

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 89/2009  
[2009] NZSC 118**

BETWEEN                      TULSI RAM NARESH  
   Applicant  
  
AND                              GORDON EDWARD MCCLUSKIE  
   Respondent

Court:                      Elias CJ, Blanchard and Wilson JJ

Counsel:                  Applicant in person  
   A R Gilchrist for Respondent

Judgment:                26 November 2009

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**JUDGMENT OF THE COURT**

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- A        The application for leave to appeal is dismissed.**
- B        The applicant is ordered to pay indemnity costs to the respondent.**

**REASONS**

[1]     The applicant applied on 6 October 2009 for leave to appeal against a judgment of the Court of Appeal, delivered on 28 July 2009,<sup>1</sup> dismissing an appeal by the applicant against a judgment of Courtney J making orders removing the applicant as a trustee of the Gordon and Hansa Family Trust, which was established by the respondent's late wife (the applicant's sister), and appointing the Public Trustee as sole trustee.<sup>2</sup>

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<sup>1</sup>     [2009] NZCA 328.

<sup>2</sup>     High Court, Auckland, CIV-2007-404-006152.

[2] By Minute dated 8 October, the applicant was advised that, in his submissions in support of his application for leave to appeal, he should address the question of the delay in filing that application. The applicant has not provided any adequate explanation for the delay. Accordingly, time is not extended and the application must be dismissed as out of time.

[3] Even if the application had been within time, leave to appeal would not have been granted. For the reasons which she clearly set out in her judgment, Courtney J concluded that the applicant had to be removed as a trustee “because he has absolutely no understanding whatsoever of his obligations towards the beneficiaries and no intention of complying with the terms of the Trust”.<sup>3</sup> The Court of Appeal concluded that the absence of merit in any of the grounds advanced by the applicant made the dismissal of the appeal “inevitable”.<sup>4</sup> No question of general importance would have arisen on appeal to this Court; the principles governing the removal of trustees are well-settled. No substantial miscarriage of justice has resulted.<sup>5</sup>

[4] In further submissions filed (without leave) in response to the respondent’s submissions in reply, the applicant renewed an application for a stay or an injunction to prevent the sale of the house which is the main asset of the Trust. That application had been refused by the 8 October Minute. It is refused again. Because the application for leave to appeal to this Court was out of time and would have been dismissed in any event, there is no legal basis on which a stay or injunction could be granted.

[5] Both Courtney J and the Court of Appeal took the exceptional step of directing that the applicant pay the respondent costs on an indemnity basis from the assets of the Trust. Because of the conduct of the applicant, those orders were justified. In the 8 October Minute, the applicant was advised to address the question of whether the respondent should be awarded indemnity costs if his application was unsuccessful. The applicant has not made out any reason why, consistently with the

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<sup>3</sup> At para [30].

<sup>4</sup> At para [32].

<sup>5</sup> *Junior Farms Ltd v Hampton Securities Ltd* [2006] 3 NZLR 522 (SC).

approach of the High Court and the Court of Appeal, an award of indemnity costs should not follow the refusal of his application. He is therefore ordered to pay to the respondent, from the assets of the Trust, the actual and reasonable costs of the respondent in this Court. Leave is reserved to the respondent to apply to have the amount of these costs fixed by the Court if they cannot be agreed.

Solicitors:  
Vlatkovich & McGowan, Auckland for Respondent