IN THE COURT OF APPEAL OF NEW ZEALAND

CA634/2008
[2009] NZCA 255

BETWEEN	LEWTYN MICHAEL SCOTT Appellant
AND	ROSEMARY ANN SCOTT First Respondent
AND	LEE MCNEILLY Second Respondent
AND	ALISON SCOTT Third Respondent
AND	CARA ANN CLARE Fourth Respondent

Hearing: 16 June 2009

Court: Hammond, O'Regan and Ellen France JJ

Counsel: No appearance for Appellant
R E Harrison QC for Respondents

Judgment: 19 June 2009 at 4 pm

JUDGMENT OF THE COURT

A The application for an extension of time for applying for the allocation of a hearing date and filing the Case on Appeal is dismissed.

B The respondents are granted leave to withdraw the cross-appeal.

C The appellant must pay to the respondents, collectively, costs for a standard appeal on the appeal, the cross-appeal, and on this application, on a band A basis, together with usual disbursements.

D The Registrar is to release to the respondents their security for costs on their cross-appeal. The security for costs paid by the appellant is to be released by the Registrar to the respondents, to defray (in part) the costs payable to them by the appellant.

REASONS OF THE COURT

(Given by Hammond J)

Introduction

[1] We have before us an application made pursuant to r 43(2)(a) of the Court of Appeal (Civil) Rules 2005 for an extension of time for applying for the allocation of a hearing date and filing the Case on Appeal.

[2] The judgment which is sought to be appealed is that of Stevens J: HC TAU CIV-2004-470-0094 15 September 2008.

[3] Notice of appeal was given timeously on 13 October 2008 and a notice of cross-appeal was given on 22 October 2008. By r 43(1), the appellant had six months after the date of bringing an appeal to apply for the allocation of a hearing date and file the Case on Appeal. That has not been done. The extension of time was applied for on 2 April 2009, just before the six month period expired.

[4] The opposition to applications of this character is sometimes lukewarm and turns as much on conditions to be imposed on the application being granted as anything else. Doubtless this is because counsel rightly recognise that this Court is reluctant to see appeal rights set aside: the expectation of at least one right of appeal is a well ingrained feature of our jurisprudence. However, in this instance, the application was strongly resisted by Dr Harrison QC. Inevitably, such an application must be grounded in the circumstances of the particular case, to which we now turn.

Background facts

[5] This litigation relates to a long-running and self-evidently bitter family dispute over two farm properties, which had been in the family for many years.

[6] In his personal capacity, the appellant, Mr Lewtyn Scott, purchased from himself, his mother, Rosemary Scott, and his sister, Lee McNeilly, in their capacity as executors and trustees of the estate of A R Scott (his father), the estate's half interest in Tombstone Station farm (Tombstone). The other half interest was and is owned by Rosemary.

[7] Mr Scott's purchase was financed by a hundred percent mortgage back at a preferential rate of interest, with the $795,000 principal sum repayable in one lump sum after 10 years. Rosemary yielded up her life interest in the exclusive occupancy of Tombstone, and vacated the farm for Mr Scott's sole use and enjoyment. He still occupies this farm; and no interest has been paid on the mortgage, for some years.

[8] In relation to a second farm, the trustees of the Arthur Scott Trust (a grandfather's trust), acting on legal advice, resolved to distribute the assets of that trust, including the second farm property, to the appellant's three sisters (Lee, Alison Scott, and Cara Clare), to Mr Scott's exclusion.

[9] In February 2004, Mr Scott issued High Court proceedings against Rosemary and Lee as trustees of the grandfather's trust, and his three sisters as recipients of the assets of that trust. The respondents counterclaimed, alleging breach of trust over an earlier transaction. Rosemary then filed a separate counterclaim seeking the immediate sale of Tombstone, on the basis of her half interest.

