IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA557/2022
[2023] NZCA 458

BETWEEN	LYNETTE JOY MILLS AND CARL JAMES PETERSON Applicants
AND	KELLY DALZELL First Respondent
	TRACEY LEVENBACH Second Respondent
	ASB BANK LIMITED Third Respondent
	GRAHAM HOWARD MILLS Fourth Respondent
	JOHN LEVENBACH Fifth Respondent
	CAROL KRAMMER Sixth Respondent

Court:	Mallon and Wylie JJ
Counsel:	Applicants in person S C D A Gollin and S L Michelsen for First and Third Respondents No appearance for Second Respondent J R Sparrow and S T Hartley for Fourth Respondent B R Webster and K B Perrett for Fifth and Sixth Respondents
Judgment: (On the papers)	20 September 2023 at 10 am

JUDGMENT OF THE COURT

A The application for an extension of time is declined.

B The applicants must pay the respondents (save for the second respondent) costs for a standard interlocutory application on a band A basis and usual disbursements as set out in [30].

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] The applicants, Lynette Mills and Carl Peterson, seek an extension of time, pursuant to r 43(2) of the Court of Appeal (Civil) Rules 2005 (the Rules), to apply for the allocation of a hearing date and file their case on appeal, and to pay security for costs. In short, they say that actions taken by the fourth respondent, Graham Mills, have prevented them from selling a property and generating funds to meet their obligations and that they should not be required to comply with r 43(1) or pay security for costs pending the High Court's final determination of an application they have made to stay a costs award made against them.

[2] The application is opposed by the respondents (other than the second respondent who, we are advised by counsel, is deceased). The respondents say that the applicants have failed to diligently prosecute their appeal. They say that there is no good reason given by the applicants for their failure to comply with the relevant rules and pay security, and that, in any event, the applicants' proposed appeal lacks merit.

The factual background

[3] The background to this matter was partially set out by Associate Judge Johnston in his judgment released on 23 September 2022 which is the subject of the proposed appeal.[1] We adopt his analysis of the factual background:[2]

> [11] The background to this litigation is not without its complications. There is a considerable amount of affidavit evidence before the Court. However, in the end, the material facts are clear enough.
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> [12] Mr Mills and Ms Mills were both domestic and business partners. They farmed two properties. They banked with ASB [Bank Ltd (the ASB)] in Nelson. They operated … a joint current account … and term loan accounts. ASB held all obligations first ranking mortgage securities over their properties.
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> [13] Although Mr Mills and Ms Mills were not married, they used the same surname. Mr Mills adopted Ms Mills' surname. …
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> [14] In 2010, Mr Mills and Ms Mills separated, though … this did not have any immediate impact on their contractual rights and obligations in relation to ASB.
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> [15] In 2014, Mr Peterson and Ms Mills commenced a relationship, which also had, and continues to have, both domestic and business dimensions.
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> [16] In May 2015, Mr Peterson, Ms Mills and Mr Mills agreed that Mr Peterson would acquire Mr Mills' relationship property and assume Mr Mills' indebtedness and related obligations to ASB. No doubt this appeared to the parties to be a tidy way of addressing aspects of the division of relationship property as between Mr Mills and Ms Mills. Regrettably, however, the parties did not involve ASB until after they had made these arrangements. When, eventually, they sought ASB's consent, it was not forthcoming.
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> [17] At around the same time there were dealings in connection with the joint current account, which appear to have been something of a flashpoint in terms of the relationships between Mr Peterson and Ms Mills, Mr Mills and ASB.
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> [18] In mid-June 2015, Mr Peterson made a payment of $40,000 into the current account. Following this payment, Mr Mills, who of course was an account holder, asked ASB to reduce the overdraft limit for the account from $50,000 to $12,000. ASB did so. When Mr Peterson and Ms Mills became aware of the reduction in the overdraft limit, Ms Mills, who was the other account holder, requested the Bank to reinstate the $50,000 limit. Again, ASB did so. Following the reinstatement of the $50,000 overdraft facility, Mr Mills withdrew $40,000.

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1 *Mills v Dalzell* [2022] NZHC 2439.

