IN THE COURT OF APPEAL OF NEW ZEALAND

CA609/2017
[2018] NZCA 75

BETWEEN	DERMOT GREGORY NOTTINGHAM Appellant
AND	DISTRICT COURT AT AUCKLAND First Respondent
	MARTIN RUSSELL HONEY, STEPHANIE FRANCES HONEY, HEMI TAKA Second Respondents

Hearing:	19 March 2018
Court:	Kós P, Brown and J Williams JJ
Counsel:	Appellant in person D W Grove for First and Second Named Second Respondents
Judgment:	28 March 2018 at 2.30 pm

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is declined.

B The appellant must pay the second respondents costs for a standard application on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] On 27 April 2017 Gilbert J granted the second respondents' application to strike out Mr Nottingham's statement of claim in a judicial review of the District Court

at Auckland alleging a criminal conspiracy to pervert the course of justice. The Judge ruled that the claim was replete with scandalous and outrageous allegations without any attempt having been made to provide supporting factual particulars, almost all of the relief sought could not be granted in the context of an application for judicial review and that the flaws in the claim were of such a fundamental character that they could not be saved by amendment.[1] The first respondent and Mr and Mrs Honey were awarded costs against Mr Nottingham on a category 2 band B basis together with reasonable disbursements.

[2] Mr Nottingham did not file a notice of appeal of that judgment within the required time. However by application filed on 26 October 2017 Mr Nottingham seeks an extension of time to appeal under r 29A of the Court of Appeal (Civil) Rules 2005. The application is opposed by the second respondents while the first respondent abides the Court's decision.

Background

[3] In March 2014 Mr Nottingham commenced a private prosecution in the Auckland District Court against the second respondents. Following a Judge alone trial extending over 17 sitting days, on 20 June 2016 Judge Paul dismissed all charges, acquitted the second respondents and made an order that the appellant pay costs totalling $117,000.[2] Mr Nottingham's application for leave to appeal pursuant to s 296 of the Criminal Procedure Act 2011 was declined by Davison J.[3] An application for leave to appeal to this Court under s 303 of the Criminal Procedure Act remains extant.

[4] The prequel to the criminal proceedings were complaints by both Mr Nottingham and Mr Honey to the Real Estate Agents Authority which culminated in a decision of the Real Estate Agents Disciplinary Tribunal,[4] an appeal to the High Court[5] and a further appeal to this Court.[6]

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1 *Nottingham v Auckland District Court* [2017] NZHC 777 at [16].
2 *Nottingham v Honey* [2016] NZDC 9272. The costs order was made by Judge Paul three weeks later on the papers.
3 *Nottingham v The District Court at Auckland* [2017] NZHC 1715.
4 *Nottingham v Real Estate Agents Authority* [2014] NZREADT 80.
5 *Nottingham v Real Estate Agents Authority* [2015] NZHC 1616.
6 *Nottingham v Real Estate Agents Authority* [2017] NZCA 1.

[5] On 12 September 2016 Mr Nottingham commenced this judicial review proceeding alleging that Judge Paul had conspired with court staff and with the second respondents to defeat the course of justice in order to wrongfully acquit the second respondents of the criminal charges Mr Nottingham had brought against them in the private prosecution.

Relevant principles

[6] The principles applicable to applications for extension of time under r 29A were recently reviewed by the Supreme Court in *Almond v Read.*[7] The ultimate question when considering the exercise of the discretion to extend time is what the interests of justice require. That necessitates an assessment of the particular circumstances of the case. Factors likely to require consideration include:[8]

(a) the length of delay;

(b) the reasons for the delay;

(c) the conduct of the parties, particularly of the applicant;

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

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

[7] The Supreme Court stated that the power to grant or refuse an extension of time should not be used as a mechanism to dismiss apparently weak appeals summarily. However the Court accepted that the merits of a proposed appeal may in principle be relevant to the exercise of the discretion to extend time because there will be occasions on which the Court will risk facilitating unjustifiable delaying tactics on the part of dilatory or recalcitrant litigants if it does not consider the merits.[9]

Analysis

[8] In the present case the delay of six months is substantial. While the notice of application states there are reasonable grounds including medical reasons for the delay,

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7 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.
8 At [38].
9 At [39].

there is nothing in the extensive materials filed in support of the application that provides any detail of such a reason.

[9] Indeed it is difficult to understand how it could credibly be said that Mr Nottingham was precluded on medical grounds from lodging a simple notice of appeal within the 20 working day period provided in the Court of Appeal (Civil) Rules when he was actively involved in other litigation. On 15, 22 and 23 May 2017 he appeared in the High Court at Auckland in support of the application for leave to appeal heard by Davison J.[10] He also appeared in the High Court on 12 June 2017 in support of an appeal from the District Court at Auckland finding him in contempt of Court for wilfully insulting a judicial officer.[11]

[10] In *Almond v Read* the Supreme Court stated that 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. One of the examples given of a hopeless appeal was where there was an abuse of process such as a collateral attack on issues finally determined in other proceedings.[12] We consider that Mr Nottingham's judicial review proceeding is an example of such a collateral attack. As the House of Lords held in *Hunter v Chief Constable of the West Midlands Police,*[13] where a final decision had been made by a criminal court of competent jurisdiction it is a general rule of public policy that the use of a civil action to initiate a collateral attack on that decision is an abuse of process of the court.

[11] Mr Nottingham's private prosecution was dismissed. An application for leave to appeal was declined. An application under s 303 to this Court is still extant. In those circumstances we consider the nature of Mr Nottingham's judicial review proceeding offends the general rule of public policy explained in *Hunter*.

[12] The implications of this collateral attack by a still further litigation process has obvious relevance to the third and fourth of the *Almond v Read* considerations.[14]

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10 *Nottingham v The District Court at Auckland*, above n 3.
11 *Nottingham v Solicitor-General* [2017] NZHC 1325, [2017] NZAR 1202.
12 *Almond v Read,* above n 7, at [39].
13 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL).
14 At [6] above.

[13] Having regard to all of these factors we conclude that the interests of justice plainly require that we should decline to exercise the discretion to extend time under r 29A for the filing of an appeal against the judgment of Gilbert J.

Result

[14] The application for an extension of time to appeal is declined. The appellant must pay the second respondents costs for a standard application on a band A basis with usual disbursements.

Solicitors:
Foy & Halse, Auckland for First and Second Named Second Respondents