NOTE: ORDER MADE IN THE HIGH COURT PROHIBITING PUBLICATION OF THE APPELLANT'S NAME REMAINS IN PLACE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA524/2013
[2014] NZCA 343

BETWEEN	B Appellant
AND	WAITEMATA DISTRICT HEALTH BOARD Respondent

Counsel: R K Francois for Appellant
J P Coates and P W Le Cren for Respondent

Judgment: (On the papers) 23 July 2014 at 2.30 pm

JUDGMENT OF ELLEN FRANCE J
(Recall of Review of Registrar's decision)

A The application to recall the judgment of 12 March 2014 is granted.

B The application for an extension of time to apply for review is granted.

C The application for review of the Registrar's decision is granted. The requirement to pay security for costs is dispensed with.

REASONS

[1] In a decision delivered on 12 March 2014 I allowed in part a review of the Registrar's decision as to the dispensation of security for costs.[1] Security for costs was reduced from $5,880 to $3,000.

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1 *Brown v Waitemata District Health Board* [2014] NZCA 65.

[2] The appellant sought leave to appeal from my decision to the Supreme Court. In that context he provided information he had not previously made available as to his financial position, in particular regarding his assets.[2] The Supreme Court in a minute dated 17 June 2014 noted the further information provided by the appellant and stated that:[3]

> [4] An appeal to this Court is a clumsy and expensive way of resolving what should be a comparatively straightforward issue which still could be addressed more simply by an application to Ellen France J to recall her judgment and to reconsider the matter afresh in light of the information now available and, of course, in light of the principles discussed in *Reekie v Attorney-General*.[4] We will therefore defer determination of the application to allow a recall application to be made.

[3] The appellant has accordingly now applied for a recall of the judgment. The respondent abides the decision of the Court on the recall application.

[4] Having considered the application, I have decided to recall my judgment.[5] I am satisfied that this case falls within the third of three situations in which recall is appropriate, namely, that for "some other very special reason justice requires" recall.[6] In *Unison Networks Ltd v Commerce Commission* this Court in summarising the "special reason" criterion referred to the judgment of Neuberger J in *Re Blenheim Leisure (Restaurants) Ltd (No 3)*, where his Honour said that recall might be appropriate where there was:[7]

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2 See *Brown v Waitemata District Health Board*, above n 1, at [8].

3 *B v Waitemata District Health Board* SC39/2014, 17 June 2014.

4 *Reekie v Attorney-General* [2014] NZSC 63.

5 The minute of the Supreme Court would appear to resolve any potential difficulties in my doing so: see the discussion in *Body Corporate 344862 v E-Gas Ltd* HC Wellington CIV-2007-485-2168, 28 September 2010 at [13]–[16]; contrast *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR11.9.01(6)]; Roderick Joyce (ed) *Civil Procedure: District Courts & Tribunals* (online looseleaf ed, Brookers) at [HC11.9.04A/DR12.8.8]; and *Sim's Court Practice* (online looseleaf ed, LexisNexis) at [HCR11.9.3].

6 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633; see the application to this Court in *Rainbow Corp Ltd v Ryde Holdings Ltd* (1992) 5 PRNZ 493 (CA); *Unison Networks Ltd v Commerce Commission* [2007] NZCA 49 at [10]; and *Erwood v Maxted* [2010] NZCA 93, (2010) 20 PRNZ 466 at [23(b)(i)].

7 *Unison Networks Ltd v Commerce Commission*, above n 6, at [32] citing *Re Blenheim Leisure (Restaurants) Ltd (No 3)* The Times, 9 November 1999 (Ch). As noted in *Unison Networks*, this observation was cited with approval by Sir Christopher Slade in the English Court of Appeal in *Stewart v Engel* [2000] 1 WLR 2268 (CA) at 2274. See also *New Zealand Rail Ltd v Accident Rehabilitation and Compensation Insurance Corp* HC Wellington CP473/93, 21 September 1995; and *Proprietors of Hiruharama Ponui Block Inc v Attorney-General (No 2)* [2004] 1 NZLR 394 (HC) at [9]–[11].

> … a failure of the parties to draw to the court's attention a fact … that was plainly relevant; or discovery of new facts subsequent to the judgment being given.

[5] My decision was premised on the basis that impecuniosity had not been shown and the interests of justice were met by a reduction in the amount payable by way of security. As the Supreme Court noted in the minute, it was implicit in my judgment that the evidence then available did not establish that the appellant would be unable to pay the $3,000 set by way of security.

[6] In a situation where I have accepted, first, this was not an appeal which at this stage could be characterised as hopeless and, secondly, that the case does raise questions of broader interest, I am now satisfied that the Registrar was not right to require the appellant to pay an amount by way of security for costs. That approach is consistent with statement in the Supreme Court's recent decision in *Reekie v Attorney-General* that an impecunious appellant's access to this Court should be preserved in cases that "a solvent appellant would reasonably wish to prosecute".[8]

[7] Accordingly, the application to recall the judgment of 12 March 2014 is granted. The judgment granted the appellant an extension of time to apply for review and I repeat that order here. The application for review of the Registrar's decision is granted. The requirement to pay security for costs is dispensed with.

[8] This judgment may be cited as *Brown v Waitemata District Health Board*.

Solicitors:
W F Simpson, Auckland for Appellant
Claro Law, Wellington for Respondent

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8 At [35(a)].