

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA173/2019
[2019] NZCA 380**

BETWEEN PETER RICHARD PRESCOTT
 Applicant

AND NEW ZEALAND POLICE
 Respondent

Hearing: 12 August 2019

Court: Brown, Clifford and Collins JJ

Counsel: Applicant in person
 G M Taylor for Respondent

Judgment: 22 August 2019 at 2.30 pm

JUDGMENT OF THE COURT

- A The application for extension of time to file an appeal is declined.**
- B The application to stay execution of the costs order is declined.**
- C The applicant is to pay one set of costs to the respondent on a band A basis
 with usual disbursements.**
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REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Mr Prescott has filed:

- (a) an application to extend time to file an appeal from a judgment of the High Court delivered on 15 February 2019,¹ striking out his application for judicial review of a decision of the District Court in a criminal matter; and
- (b) an application to stay execution of an order for costs made against him when the High Court struck out his application for judicial review.²

Background

[2] On 20 July 2016, a speed camera recorded a vehicle being driven on Triangle Road in Massey, travelling in excess of the 50 km/h speed limit.

[3] The vehicle had a “trade plate” number X7760. A trade plate is a temporary plate that may be issued by the Registrar of Motor Vehicles pursuant to reg 25 of the Land Transport (Motor Vehicle Registration and Licensing) Regulations 2011. A person to whom a trade plate is issued may operate a motor vehicle even though the vehicle is not registered, provided the vehicle is only used for a purpose for which the trade plate is issued.³ Inquiries by the Police Infringement Bureau revealed that trade plate X7760 was issued to Peter Richard Prescott of Online Car Care, 1/14A Target Road, Totara Vale, Auckland.

[4] On 2 August 2016, the police served on Mr Prescott an infringement notice alleging he had driven the vehicle in question. Mr Prescott contested the infringement notice and sought a hearing, which was scheduled for 27 October 2016 before two Justices of the Peace. Although he was advised of the hearing date Mr Prescott did

¹ Court of Appeal (Civil) Rules 2005, r 29A.

² Rule 12(3).

³ Land Transport (Motor Vehicle Registration and Licensing) Regulations 2011, reg 26.

not attend the hearing. The police proceeded by way of formal proof. The Justices of the Peace found the offence proven and ordered Mr Prescott to pay a fine of \$80 and court costs of \$30.

[5] Mr Prescott appealed to the District Court. On 21 March 2018, Judge Tremewan dismissed Mr Prescott's appeal.⁴ In her judgment the District Court Judge said that the vehicle was registered in Mr Prescott's name.⁵

[6] Mr Prescott could have sought leave to bring a second appeal under s 237 of the Criminal Procedure Act 2011, on the basis that his proposed appeal involved a matter of general or public importance, or that a miscarriage of justice may have occurred, or may occur, unless his proposed appeal was heard. Instead, Mr Prescott commenced an application in the High Court to judicially review the District Court Judge's decision. This strategy was designed to circumvent the need for Mr Prescott to satisfy the requirements of s 237 of the Criminal Procedure Act. The police applied to strike out that proceeding.

[7] The application to strike out the judicial proceeding was granted by Jagose J on 15 February 2019, on the ground that the proceeding was an abuse of process.⁶ In his decision, Jagose J also considered whether or not Mr Prescott's claim could be "repleaded" as an application for leave to bring a second appeal. The High Court Judge appears to have been satisfied that the criteria for bringing a second appeal set out in s 237 of the Criminal Procedure Act were not established.⁷ A costs order was made against Mr Prescott, the effect of which is that he is liable to pay the police \$6,943.96.

[8] On 18 February 2019, Mr Prescott applied to the High Court to recall this judgment. That application was declined on 28 February 2019.⁸

⁴ *Police v Prescott* [2018] NZDC 5372 [DC appeal].

⁵ At [2].

⁶ *Prescott v Police* [2019] NZHC 175 [HC review] at [7].

⁷ At [9].

⁸ *Prescott v Police* HC Auckland CIV-2018-404-936, 28 February 2019.

[9] On 12 March 2019, Mr Prescott attempted to file a notice of appeal in relation to the High Court decision dismissing his recall application. That document was rejected by the Court of Appeal Registry on the grounds that the recall decision was an interlocutory decision and leave was required before Mr Prescott could appeal that decision.

[10] On 13 March 2019, Mr Prescott sought leave in the High Court to appeal the recall decision. He was told that leave was not required if he wished to appeal the 15 February 2019 decision striking out his application for judicial review.

