

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA662/2007  
[2008] NZCA 147**

BETWEEN                      DOUGLAS JOHN WILLIAMSON AND  
   JOHN BLACKWOOD WILLIAMSON  
   Appellants/Respondents in strike out  
   application

AND                              SELWYN DISTRICT COUNCIL  
   Respondent/Applicant in strike out  
   application

Hearing:            19 May 2008

Court:                William Young P, Glazebrook and Baragwanath JJ

Counsel:            K Foley for Applicant  
                                 D Williamson in person

Judgment:        5 June 2008            at 10.00 am

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**JUDGMENT OF THE COURT**

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- A     The application by Selwyn District Council is allowed.**
- B     The appeal is struck out.**
- C     Costs of \$1,200 plus usual disbursements are to be paid to Selwyn District Council by the Williamsons.**
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**REASONS OF THE COURT**

(Given by Glazebrook J)

## **Introduction**

[1] On 9 November 2007, Associate Judge Christiansen gave summary judgment in favour of the Selwyn District Council to enforce the provisions of a lease entered into between the Council and the Williamson brothers. The Williamsons have appealed against that decision. The Council applies to strike out the Williamsons' appeal pursuant to r 37(1) of the Court of Appeal (Civil) Rules 2005, which provides that the Court may make an order striking out an appeal if security for costs is not paid by the due date.

[2] In this case, the appeal was filed on 7 December 2007 and the Court set security for costs at \$4,740. This should have been paid 20 working days after the notice of appeal was filed in the Registry, namely by 28 January 2008. Security was not paid at that date. At the time of the hearing of the Council's application, security remained unpaid. The Williamsons have since offered to pay part of the security for costs and have indicated that they should be able to pay the rest shortly. The Council, however, maintains its strike out application.

## **Background**

[3] The lease, which was the subject of the summary judgment, formed part of an agreement dated 28 July 2003 for the sale and purchase of land owned by the Williamsons, on which they operated a horse training facility. The reason for the purchase of the property was that the Williamsons were unhappy at the industrial development that the Council proposed to undertake near their property and were challenging various resource consents associated with it.

[4] Negotiations between the Council and the Williamsons extended over more than a year. In the event, the Council agreed to purchase the property from the Williamsons for \$800,000 plus GST. The Williamsons were to remain on the property pursuant to a lease for three years at a cost of \$1 per annum. The Williamsons did not vacate the property when the lease came to an end. Rather than relying on the provisions in the lease to remove the Williamsons, the Council issued

proceedings to recover possession of the property. This led to the grant of summary judgment.

### **The parties' contentions**

[5] The Council's main submission is that the appeal is entirely lacking in merit. It also points out that security had not been tendered even at the time of the hearing and there has been no proper explanation for this delay. Further, it appears that the financial circumstances of the Williamsons are not such as to enable them to pay security. In addition, the Council notes that the Williamsons have taken no steps in the appeal, apart from filing the notice of appeal. This is not a case, therefore, where the appellant had otherwise kept matters moving, as had been the case in *He v Hard to Find But Worth The Effort Quality Secondhand Books (Wellington) Limited (In liquidation)* (2007) 18 PRNZ 757 (CA). Further, in *He*, security had been paid promptly once the application to strike out had been filed.

[6] Mr Douglas Williamson submitted, on behalf of himself and his brother, that they had misunderstood the nature of the obligation and had been unable to pay the security once they had realised their mistake. Mr Williamson also said that the Council had acknowledged owing them money for removal expenses. Mr Williamson also maintained that the appeal had merit for essentially the same reasons as had been argued in front of Associate Judge Christiansen.

[7] We examine first the extent of the failure to pay the security for costs and then examine the Associate Judge's judgment in light of Mr Williamson's arguments before us.

### **Failure to pay security for costs**

[8] In their written material before the Court, the Williamsons argued that money owed to them by the Council should have been available by way of offset to satisfy the obligation to pay security for costs. The money allegedly owed to the Williamsons by the Council was, however, owed only contingently. The Council has agreed to pay a sum to the Williamsons with regard to their removal costs. If the

Williamsons use a removal firm, then the Council will pay the costs to the removal firm. It is only if the Williamsons themselves remove their assets from the property personally that the Council would make a payment to the Williamsons. We therefore accept the Council's submission that this cannot be taken into account.

[9] There is an obligation to pay security for costs by the due date. In this case, there is currently a continuing failure to meet this obligation. While there may have been some confusion on the part of the Williamsons in relation to the obligation to pay security for costs initially, it is clear that they now fully understand their obligation but have still failed to pay security. This, coupled with the failure to take further steps in furtherance of the appeal, would be enough to warrant granting the Council's application. The payment of security is not optional. It is a requirement.

[10] From the Council's perspective, there is a need for a certain degree of urgency in relation to the appeal. It is in the process of developing land around the property as part of a substantial industrial park development. It has plans for the property, which cannot be carried out at present because of the Williamsons' refusal to vacate it. The Council tried to have the matter set down by offering to pay the setting down fee but, unless it was prepared to waive security (which it was not prepared to do), the appeal cannot be set down. It should not be obliged to wait any longer for the Williamsons to fulfil their obligations to pay security for costs.

