IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 85/2019
[2020] NZSC 8

BETWEEN	RICHARD BRUCE ROGAN AND HEATHER ELIZABETH ROGAN Applicants
AND	KAIPARA DISTRICT COUNCIL First Respondent
	NORTHLAND REGIONAL COUNCIL Second Respondent

Hearing:	5 February 2020
Court:	O'Regan and Ellen France JJ
Counsel:	R E Harrison QC for Applicants D J Neutze for Respondents
Judgment:	19 February 2020

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is dismissed.

B The applicants must pay the respondents costs of $4,500 plus usual disbursements.

REASONS

[1] The applicants, Richard and Heather Rogan, apply for an extension of time to make an application for leave to appeal to this Court against a decision of the Court of Appeal dismissing their appeal to that Court.[1] They also seek leave to appeal. The

[1] *Rogan v Kaipara District Council* [2018] NZCA 478, [2019] NZAR 425 (Kós P, Asher and Gilbert JJ) [CA judgment].

Court convened a hearing at which argument in relation to both the application for an extension of time and the application for leave was advanced.

[2] The underlying proceeding commenced as a proceeding for recovery of rates said to be owing by the applicants that was commenced by the first respondent, the Kaipara District Council (the Council). The applicants were involved in a rates revolt, the history to which is set out in the decision of the Court of Appeal in *Mangawhai Ratepayers and Residents Assoc Inc v Kaipara District Council*.[2] Other ratepayers also refused to pay their rates, although the number of these who continue to refuse to pay is now a matter of dispute.

[3] In the District Court, the applicants raised various defences to the claim for the payment of rates and penalties advanced by the Council. In particular, the applicants argued that the Council did not comply with the requirements of ss 45 and 46 of the Local Government (Rating) Act 2002 (the Act), which set out the requirements for rates assessments and rates invoices.

[4] The District Court Judge concluded that defences based on non-compliance with ss 45 and 46 of the Act were precluded by s 60, which provides that a ratepayer must not refuse to pay rates on the grounds that the rates are invalid unless that person brings proceedings in the High Court challenging the validity of the rates on the ground that the local authority is not empowered to set or assess rates on the relevant rating unit.[3] The applicants' appeal to the High Court against that finding was dismissed.[4] The applicants obtained leave to appeal to the Court of Appeal.[5]

[5] The Court of Appeal issued its judgment on 6 November 2018. It determined that the conclusion reached by the District Court and High Court in relation to s 60 was incorrect, and that this section did not preclude the advancing of defences based on ss 45 and 46.[6] However, the Court then went on to consider the defences based on

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2 *Mangawhai Ratepayers and Residents Assoc Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437.

3 *Kaipara District Council v Rogan* [2015] NZDC 21698 (Judge de Ridder) at [51].

4 *Rogan v Kaipara District Council* [2017] NZHC 2329 (Duffy J) at [30] and [38].

5 *Rogan v Kaipara District Council* [2018] NZHC 228 (Duffy J).

6 CA judgment, above n 1, at [27].

ss 45 and 46 and found that they failed.[7] The Court therefore concluded that, despite the lower Courts being incorrect in their interpretation of s 60, they reached the correct conclusion that the applicants were not entitled to refuse the payment of rates because of the asserted errors or omissions in the rates assessments and rates invoices.

[6] The applicants wish to argue if leave to appeal is given that the Court of Appeal should not have addressed the ss 45 and 46 issues, but rather should have remitted the case to the District Court for reconsideration. They argue that the sole issue before the Court of Appeal was the interpretation of s 60 and that the issues relating to ss 45 and 46 were "unheralded" and "out of scope". They argue a breach of natural justice occurred. They also wish to argue that the Court of Appeal was wrong in its interpretation of ss 45 and 46. And they wish to advance another defence that they say they would have advanced if they had known that the Court of Appeal was going to go beyond the issue of interpretation of s 60, arising from the Council's policy of applying any payment received from a ratepayer to the oldest debt.

[7] The applicants applied to the Court of Appeal to recall its judgment, advancing the arguments just mentioned. The Court of Appeal refused to recall the judgment.[8] The Court said that the issue as to what orders should be made, including whether the District Court judgment ordering payment of the rates should stand was a question that inevitably arose on an appeal against the High Court judgment upholding the District Court judgment. The Court said it had received full argument on the issue, something that is disputed by the applicants.[9]

[8] After the Court of Appeal refused to recall the judgment, the applicants did not, as may have been expected, seek leave to appeal to this Court. Rather, their solicitor filed an application to "re-open" the Court of Appeal's judgment on the grounds that there had been a breach of natural justice. Unsurprisingly the Council objected to this on the basis that the recall judgment had addressed this issue and that the Court was functus officio. The Court of Appeal then sealed its judgment.

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7 At [34].
8 *Rogan v Kaipara District Council* [2018] NZCA 553.
9 At [13].

[9] The applicants then proceeded without advice from their legal advisors, initially emailing an application to the Court of Appeal to "use its inherent jurisdiction to re-open the appeal judgment and set the judgment aside as a nullity".

[10] The applicants then engaged in correspondence with the Court of Appeal with a view to advancing the application to re-open the judgment, which was, unsurprisingly, fruitless. A further application for re-opening of the judgment was made in early March, with the same unsuccessful outcome. The applicants then wrote a complaint to the Chief Justice, which was also an inappropriate step for them to take.

[11] Mr Rogan says in his affidavit in support of the application for an extension of time that the applicants then obtained advice with a view to making an application for leave to appeal to this Court and sought a settlement with the Council, but their offer was rejected. Arrangements were then made for them to listen to the recording of the Court of Appeal hearing, an application for a transcript of that hearing having been rejected by the President of that Court. The applicants then considered the possibility of bringing their case to this Court. The applicants' solicitor was on medical leave from work for about two weeks at the end of July and in early August and, after his return to work a senior counsel was approached to give advice on draft documents. Ultimately the application for leave to this Court was filed on 2 September 2019.

