

**BEFORE THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS
APPEALS COUNCIL**

IN THE MATTER OF an appeal against the decision of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants dated 24 February 2015

BETWEEN **LYNN ROBERTSON**, Accounting Technician (suspended) of Dunedin

Appellant

AND **THE PROFESSIONAL CONDUCT COMMITTEE OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS**

**DECISION OF APPEALS COUNCIL IN RESPECT OF AN APPLICATION
BY THE RESPONDENT FOR SECURITY OF COSTS**

Dated 27 August 2015

Members of the Appeals Council:

Les Taylor QC (Chairman)
Paul Armstrong FCA
John Hagen FCA

Counsel:

Richard Moon for the Professional Conduct Committee

Appeals Council Secretariat:

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The Application

1. On 6 July 2015 the Professional Conduct Committee (**PCC**) filed an application for security for costs in the sum of \$2,500.00 (or such other amount as the Appeals Council considers appropriate). The application was supported by detailed written submissions addressing both the merits of the application and, importantly, the question of whether the Appeals Council had power to order security for costs of the appeal and for stay of the appeal pending payment of security or dismissal of the appeal in the event that security was not paid.
2. The substantive appeal was subsequently set down to be heard on 20 August 2015 on the basis that the appeal would be determined on the papers in the event that the application for security for costs did not succeed. In those circumstances the application itself was amended to seek an order that, if payment of security was not made by the appellant within 21 days of the date of any order requiring such security, the appeal be dismissed. In the event that an order for security was made, on terms that the appeal be dismissed if security was not paid within 21 days, no order was sought as to costs.
3. The appellant did not formally oppose the application for security for costs and did not file submissions addressing that application. The Appeals Council has proceeded on the basis, however, that the application for security for costs is opposed by the appellant.

Does the Appeals Council have power to make an order for security for costs?

4. The PCC in making the application for security for costs relies upon the alleged inability of the Appellant to meet any adverse costs order should the appeal fail and on the ground that the prospects of the appeal succeeding appear low. It is argued that in those circumstances it would be unjust to require the appeal to proceed without security for costs being provided.
5. The application as filed relies upon rule 13.55 of the Institute's Rules as providing the power of the Appeals Council to make an order for security for costs. That Rule provides that:

Subject to these Rules, the Appeals Council shall regulate its procedure as it thinks fit.

6. It is common ground that there is no express power under the Rules to make an order that an appeal be stayed pending payment of security for costs and/or dismissed in the event that security is not paid within a specified time. The issue, therefore, is whether, in the absence of an express power, the Appeals Council has the power to make such an order under Rule 13.55 and/or in exercise of such

powers as are necessary to enable it to act effectively within its jurisdiction. As noted by the Court of Appeal in *McMenamin v Attorney-General* [1985] 2 NZLR 274, 276:¹

An inferior Court has the right to do what is necessary to enable it to exercise the functions, powers and duties conferred on it by statute. Such a Court also has the duty to see that its process is used fairly. It is bound to prevent an abuse of that process.

7. In *Orlov v The National Standards Committee 1 and The Auckland Standards Committee 1*² the High Court considered the application of s 252 of the Lawyers and Conveyancers Act 2006 which confers a power on the Lawyers and Conveyancers Disciplinary Tribunal to determine its own procedure "except as provided by this Act or by Rules made under this Act". The Court noted that by this provision:

Parliament has given the Tribunal expansive powers to determine its own procedure and to make such directions as it thinks fit, although of course they must be consistent with its statutory functions. The touchstone must be the just, efficient and expeditious conduct of proceedings.

8. The court stated that, although the Tribunal was free to set its own procedure:³

Obviously it must do so in a way that is consistent with the discharge of its statutory functions and does not cut across any express statutory or regulatory provisions. Subject to these constraints, the Tribunal is given a high degree of procedural flexibility in the exercise of its important statutory functions.

9. The High Court in *Orlov* cited with approval a statement of the New South Wales Court of Appeal in *Malfanti v The Legal Profession Disciplinary Tribunal and Anor*⁴ that:

It is impossible...to lay down a rigid rule. The Tribunal is bound to mould its procedures to enable it efficiently and effectively to carry out its functions in an expeditious manner...

10. Although the Appeals Council clearly has a wide power under rule 13.55 to regulate its own procedure as it thinks fit, the extent of that power is limited by the statutory framework within which the Appeals Council functions and, as the rule itself makes clear, it is subject to and cannot cut across the other provisions of the Rules. The undoubtedly wide power provided by rule 13.55 must be exercised so as to ensure the just, fair, and expeditious resolution of appeals which have been properly brought in accordance with the Rules.

