

IN THE COURT OF APPEAL OF NEW ZEALAND

CA460/2013
CA667/2013
[2014] NZCA 470

BETWEEN DOUGLAS BANKS AND CHRISTINE
SANDRA BANKS
Appellants

AND GREY DISTRICT COUNCIL
Respondent

Court: Wild, French and Miller JJ

Counsel: Appellants in person
J Shackleton and D A Ward for Respondent

Judgment: 26 September 2014 at 10.00 am
(On the papers)

JUDGMENT OF THE COURT

- A The application for review of Stevens J’s directions is dismissed.**
- B The appellants are granted leave to file a supplementary volume of the further evidence they seek to adduce that is not already included in the respondent’s case on appeal. The supplementary volume is not to contain submissions made in the High Court or any documents already on the files of this Court.**
- C The application for leave to adduce the further evidence is adjourned until the substantive hearing.**
- D Costs on the two applications are reserved for determination as part of the hearing of the substantive appeal.**
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REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mr and Mrs Banks filed two appeals. The first was an appeal against a decision of Fogarty J in which the Judge found that Mr and Mrs Banks were parties to a valid lease and accordingly liable for the payment of rent arrears.¹ The second appeal was against a subsequent decision of Fogarty J ordering Mr and Mrs Banks to pay costs.²

[2] On 13 May 2014, Stevens J gave directions that the two appeals should be consolidated, a single hearing day should be allocated and the case on appeal for the consolidated appeal should be that filed by the respondent.

[3] Mr and Mrs Banks, who are representing themselves, have applied under s 61A(3) of the Judicature Act 1908 for a review of those directions.³

[4] Mr and Mrs Banks have also applied for leave to file further evidence.

[5] Both applications are opposed.

[6] The parties have, however, agreed that the applications may be dealt with on the papers.

Discussion

[7] Mr and Mrs Banks do not challenge the decision to consolidate the appeals but consider that the consolidated appeal will require hearing time of at least one and a half days, not one day.

[8] Having read the papers and made our own assessment, we disagree. One day is sufficient. The judges who hear the case will have read the parties' written

¹ *Grey District Council v Banks* [2013] NZHC 1485.

² *Grey District Council v Banks* [2013] NZHC 2304.

³ Having previously unsuccessfully sought leave to appeal the directions to the Supreme Court: *Banks v Grey District Council* [2014] NZSC 102.

submissions in advance of the hearing. The purpose of the oral hearing is not for the parties to read out the submissions but rather to speak to them, to focus on the key points that are relevant and to clarify issues in response to questions from the panel. A disciplined approach is required and expected.

[9] Mr and Mrs Banks also object strongly to the case on appeal being that filed by the respondent. They point out that they had already filed two cases on appeal before the respondent “belatedly” filed its case on appeal without reference to the Court. In those circumstances, Mr and Mrs Banks say the directions made by Stevens J were retrospective and unfairly favoured the respondent.

[10] For its part, the respondent Council says that the cases on appeal filed by Mr and Mrs Banks were incomplete and did not comply with the Court of Appeal (Civil) Rules 2005. To assist the Court and the parties, it therefore prepared and filed a case on appeal that does comply.

[11] It is for an appellant to prepare the case on appeal and we appreciate that Mr and Mrs Banks may feel aggrieved that the respondent has usurped this role and filed a case on appeal without first obtaining authority from the Court.

[12] On the other hand, we accept that the case on appeal filed by Mr and Mrs Banks was non-compliant. It also appears that when asked to identify what further documents they wanted included in the respondent’s case on appeal, they did not identify any before Stevens J issued his directions.

[13] Since then, by way of an application to adduce further evidence, Mr and Mrs Banks have identified 44 documents they want to be provided to the Court.

[14] The documents fall into four categories:

- (a) affidavits and exhibits;
- (b) minutes and orders of the High Court;
- (c) written submissions to the High Court; and

- (d) miscellaneous documents including minutes and orders of this Court concerning the appeals.

[15] Submissions made in the Court below are not evidence and should not be included in a case on appeal. They are unlikely to be of assistance to the Court. Reference to them is usually discouraged unless an argument arises for example as to whether a new point is being taken on appeal that was not pursued in the Court below. Arguments raised in the High Court that are being pursued in this Court should simply be included in the submissions for this Court. If, however, Mr and Mrs Banks still consider the High Court submissions are relevant, then they will have an opportunity at the hearing to refer the Court to them.

[16] Minutes and orders of this Court are already part of the Court file and are not evidence.

[17] As regards the affidavits and exhibits, the respondent has already included all of these documents in the case on appeal but in some instances objects to the admissibility and relevance of them. It contends the other miscellaneous documents do not qualify as fresh evidence and/or are inadmissible.

Decision

[18] In our view the interests of justice and administrative efficiency require a pragmatic approach to both applications.

[19] The Court is better assisted as a result of the directions given by Stevens J and we are satisfied that those directions do not unfairly prejudice Mr and Mrs Banks. In our view, they were entirely appropriate directions in all the circumstances and we agree with them. We therefore confirm that the case on appeal for the consolidated appeal is to be the case on appeal filed by the respondent.

[20] As regards the application for leave to adduce further evidence, we agree that the admissibility and relevance of the contested material is questionable. However, our preference is for the panel hearing the appeal to make a final determination as regards relevance and admissibility.

[21] We therefore grant Mr and Mrs Banks leave to file a supplementary volume (and the requisite number of copies) containing the contested material that is not already included in the respondent's case on appeal. Leave is granted on the basis that the admissibility and relevance of this additional material is questionable but will be decided at the substantive hearing. For the avoidance of doubt we confirm that the submissions made in the High Court and matters of record in this Court should not be included in the supplementary volume.

[22] We also urge Mr and Mrs Banks when preparing the supplementary volume to consider carefully the relevance of each document that they propose to include, having regard to the objections raised by the respondent.

[23] Costs on the two applications are reserved for determination as part of the hearing of the substantive appeal.

Solicitors:
Simpson Grierson, Wellington for Respondent