

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA185/2021  
[2021] NZCA 437**

**BETWEEN**

**KELLY ROE**  
Applicant

**AND**

**NEW ZEALAND VICE-CHANCELLORS  
COMMITTEE**  
Respondent

Counsel:            Applicant in person  
                         T D Smith and H H E Kerry for Respondent

Judgment:           6 September 2021 at 10.00 am  
(On the papers)

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**JUDGMENT OF BROWN J**  
**(Review of Deputy Registrar's decision)**

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**A    The application to review the Deputy Registrar's decision declining to dispense with security for costs is declined.**

**B    Security for costs of \$7,060 is payable by 27 September 2021.**

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**REASONS**

**Introduction**

[1]     On 7 April 2021 Ms Roe filed an appeal against a judgment of the High Court dismissing her application for judicial review of the decision of the Chief Executive of the New Zealand Vice-Chancellors Committee (the Committee) that further

investigation of the conduct of the University of Waikato regarding her thesis submission was unwarranted.<sup>1</sup>

[2] By letter dated 9 April 2021 the applicant was advised by the Registry that security for costs had been set at \$7,060 and this was required to be satisfied by 6 May 2021. Ms Roe made an application for dispensation from the requirement to pay security for costs. In a decision dated 5 May 2021 the Deputy Registrar declined the application for dispensation.

[3] Ms Roe now seeks a review of that decision which is opposed by the respondents.

### **The relevant principles**

[4] The principles applicable to dispensation from security for costs were reviewed by the Supreme Court in *Reekie v Attorney-General*.<sup>2</sup> The Court stated that the Registrar should dispense with security if of the view that it is right to require the respondent to defend the judgment under challenge without the usual protection as to costs provided by security.<sup>3</sup> The Court explained:

[35] ... we consider that the discretion to dispense with security should be exercised so as to:

- (a) preserve access to the Court of Appeal by an impecunious appellant in the case of an appeal which a solvent appellant would reasonably wish to prosecute; and
- (b) prevent the use of impecuniosity to secure the advantage of being able to prosecute an appeal which would not be sensibly pursued by a solvent litigant.

A reasonable and solvent litigant would not proceed with an appeal which is hopeless. Nor would a reasonable and solvent litigant proceed with an appeal where the benefits (economic or otherwise) to be obtained are outweighed by the costs (economic and otherwise) of the exercise (including the potential liability to contribute to the respondent's costs if unsuccessful). As should be apparent from what we have just said, analysis of costs and benefits should not be confined to those which can be measured in money.

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<sup>1</sup> *Roe v New Zealand Vice-Chancellors Committee* [2021] NZHC 719.

<sup>2</sup> *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.

<sup>3</sup> At [31].

[5] The Court also ruled that the review function of the judge in relation to security for costs is to be exercised de novo.<sup>4</sup>

### **The Deputy Registrar's decision**

[6] Having correctly recited the relevant principles from *Reekie*, the Deputy Registrar first recorded that Ms Roe did not claim or make her application on the ground that she could not afford to pay security for costs. No evidence of impecuniosity was offered or supplied. Ms Roe was not legally aided.

[7] Turning to consider the issue of public interest, the Deputy Registrar recognised that Ms Roe's allegations that New Zealand universities do not allow work to be graded properly and that the Committee had undermined the quality and integrity of New Zealand degrees would be of public interest. However, the Deputy Registrar did not consider it to be genuinely at issue in Ms Roe's judicial review proceeding. She perceived that proceeding as concerning one decision of the Committee regarding a complaint made by Ms Roe about how the Dean of the School of Graduate Research treated her thesis submission.

[8] After reviewing the findings in the High Court judgment the Deputy Registrar concluded that Ms Roe's appeal was not comparable to the genuine public interest litigation in *Banks v Ports of Auckland Ltd*.<sup>5</sup> The Deputy Registrar's decision concluded in this way:

[20] Ms Roe has not claimed or established that she is impecunious. Her application for dispensation is solely based on public interest. However, I do not consider the appeal genuinely raises the issues of public interest that Ms Roe says it does. In my view, the appeal will turn on its specific facts, and therefore does not raise substantive issues of public interest that could justify dispensing with security in the absence of impecuniosity. I also do not consider that a reasonable and solvent litigant would pursue the appeal, as its merits appear weak, and I see little prospect of Ms Roe obtaining the benefits she seeks. I am satisfied that the respondent should not have to defend the decision under appeal without the usual amount of security for its costs.

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<sup>4</sup> At [23].

<sup>5</sup> *Banks v Ports of Auckland Ltd* [2015] NZCA 150, (2015) 22 PRNZ 461.

## **The application for review**

[9] By an email dated 9 May 2021 Ms Roe sought to appeal the Deputy Registrar's decision to refuse to dispense with security for costs. She maintained that her claim is one of those rare cases of public importance where security for costs can be dispensed with even if impecuniosity is not established. She contended that her claim is genuine public interest litigation relating to the refusal of New Zealand universities to allow graduate research students to work to international standards of scholarship by refusing to get their work to external examiners for examination and refusing to base the outcome of examination on reports of examiners.

