IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA614/2020
[2021] NZCA 69

BETWEEN	GEORGINA RACHELLE Applicant
AND	TIMOTHY CADOGAN First Respondent
	LYNETTE MARGARET MCFARLANE Second Respondent
	BERNADETTI NONI SCURR Third Respondent
	ALLWASTE CROMWELL DESPATCH/TROJAN HOLDINGS COMPANY Fourth Respondent
	STEVE GEE Fifth Respondent

Court:	Collins and Goddard JJ
Counsel:	Applicant in person F B Barton and S A McClean for First to Third Respondents
Judgment: (On the papers)	16 March 2021 at 10.00 am

JUDGMENT OF THE COURT

A The application for an extension of time to appeal under r 29A of the Court of Appeal (Civil) Rules 2005 is declined.

B The applicant must pay costs to the first to third respondents for a standard application on a band A basis, with usual disbursements.

REASONS OF THE COURT

(Given by Goddard J)

Introduction

[1] The applicant, Ms Rachelle, has applied under r 29A of the Court of Appeal (Civil) Rules 2005 (Rules) for an extension of time to file an appeal against a decision of Dunningham J delivered on 12 June 2020 (High Court decision).[1]

Background

[2] The High Court decision struck out Ms Rachelle's appeal from a decision of the District Court[2] on the basis that the appeal was an abuse of process.

[3] Ms Rachelle's claim in the District Court appears to have arisen out of an incident in which her lawnmower ran over a stone on the grass verge outside her property, and the stone was thrown out of her lawnmower, damaging the lawnmower and causing an injury to Ms Rachelle's leg. Ms Rachelle filed proceedings against five defendants, including the Mayor of the Central Otago District Council (Council), a current employee of the Council and a former employee of the Council (the first to third respondents).

[4] The relief Ms Rachelle claims against the five respondents is:

> a. Compensation in the sum of $200,000 for humiliation, loss of dignity, and injury to feelings pursuant to Section 123(1)(c)(i) under the Human Rights Act 1993 as well as Property Relationships Act 1976.
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> b. A well-deserved justified amount from Central Otago District Council to be paid to the Plaintiff Ms Georgina Rachelle for the pain and suffering she has endured.

[5] The District Court proceeding was struck out by Judge Hunt on 13 May 2020. The Judge concluded that Ms Rachelle's claims suffered from fundamental flaws in terms of pleading and that no reasonable cause of action was disclosed anywhere against any of the defendants.[3]

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1 *Rachelle v Cadogan* HC Invercargill CIV-2020-425-27, 12 June 2020 [High Court decision].
2 *Rachelle v Cadogan* [2020] NZDC 8374.
3 At [64].

[6] Ms Rachelle then filed a notice of appeal in the High Court. It was struck out by Dunningham J on 12 June 2020 on the basis that it was plainly an abuse of the process of the Court.[4] The Judge held that the notice of appeal suffered from the same deficiencies that were identified by Judge Hunt in relation to the underlying claim. It could not be amended so as to remedy its deficiencies.[5]

[7] Ms Rachelle then applied for leave to appeal direct to the Supreme Court. The Supreme Court dismissed her application for leave to appeal.[6] The Supreme Court said:

> [5] The issues Ms Rachelle seeks to raise are related to the particular facts of her case. The principles relating to strike-out are well settled and were applied by both the District Court and the High Court. No point of general or public importance arises. Further, nothing raised by Ms Rachelle suggests any risk of a miscarriage of justice. The criteria for leave are not met.
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> [6] In addition, there are no exceptional circumstances pursuant to s 75 of the Senior Courts Act 2016 to justify a direct appeal to this Court from the High Court decision.
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> (Footnotes omitted.)

The application before this Court

[8] Ms Rachelle then sought to appeal to this Court. The documents that she initially sought to file were rejected for filing on 10 September 2020. She subsequently filed an application for leave to appeal out of time under r 29A of the Rules, which was accepted for filing with effect on 23 October 2020. Ms Rachelle had 20 working days to appeal as of right from the High Court decision.[7] That period expired on 10 July 2020. So the application for extension of time was filed 75 working days out of time.

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4 High Court decision, above n 1, at [18].
5 At [14].
6 *Rachelle v Cadogan* [2020] NZSC 70.
7 Court of Appeal (Civil) Rules 2005, r 29(1); and Senior Courts Act 2016, s 56(4).

