

IN THE SUPREME COURT OF NEW ZEALAND

**SC 27/2007
[2007] NZSC 38**

BETWEEN	ROBERT ERWOOD Applicant
AND	JANET MAXTED AND ORS Respondents

Court: Blanchard, McGrath and Anderson JJ

Counsel: Applicant in person
G M Downing for Respondents

Judgment: 31 May 2007

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed with costs of \$2,500 for the respondents.**
- B The stay of execution ordered by the High Court on 16 August 2006 and extended by Blanchard J on 10 May 2007 is revoked.**

REASONS

[1] The applicant sought to enforce a trust which he alleged was created in his favour by his late mother, Lucy Erwood, and under which he claimed a right of occupation of a house in Nelson. His mother had sold the house to the applicant's brother Edward who is now deceased. Under Edward's will the applicant's sister Janet and Mr A J J Glasgow of Nelson, solicitor, were appointed the trustees. The will devised the house to Janet.

[2] Wild J tried the case in the High Court at Nelson, giving judgment on 26 May 2006.¹ He had previously refused to grant an adjournment to the applicant and the trial took place in the applicant's absence.

[3] Wild J found that the document said to create the trust, a letter from Mrs Erwood to her solicitor in 1979, did no more than express a wish that the applicant and his late brother Fredrick should be able to occupy the house. It did not create a trust. The Judge also found that, even if there might have been a trust, the letter was held by the solicitor in escrow, so that any trust did not come into force. Accordingly Mrs Erwood was free to depart from it and had done so when she sold the property to Edward. The Judge further found that when Edward took title under the Land Transfer Act 1952 he had no knowledge of any purported trust. For these reasons the applicant's claim failed.

[4] The applicant appealed to the Court of Appeal against this decision on 22 June 2006. A stay of execution of the High Court judgment was granted on 16 August 2006 by the High Court, and since the decision of the Court of Appeal to which reference will be made shortly, the stay has been extended by Blanchard J for this Court until its determination whether or not to grant leave for the proposed appeal to this Court.

[5] The applicant failed to comply with r 43 of the Court of Appeal (Civil) Rules 2005 in that he failed within six months after bringing his appeal to apply for the allocation of a hearing date and file the Case on Appeal. He did however make application to the Court of Appeal for an extension of time, doing so within three months after the expiry of the six-month period. The Court of Appeal is able to grant an extension on an application made no later than three months after that expiry.

[6] The applicant appeared by counsel to support his application for the extension but it was dismissed by the Court of Appeal in a judgment delivered on

¹ CIV 2003-442-363.

30 April 2007.² It is from that judgment that the applicant now seeks leave to appeal.

[7] We consider that this Court has jurisdiction to grant leave to appeal in these circumstances, subject to the requirements of s 13 of the Supreme Court Act 2003. It is not an exceptional case falling within s 7(b) of that Act as the decision of the Court of Appeal was not a refusal to give leave or special leave to appeal to that Court, but rather a refusal to extend time under r 43. However, s 13(1) of the Act requires that the Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal. By s 13(2), it is necessary in the interests of justice for it to do so if the appeal involves a matter of general or public importance or a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard or the appeal involves a matter of general commercial significance.

[8] We have not been satisfied by the applicant's submissions that the interests of justice do require the granting of leave. It was well within the discretion of the Court of Appeal to refuse the extension of time, notwithstanding the consequence that the applicant's appeal to that Court must therefore be deemed abandoned. The Court of Appeal dealt with the application in accordance with well-settled principles and was fully entitled to take the view that there had been disentitling behaviour of the applicant with continuing prejudice to the respondents from the delays he has caused in both the lower courts. It noted that the stay granted by the High Court was conditional upon the applicant pursuing his appeal in the Court of Appeal expeditiously and in compliance with the rules, which he had failed to do.

[9] As the present application fails, the stay of execution must be revoked.

Solicitors:
McFadden McMeeken Phillips, Nelson for Respondents

² [2007] NZCA 161.