



on 28 April asking for more information in support of his application to dispense with security. She states that, in response, Mr Erwood advised that there is currently \$783,255.51 in his account with ASB Bank Ltd (ASB) but that those funds were frozen. The Registrar's decision records that she sought the following further information from Mr Erwood:

I require from you full details of who has taken the steps to freeze your accounts and on what grounds. Also details from the bank of under what circumstances you can access those funds. Evidence from you that you have sought permission from the bank for release of the funds to meet the requirement for security for costs, and if there are issues that you need to resolve to access those funds what steps you have taken to do that.

[4] Later in her decision, the Registrar said this:

**Is the appellant impecunious?**

You have provided an e-mail from ASB Bank confirming that your funds are frozen and there are no circumstances at this time that you can access these funds. However, despite being given two opportunities to clarify your financial position, you have not provided details of who has taken the steps to freeze your accounts and on what grounds. Also, whether there are steps you can take to resolve the issues and, if so, whether you have taken the appropriate steps or are refusing to do so. Without this information I cannot make an informed decision as to the true state of your financial position.

The fact that you have been granted a waiver of fees is not conclusive evidence of impecuniosity for the purposes of dispensing with security for costs, as security for costs is an inter parties issue. In any event, impecuniosity alone does not warrant dispensation from the requirement to pay security for costs.

[5] In his application for review, Mr Erwood submits the Registrar's approach is in error. The reasons for the freezing of Mr Erwood's funds do not alter the fact that they are frozen with the consequence that he does not have access to those funds to pay security. Mr Erwood submits he has demonstrated he is impecunious and the Registrar erred in proceeding on the basis the appellant has not demonstrated impecuniosity.

[6] In minutes dated 7 August and 16 September, I asked Mr Lester to take responsibility for providing answers to the following four questions:

- (a) Currently, what amount or amounts does Mr Erwood have standing to his credit in accounts with banks, finance companies or other financial

institutions, under either his own name or under any alias or through any attorney or other agent? Full particulars are required.

- (b) If any of those accounts are “suspended” or “frozen”, then on whose instruction or upon what authority has that account or those accounts been frozen or suspended? The Court requires a full explanation, including a copy of the relevant instruction or authority.
- (c) Has Mr Erwood sought to withdraw the required \$5,880 to pay into this Court as security for the costs of his appeal? If yes, when, how and with what result? Again, the Court requires a full explanation, including copies of the request and the response.
- (d) In its 11 September 2015 letter to Mr Lester, ASB states:

I advise we are unable to rely on Mr Erwood’s signed consent to provide you with his personal information. We have previously been notified Mr Erwood suffers from diminished capacity ...

By whom, when, in what form and on what basis was the ASB Bank notified that Mr Erwood suffers from diminished capacity?

[7] In response, Mr Lester has filed two memoranda. First, in a memorandum dated 11 September he explained that, when he presented to ASB a signed authority Mr Erwood had given him, he was informed Mr Erwood had revoked it. When he asked Mr Erwood whether this was so, Mr Erwood strongly denied it and subsequently told Mr Lester he had signed the authority at the local branch of ASB. The outcome of Mr Lester’s attempts to clarify the situation was his receipt of the letter from ASB, set out in part at [6](d) above. The letter is signed by Lesley Horsburgh, Manager Customer Care.

[8] It was that response which led me to issue my second minute, of 16 September, adding question (d) set out in [6] above, to the three questions I had already asked Mr Lester.

[9] In a further memorandum dated 25 September, Mr Lester:

(a) Attached copies of the following:

- (i) A report dated 15 October 2001 from a consultant psychiatrist with Waitemata Mental Health Services in Takapuna, Auckland. This is addressed to Mr Peter Radich in Blenheim (Mr Radich is a solicitor practising in Blenheim). It expresses doubt as to Mr Erwood's capacity to make the sort of decisions and judgments required of a client in the course of complex litigation.
- (ii) A report dated 24 May 2011 on the letterhead of the Karori Medical Centre. The addressee of this report appears to have been redacted. I cannot read the signature on the report but the signatory has written below his or her signature "locum GP". This report expresses the view that Mr Erwood is "an infirm person", incapable of conducting a particular piece of civil litigation himself, and in need of an amicus to assist him.
- (iii) Page 13 of a medical report of unknown date and from an unknown source. Given the lack of provenance, I put this to one side.
- (iv) A report dated 26 August 2015 addressed to "TO WHOM IT MAY CONCERN: ASB Bank and other financial institutions". This is from Dr Lynn McBain at the Brooklyn Medical Centre. It states:

Robert Erwood has consulted with me recently. I have viewed extensive medical and court records.