2 Footnotes omitted.

> [19] These events, and most particularly Mr Mills' withdrawal of funds from the joint current account, appear to have led to Mr Peterson and Ms Mills commencing proceedings against both Mr Mills and ASB.[3] It is unnecessary to describe these claims in detail. The proceeding against Mr Mills was commenced by Mr Peterson and Ms Mills in late 2015 and the claim against ASB in early 2016. The theme running through these claims was that Mr Mills had defrauded Mr Peterson and Ms Mills, that ASB, through its officers, Ms Dalzell and the late Ms Levenbach, and Mr Levenbach, a solicitor practising in Nelson, and his legal executive, Ms Krammer, were all complicit in the fraud or frauds.
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> [20] Mr Peterson and Ms Mills' proceeding against Mr Mills was concluded by May 2021. Orders made by Palmer J in that proceeding facilitated the transfer to Mr Peterson of Mr Mills' half share in the properties and the repayment of the residual indebtedness to ASB by means of the sale of one of the properties. Mr Peterson and Ms Mills sought leave to appeal. This was declined by the Court of Appeal, the Court concluding that the application by Ms Mills and Mr Peterson was without merit.
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> [21] In the claim against ASB, the Bank applied for summary judgment and was successful in the District Court. Mr Peterson and Ms Mills appealed to this Court unsuccessfully. They then sought leave to appeal to the Court of Appeal, and this application was declined. However, special leave to appeal was granted by the Court of Appeal on the question of whether the District Court was correct to grant ASB summary judgment on one of several pleaded causes of action. Plainly the District Court was not entitled to do so, and, sensibly, the parties agreed to the appeal being upheld on that ground, and the matter being referred back to the District Court.
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> [22] At this point, the parties entered into a settlement agreement. I am informed that this was originally proposed by ASB. The settlement agreement itself was dated 21 December 2021.

[4] Notwithstanding the settlement agreement, the applicants brought a fresh proceeding making similar allegations to those they had made in the earlier proceeding. They did not consider that the settlement agreement precluded them from doing so.

[5] The respondents applied to the High Court, variously, for summary judgment or orders striking out the proceeding. The Judge considered the applications were best dealt with pursuant to r 15.1 of the High Court Rules 2016 as applications for orders striking out the applicants' claims.[4]

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3 We note that the first respondent, Ms Dalzell, the second respondent, the late Ms Levenbach, the fifth respondent, Mr Levenbach and the sixth respondent, Ms Krammer, were also parties to these proceedings.

4 At [1]–[3].

[6] The first and third respondents applied to strike out the fresh proceeding. They argued that the applicants were precluded from pursuing their claim by virtue of the settlement agreement. Further, they argued that, even putting aside the settlement agreement, the applicants were unable to establish a reasonably arguable cause of action against them. Even if there was a reasonably arguable cause of action, they argued that it would be time barred.[5] The Judge noted that the claim against the fourth respondent, Mr Mills, who was a party to the settlement agreement, was dependant on the allegation that Mr Mills had acted fraudulently by adopting Ms Mills' surname. The Judge considered that there was no proper foundation for this assertion and that the claims against Mr Mills were, in any event, stale.[6] The fifth and sixth respondents argued that the claim was nothing more than an attempt by the applicants to avoid having to make payments to the third and fourth respondents and that there was no proper pleading or foundation for any allegation against them of being involved in a (non-existent) fraud. They also relied on the limitation defence.[7]

[7] In a reserved decision issued on 23 September 2022, the Judge struck out the proceeding in its entirety pursuant to r 15.1 of the High Court Rules, on the grounds that it disclosed no arguable cause of action against any of the defendants and was otherwise an abuse of process, having regard to the terms of the settlement agreed and the fact that all claims were, in any event, time barred.[8] It is this judgment which the applicants seek to challenge.

The procedural background

[8] On 13 October 2022 the applicants filed a notice of appeal with this Court. On 19 October 2022 they filed an application for an order dispensing with security for costs in relation to their appeal and an amended notice of appeal. The third respondent opposed the application to dispense with security for costs and sought increased security.

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5 At [24].
6 At [70]–[73].
7 At [8] and [76].
8 At [85].

[9] On 23 November 2022, the Judge awarded uplifted costs against the applicants in relation to the strike out application.[9] The applicants promptly sought a stay of this order under r 12(3) of the Rules.

[10] The Deputy Registrar declined to dispense with security and allowed in part the fourth respondent's application for an increase. She ordered that security of $27,500 be paid by 19 December 2022. On 15 December 2022 the applicants filed an application seeking to review the Deputy Registrar's decision. All respondents (other than the second respondent) opposed the application for review.

[11] On 8 February 2023 the applicants sought, and the Deputy Registrar granted, a one month extension of time to the applicants to comply with their appeal obligations — paying security, filing their case on appeal and applying for the allocation of a hearing date — pending a decision on the review of the Deputy Registrar's decision. On 6 March 2023 a further extension was granted to the applicants through until 11 April 2023.

[12] On 21 March 2023 Courtney J upheld the Deputy Registrar's decision on the appropriate security for costs payable by the applicants in respect of their appeal.[10]

[13] On 31 March 2023 the applicants applied informally for a further extension of time to comply with their appeal obligations on the ground that their stay application in relation to the High Court costs awarded was still outstanding. All respondents (other than the second respondent) opposed the application. On 17 April 2023, the Deputy Registrar granted a further extension through until 11 May 2023. On 10 May 2023 the applicants again applied informally for a further extension of time to comply with their appeal obligations. On 11 May 2023 the Deputy Registrar granted an extension of time through until 18 May 2023 but advised that any further extension request had to be by way of interlocutory application if it was not consented to.