¹ [1985] 2 NZLR 274, 276 and see *Attorney-General v District Court at Otahuhu* [2001] 3 NZLR 740

² [2013] NZHC 1955 [27]

³ At [29]

⁴ [1993] NSW CA 171 at 5

The statutory framework

11. In considering whether the Appeals Council has power to make an order for security for costs the starting point is the New Zealand Institute of Chartered Accountants Act 1996 (**the Act**) and the Rules of the New Zealand Institute of Chartered Accountants effective 15 December 2014 (**the Rules**).
12. The Act provides for the continuation of the New Zealand Society of Accountants under the name New Zealand Institute of Chartered Accountants (**the Institute**) and requires the Institute to have rules governing membership, discipline and other matters and a Code of Ethics governing the professional conduct of its members.
13. Under s 5A(1) the Institute must, with reasonable skill and care, control and regulate the practice of the profession of accountancy by its members in New Zealand. That duty includes:
 - (a) maintaining, complying with, monitoring compliance with, and enforcing the Rules referred to in s 6(1)(f)-(ja) (which relate to the investigation and hearing of complaints and other matters, appeals, disciplinary matters and the recognition of auditors).⁵
14. Section 6 provides that the Institute must have rules that provide for (among other things):
 - (g) A Disciplinary Tribunal to hear complaints and matters referred to it by the Professional Conduct Committee and the powers and procedures of that Tribunal; and
 - (h) An Appeals Council to hear appeals from decisions of the Disciplinary Tribunal and the powers and procedure of that Council.⁶
15. The Institute also has power to amend and replace the Rules.⁷
16. The Rules relating to the "powers and procedure" of the Appeals Council are found in rules 13.51 to 13.64 of the Rules.
17. Rules 13.53 provides that:

When any appeal is lodged with the Appeals Council under Rule 13.51 the Appeals Council shall give the member not less than 14 days written notice of the appeal hearing.

⁵ Section 5A(2)(a)

⁶ Section 6(1)(g) and (h) of the Act

⁷ Section 6(1)

18. Rule 13.54 provides that every Appeal shall be by way of rehearing but, unless the Appeals Council directs otherwise, it is not permissible to recall witnesses who gave evidence before the Disciplinary Tribunal or to introduce any new evidence.⁸
19. Rule 13.57 provides that the Appeals Council may:
 - (a) After the hearing of any Appeal, confirm or vary or reverse the Disciplinary Tribunal's decision and make any order as to the payment of the costs of the appeal as it thinks fit; or
 - (b) Where a member discontinues an appeal prior to the hearing by the Appeals Council, make any order as to the payment of costs or any or all incidental steps up to and inclusive of the discontinuance as it thinks fit.
20. As noted above, rule 13.55 provides that "Subject to these Rules, the Appeals Council shall regulate its procedure as it thinks fit."
21. It is plain from a reading of the (relatively few) rules relating to the powers and procedures of the Appeals Council that the primary function of the Appeals Council is to hear and determine appeals which are validly filed in accordance with rule 13.51. After the hearing of any appeal, the Appeals Council may confirm or vary or reverse the Disciplinary Tribunal's decision and make any order as to the payment of the costs of the appeal as it thinks fit. The only mandatory provision up to the hearing stage is that the Appeals Council "shall give the member not less than 14 days written notice of the appeal hearing".
22. It is perhaps significant that, although rule 13.57(b) contemplates a situation where a member discontinues an appeal prior to the hearing by the Appeals Council (and the making of an order as to costs up to the time of any such discontinuance), there is no provision which contemplates stay or dismissal of an appeal prior to the hearing of an appeal on its merits. It is accepted, however, that the general power of the Appeals Council to regulate its own procedure would include a power to adjourn or temporarily stay hearing of an appeal where that was necessary to ensure the just determination of an appeal.
23. The issue, however, is whether the broad power of the Appeals Council to regulate its own procedure and to prevent abuse of the appeal process enables the Appeals Council to order security for costs of the appeal prior to hearing of the appeal and to stay an appeal pending payment of security for costs or dismiss an appeal should such security for costs not be paid.

⁸ Rule 13.56 makes specific provisions relating to the recall of a witness or the introduction of new evidence.

