

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA692/2018
[2019] NZCA 225**

BETWEEN	ALLAN JACK WEST Appellant
AND	GEOFFREY ALLAN WEST First Respondent
	DAVID JOHN CAMERON WEST Second Respondent
	THE PARTNERS OF LANGLEY TWIGG LAW Third Respondents

Court: Brown, Whata and Moore JJ

Counsel: Appellant in person
D M Kerr for First and Second Respondents
C L Bryant for Third Respondents
J F Armstrong for C J Davis

Judgment: 19 June 2019 at 12.30 pm
(On the papers)

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The appellant must pay the respondents and Mr Davis one set of costs for a standard appeal on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Brown J)

[1] Mr Allan West appeals from a judgment of Edwards J dismissing three applications which he made for particular discovery in circumstances where Mr West's substantive claim had been already determined in the High Court and an appeal filed in the Court of Appeal.¹ The appeal challenges the basis for the Judge's conclusion that the High Court was *functus officio*.

[2] The appeal was heard on the papers at the request of Mr Allan West.

Background

[3] The circumstances giving rise to the litigation in the High Court and the conduct of the hearing are succinctly recorded in the submissions of Ms Bryant for the third respondents which we record:

- 7 The appellant lives on a rural property at Muriwai in Auckland. In November 2014, at age 92, he transferred his property to his two sons, the first and second respondents. Under the terms of the transfer, the purchase price was forgiven, the appellant has the right to live on the property for so long as he wishes, and the first and second respondents have assumed various financial obligations to the appellant, his estate and other family members.
- 8 On 23 November 2016, the appellant issued proceeding CIV 2016-404-2992 in the High Court at Auckland. He sought the return of the property on the basis that the transfer was an unconscionable bargain and/or a breach of fiduciary duty and/or the result of undue influence. The third respondents, whose firm had acted for all parties to the transaction, were joined in 2017. They admitted the firm had breached its duty to refer the appellant for independent advice.
- 9 The claim was given a priority fixture. It proceeded through discovery and the exchange of witness statements to a defended hearing before Downs J on 26-29 September 2017. The appellant gave evidence in person at that hearing, as did the first and second respondents and Guy Wellwood of the third respondents' firm. The appellant was not present in person in Court during the respondents' evidence.
- 10 The hearing was adjourned to 27 November 2017 for closing submissions. The appellant's counsel withdrew shortly before the resumed hearing date, and his solicitors were also given leave to withdraw. The appellant provided his closing submissions in writing,

¹ *West v West* [2018] NZHC 2723.

in which he addressed aspects of the respondents' oral testimony as recorded in the notes of evidence.

- 11 By judgment dated 13 December 2017, Downs J dismissed all claims in the proceeding. The respondents did not seek costs, and the judgment has been sealed.

[4] Although Mr Allan West did not lodge an appeal against that judgment within time, leave to appeal was granted by this Court on 26 June 2018.² When Mr West then failed to comply with the deadline in r 43 of the Court of Appeal (Civil) Rules 2005 this Court granted him an extension of time of 20 working days to file the case on appeal and apply for a hearing date, failing which his appeal was to be treated as having been abandoned.³ Mr West failed to take those steps and consequently his appeal CA105/2018 was deemed to have been abandoned on 19 December 2018. A notice of result was issued on 18 January 2019.

The High Court judgment

[5] Commencing in August 2018 Mr West made a series of discovery applications which were heard by Edwards J at a telephone conference on 18 October 2018 in which Mr West and counsel for the respondents and Mr Davis all participated. In the judgment the subject of this appeal Edwards J described the three applications for particular discovery in this way:⁴

- (a) An application against Mr Davis, a partner in the law firm, Armstrong Murray. Mr Davis previously acted for the first defendant and a letter that he wrote dated 6 December 2015 was produced in evidence at the trial. Mr West seeks discovery of emails referred to in that letter.
- (b) Two applications directed to Mr Kerr, counsel for the first and second defendants. Mr West seeks orders requiring Mr Kerr to substantiate evidence given by the first and second defendants at trial, and to disclose whether the first defendant has a connection with Asher and/or Venning JJ.

[6] The Judge noted Mr West's submission that much of the testimony in the trial had comprised unsubstantiated allegations and that the purpose of his applications for

² *West v West* [2018] NZCA 216.

³ *West v West* [2018] NZCA 511.