[10] Thereafter the Scott family has been engaged for some years in this litigation concerning the fate of these two farms. Various attempts at resolution out of court failed. Stevens J noted that "[t]he parties all hold firm and irreconcilable views as to who is to blame for their predicament" (at [2]). It fell to the High Court to try and unravel what the Judge described as "complex and convoluted dealings" (at [2]). That led to a trial which was heard over some days, partly in Hamilton in December

2007 and partly in Rotorua in July 2008. The Judge issued his judgment in September 2008.

[11] The essence of the High Court decision is as follows:

- Mr Scott's claim (based in contract and/or estoppel) to purchase Rosemary's half share in Tombstone was dismissed.

- The Judge found that Mr Scott's purchase of the estate's half share in Tombstone was not made through duress or undue influence. But it was found that he did breach a fiduciary duty that he owed as trustee of the will trust, for which Rosemary and Lee were also blameworthy.

- The sisters, Lee, Alison and Cara, were in breach of the trust for distributing substantial sums to themselves from the farm partnership amounting to approximately $240,000.

[12] As to relief, the High Court rescinded Mr Scott's purchase of the estate's half share of Tombstone, but declined to consider whether Tombstone should be sold until the outcome of the sale of the trust farm. The Court ordered the sale of the trust farm and the distribution of the net proceeds of the sale of the trust farm and other trust assets to Mr Scott and his three sisters, with compensation to be paid to Mr Scott for the breach of trust.

[13] As the appeal and cross-appeal presently stand, Mr Scott has appealed against the order of the High Court that the trust farm be sold, together with the order that his purchase of the estate's half share of Tombstone be rescinded. The cross-appeal is against the Judge's decision reserving and/or deferring the determination of issues relating to the sale of Tombstone until the outcome of the sale of the trust farm.

The principles pertaining to a grant of leave

[14] Issues of this complexity, and with the sums of money involved, would normally find themselves advancing to this Court on appeal. However, in this

instance, Dr Harrison strongly contends that this appeal should not now be advanced. It is therefore necessary to say a little more about r 43.

[15] As this Court noted in *Harris v Davies* [2007] NZCA 358 (at [8]):

> Once an appellant has allowed r 43 to be triggered [as has occurred in this instance], he or she is then in a position where, instead of being able to appeal as of right, he or she "requires the exercise by this Court of a positive discretion": *Russell v Commissioner of Inland Revenue* (2006) 22 NZTC 19, 807 at [10] (CA). Before exercising that discretion, this court is always interested in the reason why the appeal has not been prosecuted diligently. Another relevant factor, as stated in *Russell*, is "whether the proposed appeal is genuinely arguable". Appeals as of right can be brought regardless of merits, but once an appellant needs leave to continue, this court will generally grant such leave only if the appeal seems meritorious.

[16] That statement is not exhaustive. This Court must consider all relevant factors.

The grounds of opposition

[17] In this instance, Dr Harrison submits that:

(1) Mr Scott's conduct disentitles him to the grant of an extension; and/or

(2) in any event, the reasons which the appellant puts forward to seek an extension are completely without merit; and/or

(3) the underlying appeal against the judgment of the High Court is also without merit.

[18] It is convenient to consider the present application under those three heads.

The appellant's conduct disentitles him to the grant of an extension

[19] We have been much assisted in this matter by a chronology prepared by Dr Harrison, which was attached to his written submissions. It covers the period

between the commencement of the dispute in 2000 and the delivery of the judgment under appeal on 15 September 2008, in careful detail.

[20] Dr Harrison's central proposition under this head is that the chronology shows a prolonged pattern of delay and default – always operating, he says, to Mr Scott's personal and financial advantage – continuing until the present appeal was lodged, and indeed thereafter.

[21] Dr Harrison notes that Mr Scott has engaged ten firms of solicitors since the original dispute arose. Mr Hood of Norris Ward McKinnon, Hamilton has been granted leave to withdraw as the most recent solicitor on the record in a Minute issued on 15 June 2009, for reasons which need not be gone into here. This was the third firm of solicitors to act for Mr Scott since the High Court judgment.