Relevant authorities

24. Neither counsel for the respondent nor the Appeals Council have been able to find any authority that, in the absence of an express power to order security for costs, an inferior court or Tribunal has power to order security for costs and to order stay or dismissal of a proceeding or appeal if such costs are not paid. Nor has the Appeals Council been provided with any examples of cases where security for costs has been ordered in the absence of an express power. There are, however, a few cases which discuss the issue.
25. In *Reid v New Zealand Fire Service Commission*⁹ a full Court of the Employment Court held that the Employment Tribunal did not have the power to order security for costs even though the Tribunal had relatively broad powers to give such directions as it deemed necessary or expedient in the circumstances for the purpose of disposing of any matter before it according to the substantial merits and equities of the case. The Court's reasoning in that case was that:
- Section 140(d) allows the Tribunal to give such directions as are deemed necessary or expedient in the circumstances the more effectually to dispose of any matter before it according to the substantial merits and equities of the case. On one view of the matter staying the proceedings until security is provided might, if the applicant is unsuccessful in providing security, effectually dispose of a matter but not on its substantial merits and equities. It would be staying the application because of the applicant's inability to provide security. Further, the "matter" to be "more effectually" disposed of is the substantive grievance, as the case may be, and not the application for security. To dispose of a matter means, in the present context, to adjudicate upon it, not to be rid of it by other means.*
26. As counsel for the respondent pointed out, however, *Reid* is distinguishable from this case in that it relates to powers of a Tribunal at first instance (as opposed to on appeal). A power to order security for costs on an appeal is more easily justified where a person has already had a decision on the merits. In addition, the power to give directions for the purpose of determining the substantial merits and equities of the case is different to the, arguably, broader power under rule 13.55 of the Appeals Council to regulate its own procedure "as it thinks fit".
27. In *Geotherm Energy v ECNZ*¹⁰ the Planning Tribunal held that it did not have power to order security for costs notwithstanding a general power to regulate its own procedure. In that case, however, the Planning Tribunal was influenced by the fact that the legislature, when prescribing the powers of the Planning Tribunal, incorporated various provisions of the District Court Rules but did not incorporate

⁹ [1996] 1 ERNZ 228

¹⁰ [1994] NZRMA 139

provisions in the District Court Rules which expressly empowered the District Court to order security for costs.

28. The Planning Tribunal considered that this was a strong indicator that the Tribunal was not intended to have the power to order security for costs and that such a power was not within its general power to regulate its own procedure. In reaching its conclusion the Planning Tribunal stated:¹¹

In my opinion the scope of the Tribunal's authority conferred by section 149(1) to regulate its own procedure in such manner as it thinks fit is to be found from the nature of the proceedings on which the Tribunal possessed jurisdiction. Although some cases were mainly contests between private parties whose property rights were at stake, nearly all Tribunal proceedings ... were appeals from decisions of public authorities and involved matters of public interest inherent in the objects of those Acts. Those proceedings may be contrasted with private civil proceedings in the general courts for which orders for security for costs may be necessary in appropriate cases. So although superior courts possessing inherent jurisdiction need to order security for costs, it does not necessarily follow that the Planning Tribunal needs similar power. I am not persuaded ... that such power is implied in the Planning Tribunal's statutory authority to regulate its own procedure.

29. The only other case the Appeals Council has found which deals with the exercise of a power to order security for costs in the absence of an express power is a decision of the Court of Appeal in *Reihana v Crown Island Administering Body (formerly Rakiura Titi Committee) & Anor.*¹² In that case the majority of the Court of Appeal held that, in the exercise of a discretion to grant special leave to appeal (and in circumstances where the Court of Appeal had previously held that the Court had power to impose a condition that the appellant pay its costs of the appeal in any event), the Court had an implied power to order security for costs. The majority (Tipping and McGrath JJ) held that it would be anomalous and highly unsatisfactory if the Court of Appeal did not have a discretionary power to order security when granting special leave to appeal in circumstances where the Court (through the Registrar) had express power to impose security for costs in respect of an appeal as of right. The majority stated that:

Once the power to impose a condition of one kind regarding costs is found to exist, it is hard to see any reason why there should be no power to impose a somewhat different condition regarding costs of a potentially less onerous kind.

30. Anderson J in that case dissented on the grounds that the Court of Appeal (Civil) Rules 1997 had the effect of characterising the settling of the nature and amount of security for costs as an administrative act of a Registrar of the High Court subject

¹¹ At page 4

¹² CA 9403 18 February 2004

to a limited power of review by a Judge of the High Court. In those circumstances Anderson J held (dissenting) that the Court could not assume a power which had been expressly invested in another authority.

31. The decision of the Court of Appeal in *Reihana* is, however, distinguishable. It relates to the exercise of a discretion to grant leave to appeal and the scope of the inherent or implied power to impose conditions on granting leave. In this case the appeal is an appeal as of right. There is no discretion not to hear an appeal which is properly filed pursuant to Rule 13.51.

