

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA426/2017
[2017] NZCA 627**

BETWEEN **GEOFFREY JAMES BIRD**
 Appellant

AND **THE NEW ZEALAND GUARDIAN**
 TRUST COMPANY LIMITED
 First Respondent

PHILIP ANTHONY BIRD
 Second Respondent

DAVID ANDREW BIRD
 Third Respondent

ALLEN ROGER BIRD
 Fourth Respondent

Counsel: **Appellant in person**
 No appearance for First Respondent
 J M Moran for Second, Third and Fourth Respondents

Judgment: **21 December 2017 at 3 pm**
(On the papers)

JUDGMENT OF COOPER J
(Review of Registrar’s Decision)

- A The application for review of the Deputy Registrar’s decision is declined.**
- B Security for costs in the sum of \$6,600 must now be paid on or before Monday 19 February 2018.**
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REASONS

[1] The appellant, Geoffrey James Bird, has applied for a review of a decision of Deputy Registrar McGrath declining an application he made to dispense with security for costs under r 35(6) of the Court of Appeal (Civil) Rules 2005.

[2] The Deputy Registrar was satisfied that the appellant was impecunious. Although she was of the view that the potential benefits of the appeal would slightly outweigh its potential costs, she concluded that the appeal lacked merit. She was not convinced that a reasonable and solvent litigant would proceed with it and she rejected a submission made by the appellant that the appeal raised issues of public interest. In the circumstances, she concluded that it would not be right to require the respondents to defend the judgment under appeal without security for their costs.

The judgment under appeal

[3] In the judgment under appeal, Gendall J granted an application made by three of the appellant's brothers, Philip, David and Allen, that the appellant be removed as an executor and trustee of their father's estate and that The New Zealand Guardian Trust Co Ltd be appointed in his place.¹

[4] The reason for the orders made in the High Court were fully set out in the judgment. They need not all be repeated here. It is sufficient to note that the Judge concluded on the evidence before him that there was little doubt there had been a major dispute and impasse between the brothers, who had apparently divided into two factions. On the one hand, David, Philip and Allen, and on the other, the appellant and (to some extent) a fifth brother, Graeme. The Judge found that there was patent antagonism on the part of the appellant towards David, Philip and Allen. This was clearly exhibited in various email messages recorded in the judgment. He found:²

The unfortunate split between the five brothers that has occurred in this family however, and the lack of a degree of objective even-handedness exhibited by Geoffrey here, in my judgment mean that there seems little choice but that an independent trustee is required to be appointed in this case. A degree of hostility has developed between Geoffrey and the applicants which I am satisfied prejudices the interests of all the beneficiaries. As the Court's duty in a case such as this must be to ensure that the estate is properly administered and the welfare of the beneficiaries provides the "litmus" test, this family has

¹ *Bird v Bird* [2017] NZHC 1612.

² At [25].

reached a point where the Court must intervene and appoint a new independent trustee.

[5] It seems that one of the bases of the dispute between the appellant and three of his brothers concerns steps they had taken to dispose of household effects in their deceased father's house on the basis that they were old and of little value. In correspondence the appellant suggested that he would reduce their shares in the residuary estate to reflect these issues. The Judge referred to this conduct as follows:

[47] First, threats by Geoffrey to "dock" three of his brothers' shares in the estate by arbitrary amounts, and to levy such amounts as he may choose by way of "exemplary damages", and secondly, his unsubstantiated complaints alleging theft or conversion in respect of estate household items, must be matters of significant concern here.

[6] The Judge concluded that there was a significant degree of hostility within the family. The hostility was such that the appellant's role as trustee must be seen as prejudicing the interests of a number, if not all, of the beneficiaries of the estate.

[7] This led the Judge to conclude:

[49] All of this, in my view, raises serious questions as to Geoffrey's suitability to continue as executor and trustee of the estate. His removal here, in my view, is expedient. It is in the interests of all concerned to have matters for this estate finally dealt with and independently resolved. A new corporate trustee is also able to independently investigate any estate issues which are properly raised in a neutral way.

The application for review

[8] The Deputy Registrar's decision applied the analytical approach discussed by the Supreme Court in *Reekie v Attorney-General*.³ The appellant raises various factual issues that he claims the Deputy Registrar failed to take into account. Many of these continue the theme, apparent from the High Court judgment, of strenuous criticism of the actions of his brothers. He criticises as unreasonable the Deputy Registrar's view that The New Zealand Guardian Trust Co Ltd would do as good a job of administering the estate as the appellant. He complains that she failed to take into account the fact that he is a second year law student with a very high grade point average. He argues that the High Court erred in its approach to the relevant legal test for the removal of

³ *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.

an executor, in effect arguing that this Court's decision in *Tod v Tod* was wrong to the extent that it departed from the earlier decision in *Hunter v Hunter*.⁴

[9] I am satisfied that there was a sound basis for the Deputy Registrar's conclusion that the appeal was not one that a reasonable and solvent litigant would pursue, for the reasons that she gave. The pattern of dispute that had emerged between the appellant and three of his brothers, combined with the nature of the allegations and threats that he felt it appropriate to make were on the face of it properly able to be relied on by Gendall J to make the order that he did. Moreover, the appellant is clearly not in a position to allege that he will be detrimentally affected in some way by The New Zealand Guardian Trust Co Ltd assuming the role of executor. These conclusions do not turn on any difference between the tests to be applied as articulated in *Tod v Tod* and *Hunter v Hunter*.

[10] I therefore conclude that the Deputy Registrar's decision that a reasonable and solvent litigant would not proceed with the appeal was appropriate. Nor is there any aspect of the public interest that would justify dispensing with security for costs.

Result

[11] For the reasons given, the appellant's application for review is declined and the Deputy Registrar's decision is confirmed.

[12] Security for costs in the sum of \$6,600 must now be paid on or before Monday 19 February 2018.

Solicitors:
Meares Williams, Christchurch for Second, Third and Fourth Respondents

⁴ *Tod v Tod* [2015] NZCA 501, [2017] 2 NZLR 145; and *Hunter v Hunter* [1938] NZLR 520 (CA).