[22] Mr Scott was advised through Norris Ward McKinnon of this hearing, but he did not appear in person for the hearing, or by counsel. Fortunately, and of great assistance to the Court, Mr Hood had, prior to ceasing to act, already prepared and filed written submissions and had lodged an affidavit by Mr Scott in support of his application for an extension of time. Mr Scott has therefore not been prejudiced in relation to our proceeding on the present application: everything that could conceivably have been said on his behalf has already been said in the written submissions, and in his affidavit.

[23] Dr Harrison complains that Mr Scott has done nothing whatsoever to prosecute his appeal (other than lodge security for costs) since it was filed on the very last day for appealing, despite repeated requests on behalf of the respondents that he do so. The impending deadline for filing the Case on Appeal had been pointed out to him. There was then an assurance given that the appeal was being pursued and that the Case on Appeal would be lodged within time. It was not. Dr Harrison urges that Mr Scott's delays in relation to his pursuit of the appeal need also to be considered in the context of his long history of defaults throughout the High Court litigation. He has repeatedly derailed hearings by changing lawyers, routinely at the last moment.

[24] Mr Scott's response to these concerns is best considered in the context of his alleged reasons for the default, which is Dr Harrison's next head (see [17] above), and to which we now turn.

The reasons put forward for seeking an extension

[25] The only formal application for an extension of time is a distinctly rudimentary one made by then counsel for the appellant, Mr Lawson, on 2 April 2009. Paragraph 3 of that application stated: "The appellant has filed in the Tauranga High Court an Interlocutory Application for the Division of Property. That application is yet to be heard. The outcome of that application may render the appeal unnecessary."

[26] It is necessary to add here that Mr Lawson was one of the many advisors on Scott's behalf over the years. He "withdrew" as counsel on 14 April 2009 (without leave) and filed a memorandum in this Court to that effect. In that memorandum it was said, for the first time, that it was because Mr Scott had not been able to get hold of files from a former firm of solicitors (Sharp Tudhope, Tauranga) and his former counsel, Mr Quinn, that he had been held up on his appeal. It seems therefore that by April 2009 Mr Scott had given away the suggestion that it was collateral proceedings in the High Court which would hold this appeal up. He was now alleging "lack of legal representation for significant periods of the time within which he could have filed the Case on Appeal" and that Sharp Tudhope and Mr Quinn had "refused to hand over information that he needed".

[27] Mr Scott's propositions are strongly contested by Dr Harrison. On the basis of Dr Harrison's chronology, he contends that even on the most charitable interpretation of the sequence of events, the appellant was unrepresented for only one of the six months at issue.

[28] However, matters go beyond that. The respondents had felt sufficiently concerned at the delays which had occurred that they had sought to have Mr Scott waive privilege in confidentiality to enable Mr Quinn and Sharp Tudhope to respond

to Mr Scott's allegations of their leaving him in the lurch, and failing to release the documentation which would be required for the purpose of the Case on Appeal.

[29] Further, it is said that Mr Scott has never specified just what it was that was required from Sharp Tudhope or Mr Quinn to advance the appeal. And in any event, Mr Quinn had provided Mr Scott with six ring binders of material, which, so far as Dr Harrison can ascertain, contains everything that would be needed for the Case on Appeal.

[30] There is powerful force in these submissions. The history of the delays and evasions which have attended this proceeding is quite unacceptable; the most recent unhorsing of counsel on the eve of the hearing in this Court is simply a furtherance of the same sort of delaying tactics.

The merits of the underlying appeal

[31] Mr Scott has not sought to appeal against the entirety of the High Court judgment. He appeals only two aspects. The first is that the trust farm be sold forthwith by a newly appointed sole trustee, by public auction. The second is the order that his purchase of the estate's half share of Tombstone be rescinded.

[32] Dr Harrison submits that the order as to the sale of the trust farm amounted to an exercise of judicial remedial discretion, resting on particular findings of fact. He submits that Mr Scott has not demonstrated the financial ability to purchase the trust farm outright or finance it, but even if he could have done so, the Judge thought the best course was to direct that the trust farm be sold by public auction (at which, of course, Mr Scott could bid).