Submissions of counsel for the respondent

32. Mr Moon in his written and oral submissions argued strongly that the Appeals Council, notwithstanding the absence of an express power to order security for costs, had such power either under the Rule 13.55 power to regulate its own procedure or in the inherent or implied power of the Appeals Council to make such orders as are necessary to enable it to effectively and efficiently carry out its statutory function. He pointed out that the position of the Appeals Council is distinguishable from other jurisdictions and, in particular, the disciplinary procedures provided for under the Act and in the Rules were "for members and between members and were privately funded".
33. Mr Moon also noted that the Institutes disciplinary procedures were different to many other such disciplinary bodies because the appeal function was internal (to the Appeals Council) rather than to a Court. He argued that a power to order security for costs was necessary in order to ensure the efficient disposal of appeals, including in particular cost efficiency, where the appellant was unlikely to be able to pay any order as to costs and it was apparent that the merits of the appeal were not strong.
34. Relying on the Supreme Court decision in *Reekie v Attorney-General & Anor*¹³ counsel pointed out that a power to order security for costs is a normal discipline in the context of civil appeals and was an accepted means of protecting respondents from vexatious appeals by impecunious litigants where such appeals would not sensibly be pursued by a solvent litigant. We accept there is considerable merit in that submission but note that the Supreme Court in *Reekie* was discussing principles applicable to applications for waiver of an express requirement for payment of security for costs on an appeal.

¹³ [2014] NZSC 63

35. Mr Moon accepted that the effect of such an order may be to deprive the appellant of having the appeal determined on its merits. That, he argued, was an issue which could be addressed in exercise of the discretion as to whether security for costs should be ordered. It was not a reason for deciding that the Appeals Council had no power to order security for costs.

Discussion

36. There is considerable force in the submissions made Mr Moon in support of his argument that the Appeals Council does have power to order security for costs. After careful consideration, however, the Appeals Council is not satisfied that it has such power.
37. We note first that, on the authorities before us, security for costs in an appeal as of right has (except in the case of the High Court which has an inherent jurisdiction) only been ordered in circumstances where there is express provision in the relevant Rules for imposition of security for costs. In addition, such jurisdiction is usually only found in civil cases.
38. We agree, however, that in other disciplinary jurisdictions where there is a right of appeal to the District Court or High Court the security for costs regime in those Courts has the effect that security for costs will normally be payable pursuant to the rules applicable to such appeals in those Courts. There is therefore something to be said for the view that the Appeals Council in this case should not be concerned about implying such a power given the express powers to order security in other disciplinary jurisdictions.
39. We note that there is no express power in the Court of Appeal to impose security for costs in respect of a criminal appeal and we are aware of no cases in which security for costs has been ordered in criminal appeals. However the disciplinary process of a professional body such as the Institute is not the same as a criminal process (it sits somewhere between a purely civil and purely criminal jurisdiction but is generally treated as being civil in nature). We think, however, that the absence of an express power to award security for costs under the Rules points against the existence of such a power.
40. We can see, for the reasons carefully articulated by Mr Moon and supported by the Supreme Court in *Reekie*, that a power to order security for costs may well be desirable in order to ensure that the resources of the Institute and its members are not unnecessarily wasted on unmeritorious appeals by appellants who do not have the financial means to pay costs in the event that the appeal does not succeed. We

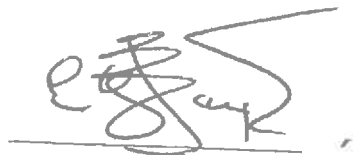
also accept that an express power to impose security for costs on appeal is common in other appellate jurisdictions.

41. We do not consider, however, that such a power is "necessary" in order to ensure the "just, efficient and expeditious" disposal of an appeal. In our view the Rules contemplate disposal of an appeal on its merits.
42. Finally, we do not consider that the general power to regulate its own procedure "subject to these Rules" confers a power to order security for costs prior to hearing of an appeal. In particular we note that the power to order costs is expressly limited by the Rules to "after the hearing" or to circumstances where the appeal has been discontinued by the appellant. We consider, therefore, that a power to impose costs before an appeal is heard is inconsistent with or "cuts across" the Rules as they stand.
43. Unlike the decision of the majority of the Court of Appeal in *Reihana* there is no recognised power to make orders as to costs prior to an appeal being heard. This is not a case where security for costs is an arguably "less onerous" order in circumstances where there is a discretion to make orders as to costs prior to hearing of the substantive appeal.

Decision on Application

44. For all of the above reasons we have concluded that the Appeals Council does not have power to order security for costs as sought. We note, however, that there are good reasons why such a power may be desirable. If the Institute considers it appropriate, consideration can (and perhaps should) be given to amending the Rules to expressly provide for such a power.
45. Given the above it is unnecessary for us to consider the application for security for costs on its merits. The application is dismissed on the ground that the Appeals Council does not have power to make the order sought.

Dated this 27th day of August 2015.



**L J Taylor QC
Chairman
Appeals Council**