⁴ *West v West*, above n 1, at [6].

particular discovery was to put the other parties to proof regarding accusations made in the course of the trial.

[7] The Judge's reasons for dismissing the applications were as follows:

[10] Once a Court has made an order, and an appeal has been lodged, the Court becomes *functus officio*, and is unable to take any further action in relation to that order. That is the position in this case. The delivery of Downs J's judgment in this case, and the filing of an appeal, means this Court is *functus officio* in relation to the proceeding giving rise to the judgment.

[11] In addition, the applications for discovery are misconceived. Mr West's complaint appears to be aimed at the adequacy of the evidence called at trial on behalf of the defendants. The appeal provides the appropriate avenue to address those concerns.

(Footnotes omitted).

The appeal

[8] On 6 December 2018 Mr Allan West filed a notice of appeal against the judgment of Edwards J. The document plainly challenged the basis for the Judge's conclusion and annexed a number of extracts from dictionaries providing definitions of the phrase "*functus officio*". However it is not an easy document to follow and it traverses several other matters which have no relevance to the present appeal, such as alleged associations between Mr Geoffrey West and the two Judges referred to in the second application for particular discovery.

Submissions

[9] On 30 April 2019 Mr Allan West filed a document which, while described as a "notice to appeal", comprised his synopsis of argument on the appeal. It is a discursive document of 16 pages, to which are attached a large number of "exhibits" which include, in addition to various judgments and documents filed in the High Court proceeding, material referring to Mr Allan West's state of health.

[10] In submissions in response the first and second respondents supported the judgment, submitting that once a court has made an order and an appeal has been lodged against that order the court becomes *functus officio* and is therefore unable to

take further action in relation to the matter.⁵ They drew attention to the very similar case of *Grey District Council v Banks* where the appellants applied to the High Court post-judgment for discovery.⁶ The Court held that being functus officio it had no jurisdiction to make the orders for discovery sought.

[11] Ms Bryant for the third respondents made a similar submission, making the point that the principle reflects the public interest in there being an end to litigation. Counsel for Mr Davis endorsed the submissions of the respondents.

[12] On 24 May 2019 Mr Allan West filed a further document bearing the description “Memorandum why counsel changed their minds” in which he made reference to the first instance judgment of Venning J in *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue*.⁷ In particular he drew attention to the fact that the respondents’ submissions did not refer to *Redcliffe*, having done so at an earlier point in the litigation.

Discussion

[13] The *Redcliffe* case does not assist Mr Allan West’s argument. The Supreme Court’s decision has application to the present circumstances in that it recognises that when a judgment is the subject of an appeal the trial court becomes functus officio.⁸ However *Redcliffe* is primarily concerned with a different issue, namely the fraud exception to finality. The respondents in this case were correct to focus on *Grey District Council* which is directly on point.

[14] Mr Allan West’s memorandum also referred to and annexed a minute of Brown J dated 26 June 2018 which directed that Mr West’s application to the Court of Appeal for recovery and release of stolen personal records not be accepted for filing. The document Mr West had filed purported to seek an order directed to the Department of Internal Affairs and an order under the Official Information Act 1982 and the Privacy Act 1993. Mr West saw significance in the fact that the minute in effect

⁵ Citing *Russell v Klinac* HC Whangarei AP18/01, 11 December 2001.

⁶ *Grey District Council v Banks* [2015] NZHC 615, [2015] NZAR 725.

⁷ *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue* [2011] 1 NZLR 336 (HC).

⁸ *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 at [24].

redirected his application to the High Court, making the point that Brown J was unlikely to have suggested a redirection to a Court that was functus officio.

[15] However Mr Allan West overlooks the fact that his application was a new matter which had not been addressed in the substantive judgment. The minute simply noted that the Court of Appeal is not a court of original jurisdiction. The High Court will only be functus officio in relation to matters which it has determined and which have progressed to appeal. Mr West's new application was not in that category.

[16] In our view the respondents' and Mr Davis's contentions are sound. In the circumstances where the judgment of Downs J had progressed to appeal, Edwards J was correct to dismiss Mr West's applications for particular discovery for the reason that the High Court was functus officio.

Result

[17] The appeal is dismissed.

[18] The appellant must pay the respondents and Mr Davis one set of costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:

Bannister & von Dadelszen, Hastings for First and Second Respondents

Hesketh Henry, Auckland for Third Respondents

Armstrong Murray, Auckland for Mr Davis