These letters confirm that Mr Erwood has a chronic medical disabilities and chronic mental illness of such a nature that make him incompetent to deal with his own financial affairs and make decisions that are in his own best interests.

It is requested that his accounts be frozen with the exception of him receiving a \$250 per week living allowance. This to remain in effect until a suitable person is found to assist in managing his financial affairs.

Based on my knowledge of him and supported by the extensive records, I am in agreement with this request.

(b) States:

10. Mr Erwood has this afternoon asked Counsel to convey to the Court that he agrees to the bank freezing [I think Mr Lester means freeing] the amount of security that has been ordered so that security would be in place for the benefit of the respondent. This would permit any order for costs to be recovered from the funds at the ASB. Mr Erwood could obtain from the ASB an undertaking to hold the amount of security until the appeal was resolved and that such undertaking would be sufficient security — the Court being able to accept arrangements the equivalent of cash as security.

[10] From all this material the following position emerges:

- (a) Mr Erwood, on his own admission to this Court's Registrar, had (in May this year) \$783,255.51 standing to his credit in an account or accounts with ASB.
- (b) Mr Erwood has refused to sign an authority authorising ASB to release to Mr Lester information about the monies he has with ASB. The authority had been sent to the Registrar of the High Court at Wellington, with a request that in the event Mr Erwood came to the Registry, she ask him to sign it. The Registrar advised Mr Lester that Mr Erwood had come into the Court on 14 September "and refused to sign the form".
- (c) ASB, on the basis of information apparently provided to it by Mr Erwood himself, appears to have taken it upon itself to treat Mr Erwood as a customer who lacks the capacity to give ASB authority in respect of the monies it holds to his credit. On

established principles of banking law, I simply do not understand how ASB can take this position, which is inherently contradictory. If it has not done so, it is timely ASB take competent legal advice as to the position it is taking. I may be mistaken, but it appears to me ASB has effectively appointed itself manager of the monies Mr Erwood has deposited with it, usurping the jurisdiction of the Family Court under the Protection of Personal and Property Rights Act 1988.

- (d) Assuming my understanding of [9](b) above is correct (namely, that Mr Erwood has indicated to Mr Lester he will instruct ASB to free the amount required for security for the costs of this appeal) then, if the Bank acts upon that instruction, it compounds the contradiction in ASB's position. This is precisely the point made by counsel for the Official Assignee in the memorandum he filed dated 5 October:

4. Paragraph 10 of the minute of Amicus proposes a resolution of this matter. This refers to Mr Erwood's "agreement" and to the ASB taking steps (the freezing of funds to meet security and the provision of an undertaking) on Mr Erwood's instructions. If Mr Erwood has the capacity to agree and is able to instruct the ASB to do certain things then it is presumed that he is also able to arrange for payment of the security sum into Court as has been ordered. That is what the Assignee seeks.

[11] I see the position in these terms. First, Mr Erwood has a very large amount of money on deposit with ASB and is easily capable of giving security for the costs of this appeal. Secondly, if Mr Erwood lacks the capacity to give proper instructions in respect of that money, then his proper course is to apply to the Family Court under pt 3 of the Protection of Personal and Property Rights Act for an order appointing a suitable person to act as manager of the money Mr Erwood has with ASB, and perhaps to look after his financial affairs generally. Section 26 of the Act relevantly provides that Mr Erwood can make such an application himself, or it can be made by his medical practitioner or, with leave of the Court, by any other person. Any competent solicitor can, on Mr Erwood's instructions, make such an application for him.

[12] What is not a tenable position — and certainly not one this Court will accept — is the sort of “halfway house” where Mr Erwood attempts to assert to this Court that he has no access to the substantial sum of money he has deposited with ASB, but has not made an application under the Protection of Personal and Property Rights Act.

[13] For all those reasons, having reviewed the Registrar’s decision and the further information Mr Lester has, at my request, been able to provide, I uphold the Registrar’s decision.

[14] Security for the costs of this appeal in the sum of **\$5,880** is to be paid by ***Friday 30 October 2015***.

[15] If security is not paid, then the Official Assignee can apply under r 37(1) of the Court of Appeal (Civil) Rules for an order striking out this appeal.

[16] Two final points. First, I thank Mr Lester for his considerable endeavours to provide this Court with the information I requested in order that the Court could deal properly with Mr Erwood’s application. Secondly, I direct the Registrar to send a copy of this judgment to Ms Horsburgh at ASB, drawing her attention to [10](c).

Solicitors:  
Anthony Harper, Christchurch for Respondent