[12] The application for leave to appeal (and for an extension of time) was filed almost nine months after the expiry of the period for doing so.[10]

[13] The Council opposes any extension of time. It argues that the delay was not due to any inadvertence or "slip up" but rather a choice to employ other tactics to challenge the Court of Appeal decision. They argue that an extension of time would cause prejudice to the respondents because of the further delay in resolving the rates collection proceedings, further extending what has been a long running saga. The Council argues that this would be unfair to the Council's other ratepayers, the vast majority of whom have paid their rates.

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[10] Supreme Court Rules 2004, r 11.

[14] In this Court's judgment in *Almond v Read*, it set out a list of factors that are likely to require consideration when a Court is considering the exercise of the discretion to extend the time for an appeal or, as in this case, for an application for leave to appeal.[11] *Almond v Read* was dealing with the discretion to extend time under r 29A of the Court of Appeal (Civil) Rules 2005, but the principles set out by the Court are also relevant to the present situation.

[15] The factors, and our evaluation of them, are:

(a) *Length of the delay*: A nine month delay is significant, and, as Mr Neutze for the Council pointed out, the delay was not due to an error but a choice to follow a number of fruitless steps in challenging the Court of Appeal decision, instead of proceeding promptly with an application for leave to appeal to this Court. The Court of Appeal specifically stated in a minute dated 19 February 2019 (indicating it would not entertain the intended application to re-open the appeal after the judgment had been sealed) that, if the applicants wished to pursue the matter further, "the appropriate course is to seek leave to appeal to the Supreme Court".[12] As this Court said in *Almond v Read*, the longer the delay, the more the applicant will be seeking an indulgence from the Court and the stronger the case for an extension will need to be.[13] In this case, the misguided actions of the applicants in circumstances where the obvious next step was to seek leave to appeal to this Court have caused the delay. It is not a matter of inadvertence but an active choice on their part.

(b) *Reasons for the delay*: In *Almond v Read*, this Court said it would be particularly relevant to know whether the delay resulted from the deliberate decision not to proceed followed by a change in mind, from indecision, or from error or inadvertence. It noted that if a change of mind or indecision is the reason for the delay then there would be less

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11 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].
12 *Rogan v Kaipara District Council* CA107/2018, 19 February 2019 at [4].
13 *Almond v Read*, above n 11, at [38(a)].

justification for an extension than where the delay results from an error or inadvertence.[14] In this case, the applicants made a deliberate decision to pursue the various fruitless steps described earlier to challenge the Court of Appeal judgment even after the Court had specifically pointed out to them that an application for leave to appeal to this Court was the appropriate next step if they wished to challenge its judgment.

(c) *Conduct of the parties*: If an applicant has been uncooperative or has delayed in previous steps, this will count against an application for an extension of time.[15] We do not see this factor as counting against the applicants in the present case.

(d) *Prejudice or hardship to the respondent or others*: We have mentioned earlier the prejudice claimed by the respondents. It is true that this has been a prolonged saga and that the Council's ratepayers have been required to pursue extensive and various proceedings. What needs to be identified here is, however, the additional prejudice caused by the delay (that is prejudice over and above any prejudice that results from the lengthy proceedings and prejudice that would have resulted anyway if an application for leave to appeal had been made within time). In this case we accept there is prejudice in further prolonging the extremely protracted proceedings, but we do not see the delay as significantly adding to that prejudice.

(e) *Significance of the issues to be raised*: In *Almond v Read*, this Court said that if there is a public interest in the issues, the case for an extension is likely to be stronger than if there is no such interest.[16] The applicants argue that there is significant public interest in the litigation given its focus on the powers of councils to levy rates on their ratepayers and also on the way in which the Court of Appeal addresses appeal issues in the event that it overturns one aspect of a lower court

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14 At [38(b)].
15 At [38(c)].
16 At [38(e)].

> decision. It is clear the Court of Appeal saw the arguments raised by the applicants in that Court as technical and did not regard them as having a lot of merit. It is not appropriate for us to make a judgment on that in the absence of full argument, but we do not see the public interest aspect of the case as having the significance that the applicants argued it did. The argument they wish to raise in relation to the Act relates to detailed provisions about rates assessments and rates invoices in circumstances in which there is no doubt that they were fully informed of what they had to pay and when they had to pay it: the reason they did not pay was because of their protest rather than because of any confusion on their part about their obligation.

[16] This brings us to the merits of the proposed application. With all the material available to us, and acknowledging there has not been full argument, we conclude that lack of merit would not be a proper basis for refusing an extension of time. The application is not hopeless, but nor do we consider that it is so compelling that we feel obliged to allow an extension of time despite the extensive delay.

[17] Bringing all the factors together, we conclude that the applicants have not made out a case for an extension of time to bring their application for leave to this Court. The misguided steps they took in the Court of Appeal well after the proceeding in that Court had come to an end are puzzling and were taken in the face of clear advice from that Court that the appropriate step to take was to apply for leave to appeal to this Court. We accept that for periods the applicants were not receiving legal advice, but that was their choice and the consequences of it should not be visited on the Council. We are not convinced that the arguments they wish to pursue are more than technical arguments. In circumstances where they are seeking an indulgence to seek leave for what would be a third appeal, we do not consider their case is strong enough to justify such an indulgence being given.

[18] We therefore dismiss the application for an extension of time to apply for leave to appeal.

[19] The applicants must pay the respondents costs of $4,500 plus usual disbursements.

Solicitors:
Henderson Reeves Lawyers, Whangarei for Applicants
Brookfields Lawyers, Auckland for Respondents