[10] She explained:

Ms Roe brought this issue (which appears to be systematic by their own admission) to the NZVCC and the NZVCC refused to get evidence of serious wrongdoing (effectively forcing students to labor as slaves and / or pay bribes otherwise they will never receive their graduate research degree) to third parties in order to prevent government prosecution. As things stand with the courts it appears the courts have condoned these practices of NZ Universities refusing to get their students work to external examiners and refusing to allow the external examiners to sign off on students work. As things stand with the courts it appears the courts have condoned the NZVCC from refusing to investigate complaints and / or refusing to pass the outcome of the evidence collection process onto third parties thereby preventing prosecution of serious wrongdoing within the Universities of New Zealand. This is an issue of quality and integrity of NZ Degrees. These are public (not private) institutions. There is an additional matter of tertiary education being a multi-billion dollar business for the NZ government where we profit from international student enrolments while refusing to process complaints of serious wrongdoing in violation of our commitments to international community. I have given the NZ government (and the courts as the branch of government that is the judiciary) every opportunity to put things right internally. If NZ refuses to properly process complaints of corruption within NZ then Ms Roe has no choice but to go to [the] international community so that international sanctions can be imposed on NZ to inspire it to do what it promised it would do.

[11] The lengthy email concluded by observing that a reasonably solvent litigant would not do business with New Zealand universities. That theme was developed in a further email dated 10 May 2021 which commenced in this way:

There would not [be] any such thing as a "reasonably solvent" litigant, in NZ BECAUSE (for the reason that) the courts or judiciary of NZ REFUSE TO DELIVER CONSEQUENCES OR SANCTIONS OR PENALTIES FOR WRONGDOING so as to make court worthwhile. The courts choose to protect / preserve the position of the wrongdoer, only.

The balance of that email reflected upon the adequacy of Mr Whelan to discharge his employment obligations.

## **Discussion**

[12] Given the footing on which Ms Roe's application for dispensation and her review of the Deputy Registrar's decision have been made, I consider that consideration of her review involves two issues:

- (a) Does her claim involve an issue of public interest?
- (b) Would a reasonable and solvent litigant pursue an appeal from the High Court judgment?

[13] I have already had reason to consider the first issue in the course of a prior judgment on Ms Roe's application to review the Deputy Registrar's decision to decline a fee waiver.<sup>6</sup> The review was advanced in reliance on the ground in reg 5(4)(a) of the Court of Appeal Fees Regulations 2001 that the proceeding was intended to determine a question of law that is of significant interest to the public or to a substantial section of the public.

[14] After considering the High Court judgment I concluded:

[14] As the quoted passages from the judgment reflect, the proceeding concerns the process which was followed in the assessment of Ms Roe's thesis. That is the ambit of the proceeding. I am unable to identify any feature of the proceeding which extends beyond Ms Roe's personal interest so as to raise an issue of significant interest to the public.

[15] As I explained, Ms Roe may contemplate her proceeding as serving an ancillary purpose of enabling her to ventilate beliefs she holds concerning the practices of various academic institutions. But I considered this fact cannot convert a proceeding that simply concerns only the facts and process pertaining to the consideration of Ms Roe's thesis into one raising a broader issue of public interest.

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<sup>6</sup> *Roe v New Zealand Vice Chancellors Committee* [2021] NZCA 420.

[16] I also drew attention to the observation of Isac J that it is rather surprising that Ms Roe preferred to instigate review proceedings in the High Court rather than use her time to bring her thesis up to an acceptable standard.<sup>7</sup> In my view that observation is pertinent to the second issue of whether a reasonable and solvent person would pursue an appeal from the judgment.

[17] As the Judge recorded, Ms Roe made it clear during the hearing that she is not focused on the eventual award of an MPhil. Indeed, in discussing the question of relief, the Judge observed that, if reviewable errors had been identified and Ms Roe's claim had succeeded, the appropriate relief would most probably have been for the Committee's decision to be reconsidered. Significantly however the Judge noted that Ms Roe did not seek such relief.

[18] Thus it appears that Ms Roe's focus is no longer the completion of her thesis but instead a broader objective which is reflected in the relief sought in the judicial review proceeding, namely an order directing the removal of Mr Whelan from his office and various declarations affecting all universities at a fundamental level. However, as Isac J stated, nothing in the evidence could justify such outcomes even if it was open to the Court to make such orders.<sup>8</sup>

[19] In my view a reasonable and solvent litigant would not pursue an appeal against a judgment which so clearly recognised and rejected such a litigation objective.

## **Result**

[20] The application to review the Deputy Registrar's decision declining to dispense with security for costs is declined.

[21] Security for costs of \$7,060 is payable by 27 September 2021.

Solicitors:  
Chapman Tripp, Wellington for Respondent

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<sup>7</sup> *Roe v New Zealand Vice-Chancellors Committee*, above n 1, at [79].

<sup>8</sup> At [101].