

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA262/2021
[2021] NZCA 556**

BETWEEN MARY JELENA O'NEILL
Applicant
AND PETER JAMES MALCOURONNE
Respondent

Court: French and Courtney JJ
Counsel: N M Pender for Applicant
S A Keall for Respondent
Judgment: 21 October 2021 at 10 am
(On the papers)

JUDGMENT OF THE COURT

- A The application for an extension of time to file the application for leave to appeal under s 36 of the Harassment Act 1997 is granted.**
 - B The application for leave to file an amended application for leave to appeal is granted.**
 - C The application for leave to appeal is declined.**
 - D The applicant must pay the respondent costs for a standard application on a band A basis with usual disbursements.**
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REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mrs O’Neill seeks leave under s 36 of the Harassment Act 1997 (the Act) to appeal a decision of Clark J in the High Court.¹ The application for leave was filed out of time and accordingly Mrs O’Neill also seeks an extension of time. In addition, she applies for leave to amend her application for leave to appeal.

Background

[2] Mrs O’Neill and Mr Malcouronne are neighbours. There has been ongoing conflict and in 2019 both applied for a restraining order under the Act against the other. There was a hearing in the District Court before Judge Harvey. On 19 February 2020, the Judge issued two restraining orders.² One was against Mrs O’Neill in favour of Mr Malcouronne and his partner for two years.³ The other order was against Mr Malcouronne in favour of Mrs O’Neill for one year.⁴ The Judge found that what he described as Mrs O’Neill’s “relentless and obsessive pattern of behaviour” warranted a longer period of restraint.⁵ In a separate costs judgment, the Judge held that costs should lie where they fell.⁶

[3] Dissatisfied with that outcome, Mr Malcouronne appealed to the High Court. Clark J allowed the appeal.⁷ She held there was an insufficient evidential basis for the Court to be satisfied that making an order against Mr Malcouronne was necessary to protect Mrs O’Neill from further harassment.⁸ She set aside the restraining order against Mr Malcouronne and also remitted the issue of costs in the District Court back to that Court for reconsideration in light of her judgment.⁹

[4] It is this decision of Clark J that Mrs O’Neill now wishes to appeal.

¹ *Malcouronne v O’Neill* [2021] NZHC 641 [High Court judgment].

² *O’Neill v Malcouronne* [2020] NZDC 2991.

³ At [69]–[72].

⁴ At [73]–[75].

⁵ At [75].

⁶ *Malcouronne v O’Neill* [2020] NZDC 2814 at [11].

⁷ High Court judgment, above n 1.

⁸ At [119]–[128].

⁹ At [129]–[130].

[5] The application for leave to appeal was filed eight working days out of time.¹⁰ That is a short period of delay. Further, there is an explanation for the delay involving miscommunications with Mrs O’Neill’s lawyers. In those circumstances, we consider an extension of time should be granted and we so order.

[6] We turn now to consider the application for leave to appeal. We do so on the basis of the amended notice of application which Mrs O’Neill wishes to replace the application she originally filed. We are satisfied there is no prejudice to Mr Malcouronne in allowing the amendment and the application for leave to amend is also accordingly granted.

The application for leave to appeal

[7] The application sets out the proposed grounds of appeal. They are conveniently summarised in submissions filed on behalf of Mrs O’Neill in the following terms:

- (1) The High Court Judge erred in the exercise of the court’s appellate jurisdiction by failing to take account of the special advantage enjoyed by the trial judge when assessing issues of character and the dynamic interplay of the parties’ relationship.
- (2) The High Court Judge breached the appellant’s right to natural justice by taking account of contentious evidence that had not been the subject of cross examination.
- (3) The High Court Judge’s findings about the respondent’s removal of a rubbish bag that the appellant had left out for collection, were not supported by the evidence.
- (4) The High Court Judge’s finding that the respondent’s encouragement of another person to block access to the appellant’s property on 20 March 2019 was for a lawful or legitimate purpose and therefore not a “specified act” misconstrued both the evidence and the legal test.
- (5) The High Court Judge’s finding that there was no evidence to show that the appellant was in need of protection from the respondent was not supported by the evidence and misconstrued the object of the Act.

¹⁰ Court of Appeal (Civil) Rules 2005, r 14(2)(a).

- (6) The High Court Judge’s finding that the respondent had taken a “conciliatory and responsible position throughout”, in contrast to the appellant, was unreasonable.

[8] Mrs O’Neill submits that these grounds raise important issues about the jurisdiction of an appellate court and its application of natural justice principles when considering appeals against orders made under the Act. She seeks the following remedies:

- (a) judgment reversing the High Court’s decision to set aside the restraining order against Mr Malcouronne;
- (b) an order re-affirming that costs in the District Court should lie where they fall; and
- (c) orders awarding her costs in the High Court and this Court.

Analysis

[9] Although s 36 of the Act does not itself stipulate the matters to which this Court should take into account when deciding whether to grant leave, the general principles for second appeals are well established. The proposed appeal must raise some question of law or fact capable of serious argument in a case involving some interest, public or private of sufficient importance to outweigh the cost and delay of the further appeal.¹¹

[10] In this case, Mrs O’Neill has failed to persuade us that those criteria are satisfied. The law regarding the approach by appellate courts towards challenged findings of fact, including findings of credibility, and the rules of natural justice are well settled. There is nothing in the Act that calls for a different set of principles. The proposed appeal does not therefore raise any issue of law or fact of general or public importance requiring this Court’s guidance.

¹¹ *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413.

[11] Correctly analysed, all of the issues which Mrs O'Neill wishes to raise are entirely case-specific. Further, what private significance the High Court findings might have for the parties is greatly reduced by the fact that the restraining order against Mr Malcouronne has already expired and indeed had done so before the High Court delivered its judgment. As for the strength of the proposed appeal, it is not immediately apparent to us that the approach taken by Clark J was anything other than orthodox. The chances of this proposed second appeal succeeding are in our assessment low.

[12] Having regard to all these circumstances, we conclude that it would not be in the interests of justice to grant leave to appeal. The application is accordingly declined.

[13] As regards the costs of the application, there is no reason why costs should not follow the event. We therefore order that the unsuccessful applicant must pay the respondent costs for a standard application on a band A basis with usual disbursements.

Outcome

[14] The application for an extension of time to file the application for leave to appeal under s 36 of the Harassment Act 1997 is granted.

[15] The application for leave to file an amended application for leave to appeal is granted.

[16] The application for leave to appeal is declined.

[17] The applicant must pay the respondent costs for a standard application on a band A basis with usual disbursements.

Solicitors:
Cathedral Lane Law, Napier for Applicant
Souness Stone Law Partnership, Hastings for Respondent