[33] In the written submissions from Mr Hood, it was contended that the Court gave "too much weight" to the wishes of Rosemary and Lee (themselves partial wrongdoers) and "insufficient weight" to Mr Scott's wishes, his financial ability to purchase the trust farm, and the question as to whether he should have a pre-emptive right to purchase the trust farm at a fixed price.

[34] As to the second ground of appeal (which amounts to an acquiescence or waiver argument), Stevens J held as a fact that the evidence did not establish waiver or fully informed and independently advised consent. Indeed, the Judge held that Lee, Alison and Cara were actually misled by Mr Scott about the proposed transactions, with the consequence that their lack of consent was "clear and palpable" (at [85]). The evidence of misleading was to be found in an email rather than oral discussions, so it is said this was a clear finding on documentary evidence.

[35] It is necessary also to have regard to the realities of the litigation. Stevens J had set out, as he explicitly acknowledged in his judgment, to attempt to balance the equities overall (at [2]). That approach left Mr Scott in de facto possession of Tombstone and ensured the sale of the trust farm *before* the issue of the sale of Tombstone arose (which Rosemary had apparently been seeking since 2004). If Mr Scott had not appealed, the sale of the trust farm, combined with other relief to which he was entitled, would have given him a capital sum which the Judge undoubtedly contemplated could have been utilised by him towards the purchase of Tombstone. But by appealing Mr Scott has, as Dr Harrison put it, yet again attempted to gain control of both farms at the expense of the respondents. It is said that this sort of manoeuvring has kept Mr Scott in possession over a period of some years, to the detriment of the respondents. Further, this prospective appeal would now further delay resolution of this unhappy family saga by many months.

Resolution

[36] To take the third issue first, it is not possible on an application of this kind for this Court to anticipate the ultimate resolution of the merits of a case, except in a very provisional way. What can be fairly said is that the High Court Judge made a distinct effort to unravel the mess into which the family had got themselves, in what the Judge overtly acknowledged to be an equitable way. What is really put in issue on the prospective appeal is the relief afforded by the Judge. The underlying merits were all resolved against Mr Scott, on the facts of the case. The outcome of the remedial exercise was to leave Mr Scott, whether deservedly or not, in a further favourable position, at least for a time. The fact of the matter is that the delays in the

ultimate resolution of this case appear to have lain distinctly at Mr Scott's door. The evidence is overwhelming that the respondents have been trying to get this case (including this appeal) resolved, for a very long time. There has been no real incentive for Mr Scott to do so, and he has taken refuge in delaying tactics rather than advancing matters.

[37] The shifting grounds of Mr Scott's reasons for his delay in prosecuting the appeal count against him, as does the fact that absolutely nothing seems to have been accomplished in the way of preparing a Case on Appeal. The respondents are standing on a judgment, and they are entitled to have the appellant get on with any appeal, as r 43 itself affirms. That it has not advanced is not for want of remonstrance on the respondents' part. The delay has perpetuated their very real detriment.

[38] It is unusual to decline an application of this kind. We have considered the only other possible option: that of putting Mr Scott on a very short leash, for instance, by "unless" orders. But in our view, this is an egregious case. The delays and prevarications are very bad. The merits of the case are not strong, and in reality go only to the relief ordered. The respondents are prejudiced. At some point, a court has to say "enough is enough". Civil litigation cannot be blighted by contrived delays.

[39] The application will therefore be dismissed.

[40] The respondents are granted leave to withdraw the cross-appeal.

[41] The appellant must pay to the respondents, collectively, costs for a standard appeal on the appeal, the cross-appeal, and on this application, on a band A basis, together with usual disbursements.

[42] The Registrar is to release to the respondents their security for costs on their cross-appeal. The security for costs paid by the appellant on the appeal is to be released by the Registrar to the respondents, to defray (in part) the costs payable to them by the appellant.

Solicitors:
O'Sullivan Clemens, Rotorua for Respondents