[11] On 17 April 2019, Mr Prescott filed in this Court a “notice of application for leave to appeal to the Court of Appeal”. We treat that document as being a notice to appeal the decision striking out his judicial review proceeding. That notice of appeal was, however, required to have been filed by 15 March 2019.⁹ Mr Prescott is now attempting to remedy the failure to commence an appeal within time by seeking an extension of time in which to file his notice of appeal.

[12] On 16 May 2019, Mr Prescott also applied for an order staying execution of the costs order pending the determination of his appeal.

Application for extension of time

[13] In *Almond v Read*, the Supreme Court explained the following six factors may be engaged when determining whether or not it is in the interests of justice to extend the time for filing a notice of appeal:¹⁰

- (a) the length of the delay;
- (b) the reasons for the delay;
- (c) the conduct of the parties, and in particular the applicant;

⁹ Court of Appeal (Civil) Rules, r 29(1)(a).

¹⁰ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38]–[39].

- (d) any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome of the proposed appeal;
- (e) the significance of the issues raised by the proposed appeal; and
- (f) in some limited cases, the merits of the proposed appeal.

[14] Ms Taylor, for the respondent, properly accepts that the delay in this case is not significant and that the respondent will not be prejudiced if an extension of time to commence an appeal is granted. Ms Taylor submits, however, that the reasons for the delay and Mr Prescott's conduct count against granting an extension of time to file an appeal. She also submits that the issues raised by the proposed appeal are of no consequence and, most significantly, that the proposed appeal is devoid of merit.

[15] We agree that the length of the delay in this case is not significant and that there would be no prejudice caused if an extension of time to appeal were granted. We are also satisfied that the reasons for the delay and Mr Prescott's actions are attributable to him being self-represented and his lack of familiarity with the Court's processes. These factors weigh in favour of the application being granted.

[16] We will refer to the significance of the issues when examining the merits of the proposed appeal. Mr Prescott has stated in his submissions that he was not the driver or the registered owner of the vehicle. This assertion engages s 133 of the Land Transport Act 1998. Under that section, infringement proceedings of the kind brought against Mr Prescott may be taken against:

- (a) the driver of the vehicle; or
- (b) the registered owner of the vehicle; or
- (c) the person "lawfully entitled to possession of the vehicle involved in the offence (whether jointly with any other person or not)".¹¹

¹¹ Land Transport Act 1998, s 133(1).

[17] Where proceedings are taken on the bases we have set out at [16(b) or (c)], it is presumed the defendant was the driver or person in charge of the vehicle and that the acts of the driver or person in charge of the vehicle were those of the defendant.¹²

[18] Mr Prescott's application for judicial review could not succeed as it was an abuse of process for him to attempt to overturn the judgments of the Justices of the Peace and Judge Tremewan, which were Courts of competent jurisdiction.¹³ It was also an abuse of process for Mr Prescott to attempt to circumvent the requirements of a second criminal appeal by launching his application for judicial review without first exhausting the appeal pathways in the Criminal Procedure Act. Furthermore, even if the application for judicial review could have been treated as an application for leave for a second appeal, the judicial review proceeding would have been brought to an end. Thus, looking at matters in a light that is most favourable to Mr Prescott, his application for judicial review was doomed to fail. The proper course was for Mr Prescott to have applied for leave to bring a second appeal. Such an application would have required Mr Prescott to provide evidence that he was not liable under the provisions of s 133 of the Land Transport Act. He did not attempt to provide that evidence in the High Court.

[19] We agree with Ms Taylor that the proposed appeal has no merit as there was no basis upon which Mr Prescott's application for judicial review could succeed. Nor does the proposed appeal engage any interest beyond those that relate to Mr Prescott's personal circumstances.

[20] We therefore conclude that this is one of those cases in which an extension of time should not be granted to bring an appeal because the proposed appeal has no chance of succeeding.

¹² Section 133(2).

¹³ *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL); *W v W* [1999] 2 NZLR 1 (PC); and *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7.

Stay of execution of costs judgment

[21] Our conclusion in relation to the application for an extension of time to bring an appeal means that there is no merit to the application to stay execution of the costs order.

Result

[22] The application for extension of time to file an appeal is declined.

[23] The application to stay execution of the costs order is declined.

[24] The applicant is to pay one set of costs on a band A basis with usual disbursements.

Solicitors:
Crown Law Office, Wellington for Respondent