### **The judgment of the Associate Judge**

[11] In any event, we accept the Council's submission that the appeal is hopeless. The Williamsons essentially raise no new matter before us that was not raised before the Associate Judge. For the same reasons as the Associate Judge, we consider that summary judgment was appropriately granted.

[12] The Judge noted that a number of matters had been raised by the Williamsons as possible defences. He said that in general the Williamsons considered that they should not be bound by the terms of the agreement or the lease because the whole situation was "unfair" and that they should be able to buy the property back for the same price they were paid for it.

[13] The Associate Judge held that there was no evidence of any threat or pressure exerted upon the Williamsons at any stage of the negotiations and that therefore duress would not be a defence. He also rejected the view that there was undue influence applied. He noted that throughout the Williamsons were receiving legal advice. The parties were very much of equal bargaining power. He also rejected any view that this was an unconscionable bargain. Further, there was no evidence that the Williamsons were in a position of particular disadvantage or that the Council knew of this or exploited it. To the contrary, the Williamsons were represented by lawyers throughout who acted as strong advocates for them.

[14] The Judge noted that, at the end of the negotiations, the Council paid \$300,000 more for the property than its initial offer, as well as a substantial contribution to the Williamson's legal costs. The Council also allowed the Williamsons to lease the property for three years effectively rent free. The Judge held that there was no evidence of misrepresentation and that the terms of the lease were agreed following lengthy correspondence between the parties' advisers. He also rejected the contention that the Council resiled on a promise to provide a loan to facilitate the purchase of another property. This had clearly been overtaken by the extension of the lease term from one year to three years free of any cost.

[15] The Judge also rejected the Williamsons' claims that the Council had not complied with the Local Government Act 1974. In the Judge's view, a local authority is required to undertake its commercial transactions in accordance with sound business practice. In this case the transaction was conducted at arms length and on a commercial basis. He also noted that the Council had purchased the property for commercial purposes. It was not acquired for public works and the Public Works Act 1981 therefore did not apply.

[16] The Judge indicated that his overall impression of the correspondence between the parties concerning valuations, the agreement and the lease terms indicated a thorough examination of matters of concern to the Williamsons during the negotiations. We agree with the Judge's assessment on these issues. The Williamsons might now regret their bargain but that is not a reason to set it aside.

[17] The Judge also rejected the Williamsons' attempt to re-open the resource management issues that had been the catalyst for the sale. We accept the Council's submission that he was correct to do so and that, contrary to the Williamsons' submission, resource management issues are not at the heart of the matter. All resource consent related issues were tied up and settled with the agreement for sale and purchase. They cannot now be re-opened.

[18] The Williamsons took what can be seen as a perfectly sensible commercial decision to drop the resource management challenges in return for being bought out of their property. In making this decision, the Williamsons presumably factored in the possibility that they would fail in any challenge and thus would have spent time and resources for no benefit. They would also have factored in that, under the sale and purchase agreement, they not only received the use of the sale price of the property for three years but also had the use of the property for three years, effectively rent free, while they found a replacement property.

[19] The main issue raised before us was in relation to an alleged conflict of interest on the part of the Williamsons' solicitors, Anthony Harpers. Anthony Harpers has not at any time acted for the Council. However, it acts for one of the Selwyn councillors, Mr Christensen, in his personal capacity, although one matter on which they had acted for him did relate to his work with the Council. It was, however, totally unrelated to these transactions or these negotiations.

[20] The Williamsons say that Anthony Harpers had a conflict of interest because it had acted for Councillor Christensen and this means that the transaction should be set aside. They say that Anthony Harpers should have disclosed that conflict at the time the Williamsons gave the instructions to that firm. By the time, they found out it was too late to change solicitors. This same argument was put to, and rejected, by the Associate Judge.

[21] The Judge noted that the claims about breach of fiduciary duty do not concern the relationship between the Council and the Williamsons but rather that between the Williamsons and their solicitors. Further, the Judge found that, although some of the earlier discussions had involved Councillor Christensen, the bulk of the

negotiations involved Connell Wagner Consultants for the Council and Mr Fowler from Anthony Harpers for the Williamsons.

[22] The Judge held in any event that there was clear evidence of affirmation of the agreement and the lease in full knowledge of the alleged conflict. Instructions had not been discontinued after the alleged conflict had been discovered. There was no evidence that the alleged conflict had been raised when the Williamsons found out about it some time prior to the finalisation of the sale and purchase agreement.

[23] The alleged conflict was not mentioned when the Williamsons first raised concerns about aspects of the transaction involving the sale of the property some two years later (by e-mail dated 11 March 2005). The conflict issue was first raised by Mr Williamson's e-mail to Selwyn District Council of 10 December 2006 when the Williamsons were under some pressure to advise when they would be vacating the property. The Judge held that there had also been affirmation through the Williamsons agreeing to pay rent for a period of five months beyond the lease term.

[24] If there was a conflict of interest (and we make no comment on this or on the Williamsons' contention that it would have unravelled the transaction if there had been such a conflict), there was clearly waiver of that conflict for the reasons set out by the Associate Judge.

### **Result and costs**

[25] The application by Selwyn District Council is allowed. The appeal is struck out.

[26] Costs of \$1,200 plus usual disbursements are awarded to Selwyn District Council.

Solicitors:  
Buddle Findlay, Christchurch for Appellant