[14] On 18 May 2023 the applicants informally sought a further seven day extension of time. The Deputy Registrar advised the applicants that an interlocutory application

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9 *Mills v Dalzell* [2022] NZHC 3067 [High Court costs judgment].
10 *Mills v Dalzell* [2023] NZCA 68 [Court of Appeal security judgment].

was required and that it had to be filed by the end of the day. The application that is the subject of this judgment was filed, but only after the Registry had closed for business on 18 May 2023. It was treated as having been filed on 19 May 2023. On the same day, the Deputy Registrar issued a notice of result, recording that the appeal was deemed abandoned pursuant to r 43(1) of the Rules.

[15] On 20 June 2023 Associate Judge Skelton issued an on the papers judgment adjourning the applicants' stay application.[11] This allowed the respondents to enforce the costs order, but the Judge reserved to the applicants the right to bring on their stay application if enforcement would result in the sale of either of their properties before the result of the appeal against Associate Judge Johnston's decision is known.[12]

Submissions

[16] The applicants have filed two sets of submissions and two affidavits. Taken at their highest, and in so far as is relevant to the present application, the applicants argue as follows:

(a) it is unfair to expect them to pay security for costs before their application for a stay of the costs ordered by the Judge has been finally determined;

(b) Mr Mills has committed fraud, by changing his name to adopt the first named applicant's, Ms Mills', surname. The Judge erred when he held that this did not constitute fraud;

(c) under the settlement agreement, Mr Mills purported to transfer his title to a property to the second named applicant, Mr Peterson, subject to a mortgage and a caveat. However an emissions trading scheme notice on the title to the property records that Mr Mills is a 50 per cent owner of carbon units attached to pine forests on the property. This is preventing the applicants from selling the property as required under the settlement agreement;

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11 *Mills v Dalzell* [2023] NZHC 1530.
12 At [37].

(d) the Judge ought to have applied the Limitation Act 1950, given that some of the claims relied on by the applicants arose before 1 January 2011. In any event, Mr Mills' "name fraud" was only discovered in July 2022, so the claims are valid under both the 1950 Act and the Limitation Act 2010;

(e) clauses 2.5 and 4.1 in the settlement agreement are contradictory and the Judge erred in his attempt to resolve this contradiction. The settlement agreement as a whole is a nullity because the obligations it sets out have not been fulfilled; and

(f) the Judge wrongly rejected evidence given by one of the applicants, Ms Mills, that she did not execute documentation relating to her and Mr Mills' joint account in 2011.

[17] The respondents have each filed separate submissions but they are largely to the same effect. Broadly they argue as follows:

(a) awaiting the final outcome of the application for the stay of costs ordered in the High Court is not a good reason for not meeting the appeal obligation set out in r 43 or for not paying the security for costs ordered. The appeal is not contingent on the disposition of the stay application;

(b) the applicants' evidence regarding their financial position is contradictory. They say on the one hand that they are willing and able to pay the security for costs ordered; on the other hand they say that they cannot pay the costs awarded by the High Court, because the emissions trading scheme notice has prevented them from selling the property. The notice might go to the attractiveness of the property to prospective purchasers but it does not prevent transfer;

(c) the proposed appeal is devoid of merit. The applicants' claims were struck out in the High Court and, in awarding increased costs against

the applicants, the Judge commented that "it is difficult indeed to see any genuine motivation for the proceeding other than an attempt to avoid the contractual commitments they had made in the deed";[13]

(d) even if the Limitation Act 1950 applies to the claim, either in whole or in part, the claim is nevertheless time barred as the alleged fraud was discovered by Ms Mills sometime between 2013 and May 2015; and

(e) Mr Peterson has extensive experience as a lay litigant, including in appellate proceedings. He is or should be familiar with his obligations.

Analysis

[18] Rule 43(1) of the Rules provides that an appeal is to be treated as having been abandoned if an appellant does not apply for the allocation of a hearing date and file the case on appeal within three months after the appeal is brought. The Court can extend the time for compliance on application. The philosophy behind the rule is that once a matter has been the subject of a determination by the High Court, any party wishing to challenge that determination must do so expeditiously.[14]

[19] In *Almond v Read*,[15] the Supreme Court summarised the principles that it considered should guide the exercise of the discretion there in issue. As this Court explained in *Yarrow v Westpac New Zealand Ltd*,[16] the decision of the Supreme Court in *Almond v Read*, although concerned with r 29A of the Rules and not r 43, applies to any interlocutory application for an extension of time where there is a right of appeal.

