level of costs, and therefore the best scenario would be for the company to pay any costs in instalments.

[11] However, even if the appellant had been able to establish impecuniosity or financial hardship, that alone would not be a sufficient reason to dispense with security for costs. Exceptional circumstances are required.⁸ Although this Court in the leave judgment has given the appellant leave to argue a question of law, no material has been advanced by the appellant to show that exceptional circumstances exist such as to warrant dispensing with security for costs.

Decision

[12] The application for review of the Registrar's decision declining to dispense with security for costs is discussed. Security for costs in the sum of \$5,880 must be paid into Court on or before 2 November 2012.

[13] The attention of the appellant is drawn to r 37 of the Rules, which sets out the consequences of the failure to comply with any requirement to pay security for costs.

Solicitors:
Lane Neave Lawyers, Christchurch for Appellant
Duncan Cotterill, Christchurch for Respondent

⁸ *Fava v Zaghloul* at [9].