[9] The first, second and third respondents oppose the application for an extension of time on the following grounds:

(a) The Supreme Court has declined the applicant leave to appeal from the High Court. This Court is bound by the Supreme Court's findings that the lower Courts correctly applied the law on strike-out applications.

(b) There is no justification for the extended delay in bringing this appeal.

(c) The appeal is hopeless and an abuse of process.

[10] The fourth and fifth respondents have not taken part in proceedings before this Court. It appears they did not take any steps in the proceedings before other Courts.

Discussion

[11] As the Supreme Court said in *Almond v Read*, the ultimate question when considering the exercise of the discretion under r 29A of the Rules is what the interests of justice require.[8] The factors which are likely to require consideration under r 29A include:

(a) the length of the delay;

(b) the reasons for the delay;

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

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

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8 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].

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

[12] In *Almond v Read* the Supreme Court accepted that the merits of a proposed appeal might be relevant to the discretion to extend time. The Court said:[9]

> Consideration of the merits of an appeal in the context of an application to extend time must necessarily be relatively superficial. In this connection, we agree with the observations of the Court of Appeal of England and Wales in *R (Hysaj)*, to the effect that the court should firmly discourage much argument on the merits and should reach a view about them only where they are obviously very strong or very weak. Moreover, any assessment of the merits must take place against the background of this Court's description of the nature of a general appeal in *Austin, Nichols*. Accordingly, a decision to refuse an extension of time based substantially on the lack of merit of a proposed appeal should be made only where the appeal is clearly hopeless. An appeal would be hopeless, for example, where, on facts to which there is no challenge, it could not possibly succeed, where the court lacks jurisdiction, where there is an abuse of process (such as a collateral attack on issues finally determined in other proceedings) or where the appeal is frivolous or vexatious. The lack of merit must be readily apparent. The power to grant or refuse an extension of time should not be used as a mechanism to dismiss apparently weak appeals summarily.

[13] The appeal to this Court was filed well out of time. Ms Rachelle refers in her application to COVID-19 but does not explain the link between her delay and the COVID-19 pandemic. There is no reason why COVID-19 should have hindered the filing of an appeal from the High Court decision in this case. The main reason for the delay appears to be the attempt to appeal direct to the Supreme Court.

[14] Whatever the reason for the delay, the respondents have not identified any specific prejudice to them attributable to that delay. In those circumstances, delay is a factor that weighs against the grant of an extension of time, but it is not of itself decisive.

[15] As the Supreme Court held, no point of general or public importance arises in this proceeding. Ms Rachelle plainly sees the issues raised by her claim as significant. She is also plainly concerned and frustrated by the Courts' refusal to allow her claim

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9 At [39(c)] (footnotes omitted).

to proceed to a substantive trial. The significance of this private interest turns on whether the claim is sufficiently arguable that it ought to be tried.

[16] That brings us to the decisive factor in this case: the nature of the claim and its merits. We agree with the High Court Judge that to the extent that the substance of the claim can be identified, it lacks any proper legal basis. No facts are pleaded that could conceivably entitle Ms Rachelle to the relief she claims, as set out at [4] above. It is difficult to see what relevance the Human Rights Act 1993 could have to the matters referred to in the claim. And the Property (Relationships) Act 1976 is plainly irrelevant: Ms Rachelle is not in a relevant relationship with any of the respondents and the claim has nothing to do with interests in relationship property.

[17] Equally, the proposed appeal to this Court has no prospect of success. As the Supreme Court said, the principles relating to strike-out are well settled and were applied by both the District Court and the High Court. Applying those principles, the decision by the District Court to strike the claim out was inevitable. So too was the striking out of Ms Rachelle's notice of appeal to the High Court.

[18] Thus the proposed appeal is, in the language of the Supreme Court in *Almond v Read*, hopeless. The respondents should not be put to the trouble and expense of responding to a hopeless appeal.

[19] In these circumstances, the interests of justice plainly require that the extension of time be declined.

[20] Costs should follow the event in the ordinary way.

Result

[21] The application for extension of time to appeal under r 29A of the Rules is declined.

[22] The applicant must pay costs to the first to third respondents for a standard application on a band A basis, with usual disbursements.[10]

Solicitors:
Anderson Lloyd, Dunedin for First to Third Respondents

[10] For the preparation of a memorandum of opposition to the application, calculated on a band A basis of 0.2 days at the daily recovery rate for a standard application of $2,390, which amounts to $478.00.