[20] Factors relevant to the exercise of the discretion can include the following:[17]

(a) the length of the delay;

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13 High Court costs judgment, above n 9, at [15].
14 See *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 29 (CA) at 30; and *Neilsen v Body Corporate No 199348* [2010] NZCA 101 at [10].
15 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.
16 *Yarrow v Westpac New Zealand Ltd* [2018] NZCA 601 at [4].
17 *Almond v Read*, above n 15, at [38]–[39].

(b) the reasons for it;

(c) the conduct of the parties and in particular the applicant;

(d) any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome;

(e) the significance of the issues raised by the proposed appeal, both to the parties and more generally; and

(f) the merits of the appeal (although a decision to refuse an extension of time based substantially on the merits should be made only where the appeal is clearly hopeless because there is no point in extending time for an appeal that has no prospect of success[18]).

[21] While some latitude in respect of compliance with case management requirements can be permitted to litigants in person if the overall justice of any particular case requires this be done, the Court is likely to afford less latitude to a lay litigant who has extensive experience in the appellate jurisdiction.[19]

[22] In the present case, the delay is becoming lengthy. The notice of appeal was filed on 13 October 2022. Various extensions have been granted but the applicants have still not applied for the allocation of a hearing date; nor have they filed the case on appeal, both as required by r 43(1). Security for costs was fixed on 29 November 2022. It was payable by 19 December 2022. While the applicants sought a review of the Deputy Registrar's decision, Courtney J, in her decision issued on 21 March 2023, required that security in the amount fixed be paid. It remains unpaid.

[23] No good reason has been advanced as to why the applicants have not complied with their obligations. The applicants maintain that they can pay the security ordered and comply with their other appeal obligations but assert that, to require payment and

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18 See also *White v Lynch* [2016] NZCA 513 at [31].

19 *Rabson v Gallagher* [2011] NZCA 204 at [9]; and *Erwood v Official Assignee* [2015] NZCA 620 at [9].

compliance with the other appeal obligations, would be unjust in the circumstances, where their High Court stay application remains undetermined. It is difficult to understand the applicants' logic in this assertion. The requirement that the applicants meet their appeal obligations is not dependant on their application for a stay of the costs order. The applicants offer no adequate explanation as to why their position justifies a further indulgence from the Court.

[24] The applicants have already had the benefit of a number of extensions granted by the Deputy Registrar, but there has been no urgency by them to comply with their obligations. Rather it appears that they have wilfully chosen not to do so. They say that they can comply but they have not done so. Other conduct of the applicants is also of concern. They have signalled an intention to appeal the High Court's decision if a stay of enforcement of the costs order is declined. If that happens, they would presumably seek further extensions to comply with their appeal obligations.

[25] The respondents are entitled to have the appeal brought on for hearing promptly. They are prejudiced by the fact that the appeal is hanging over them like a sword of Damocles and by the applicants' failure to promptly bring the appeal to a head.

[26] The issues raised by the applicants in their proposed appeal are of no great moment. It is a dispute between private parties with no greater public importance. It also appears that the appeal lacks merit. All claims were struck out by the Judge in the High Court. In awarding increased costs in the High Court, the Judge characterised the applicants' case as "hopeless".[20] He found that the applicants either were or should have been aware that their claim could not succeed. The lack of merit in the proposed appeal was a factor in the Deputy Registrar's decision to require the payment of increased security. Similarly, Courtney J noted in her decision upholding the Deputy Registrar's decision that the appeal seems to lack any merit. She went on to comment that the prospects of the appeal succeeding appeared slim for the reasons given by the Judge and that this was "not an appeal that would sensibly be pursued by

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[20] High Court costs judgment, above n 9, at [13].

a solvent litigant".[21] We have considered the applicants' notice of appeal and the Judge's judgment. We agree with all of these comments.

[27] The applicants are lay litigants, but they are nevertheless relatively experienced in legal proceedings. Mr Peterson in particular has been involved in proceedings on a very regular basis over a number of years. We suspect he is more than capable of preparing the case on appeal.

[28] For the reasons we have set out, we conclude that the applicant's request for an extension of time is not justified in the circumstances of this case. The applicants have already been afforded numerous extensions of time by the Deputy Registrar. They have shown neither willingness nor inclination to pursue their appeal in a timely fashion.

Result

[29] The application for an extension of time is declined.

[30] The applicants must pay the respondents (save for the second respondent) costs for a standard interlocutory application on a band A basis and usual disbursements as follows:

(a) one award of costs for the first and third respondents jointly;

(b) one award of costs for the fourth respondent; and

(c) one award of costs for the fifth and sixth respondents jointly.

Solicitors:
MinterEllisonRuddWatts, Auckland for First and Third Respondents
Holland Beckett Law, Tauranga for Fourth Respondent
Morgan Coakle, Auckland for Fifth and Sixth Respondents

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[21] Court of Appeal security judgment, above n 10, at [15].