IN THE SUPREME COURT OF NEW ZEALAND

SC 65/2009
SC 84/2009
[2009] NZSC 111

BETWEEN	LEWTYN MICHAEL SCOTT Applicant
AND	ROSEMARY ANN SCOTT First Respondent
AND	LEE MCNEILLY Second Respondent
AND	ALISON SCOTT Third Respondent
AND	CARA ANN CLARE Fourth Respondent

Hearing: 16 October 2009

Court: Tipping, McGrath and Wilson JJ

Counsel: K G Davenport for Applicant
R E Harrison QC for Respondents

Judgment: 16 October 2009

Reasons: 29 October 2009

JUDGMENT OF THE COURT

A The applications are dismissed.

B The applicant is ordered to pay to the respondents jointly costs of $7,500 and reasonable disbursements.

REASONS

(Given by Wilson J)

Introduction

[1] The applicant was in dispute in the High Court with the first respondent, his mother, and the other respondents, his sisters, over two family farms, known as "Tombstone Station" and the "Scott Trust" farm. Stevens J delivered two judgments, the first on 15 September 2008[1] and the second on 5 August 2009.[2] The applicant filed an appeal against the first judgment on 13 October 2008. He did not file the Case on Appeal and seek a fixture within six months, as required by r 43 of the Court of Appeal (Civil) Rules 2005. On 16 June 2009 the Court of Appeal, in the absence of the applicant and with no counsel representing him, considered an application by him under r 43(2)(a), made shortly prior to the expiration of the six months from the filing of the appeal, to extend that time. On 19 June 2009 it refused the application, with the result that his appeal is treated as having been abandoned.[3] The applicant sought leave to appeal to this Court against that refusal.

[2] On 3 September this year, the applicant filed an appeal against the second judgment of Stevens J, which was primarily directed to issues of relief. On 16 September, the Court of Appeal heard applications by Mr Scott for stays of proceedings based on his application for leave to appeal to this Court (in relation to the deemed abandonment of his appeal against the first judgment of Stevens J) and his appeal to the Court of Appeal (in relation to the second of the High Court judgments). On 18 September the Court refused both stays.[4] On 24 September, the applicant filed an application for leave to appeal to this Court against the refusal of the stays by the Court of Appeal.

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1 *Scott v Scott & Ors* (High Court, Tauranga, CIV-2004-470-000094, 15 September 2008, Stevens J).

2 *Scott v Scott & Ors* (High Court, Tauranga, CIV-2004-470-000094 and CIV-2004-470-000957, 5 August 2009, Stevens J)

3 [2009] NZCA 255 (Hammond, O'Regan and Ellen France JJ).

4 [2009] NZCA 417 (Hammond, Harrison and Miller JJ).

[3] At a hearing on 16 October, we first heard Ms Davenport in support of the application for leave to appeal against the refusal of the Court of Appeal to extend time under r 43. Without finding it necessary to call upon Mr Harrison QC, but having considered his written submissions, we refused the application and said that we would give our reasons for doing so at a later date. That left for our consideration the application for a stay of the second judgment of Stevens J. Again, after hearing from Ms Davenport we refused the application without calling upon Mr Harrison, with reasons to follow. Accordingly, the present judgment sets out the reasons of the Court for dismissing both the r 43 and the stay leave applications.

The r 43 leave application

[4] In its judgment delivered by Hammond J, the Court of Appeal reviewed the background to the litigation and the decision of the High Court under appeal. It considered whether it should exercise its discretion to extend the six month period. The Court recorded the submission of Mr Harrison that there had been "a prolonged pattern of delay and default",[5] always operating to the advantage of Mr Scott and involving his having successively engaged ten firms of solicitors since the original dispute arose, three of them since the High Court judgment. Most recently, the solicitors then acting had been given leave to withdraw the day before the Court of Appeal hearing, after they had prepared and lodged written submissions and an affidavit from Mr Scott which were "of great assistance to the Court"[6] and said everything "that could conceivably have been said"[7] on behalf of Mr Scott.

[5] The judgment went on to record that Mr Scott had refused to waive privilege to enable his former solicitors to respond to allegations he made against them and to note that, while it was impossible to assess the merits "except in a very provisional way", the trial Judge had attempted to resolve the dispute in an equitable way, that although the "underlying merits" had been resolved against Mr Scott he had been left in a favourable position but had "taken refuge in delaying tactics rather than

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5 At para [20].
6 At para [22].
7 At para [22].

advancing matters" towards resolution of the appeal.[8] The advantage of delay to Mr Scott was principally that he had purchased his father's half interest in the Tombstone Station farm, financed by a hundred per cent mortgage back at a preferential rate of interest, with the principal repayable after 10 years, on which he was not paying interest. He was able to occupy the farm because his mother, the first respondent, was not enforcing her life interest of exclusive occupancy.

[6] The Court of Appeal concluded that the application to extend time should be refused because:[9]

> ... this is an egregious case. The delays and prevarications are very bad. The merits of the case are not strong, and in reality go only to the relief ordered. The respondents are prejudiced. At some point, a court has to say "enough is enough". Civil litigation cannot be blighted by contrived delays.

[7] These strong findings were all justified by the evidence. It is, however, of relevance that they were made following a hearing at which Mr Scott was not present, and was not represented by counsel. Written submissions cannot substitute fully for oral argument; if they could, there would be no necessity to conduct hearings. On any view of the present facts, however, it is apparent that Mr Scott was aware at least four days prior to the date of hearing that it was due to take place and that the counsel acting for him would be seeking the leave of the Court to withdraw from doing so. It was his responsibility to arrange alternative representation, or to appear himself.

[8] Mr Scott's refusal to waive privilege, to enable his former solicitors to respond to the allegations he was making against them, is of particular concern. Those who seek an indulgence from the Court, as he was, cannot expect to have their application viewed favourably if they prevent potentially relevant information from being placed before the Court. As a separate but related point, a refusal to waive privilege will normally justify the inference, which we draw here, that information from the former solicitors would be unhelpful to the cause of the party refusing to waive the privilege.

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8 At para [36].
9 At para [38].

[9] The Courts must deal firmly with those who attempt to frustrate their processes, the more so when that results in significant prejudice to other parties.

Because of the history of this litigation, both before and after the lodging of the appeal, the Court of Appeal was fully entitled to exercise its discretion to refuse to extend the six month period. No substantial miscarriage of justice has resulted from its doing so.[10] We therefore refused the application for leave to appeal from that decision.

The stay leave application

[10] Because leave was refused to appeal against the r 43 decision of the Court of Appeal, which effectively brought to an end the appeal against the first judgment of Stevens J, there could no longer be any question of a stay of that judgment. What was in issue was whether Mr Scott should be granted leave to appeal to this Court against the refusal of the Court of Appeal to stay the second judgment of Stevens J, pending its determination of his appeal against that judgment.

[11] Stevens J had ordered the sale of both farms. As the Court of Appeal recorded:

> [16] It is appropriate to put the issues under this head in their broad context. Mr Scott accepts that, to preserve what he regards as his interests, he is going to have to buy out the other interests in these properties at some point. The central issue for some considerable time has been, and still is, the basis on which he is to do so. Obviously, the sensible resolution of this whole unfortunate litigation would have been an agreed private treaty between the parties to achieve that outcome. That did not occur. Stevens J has had the burdensome task of trying to produce a fair outcome to which, with respect, he applied himself scrupulously. He gave Mr Scott the very opportunity to achieve a better outcome for himself, and it was not taken up.

[12] As the Court went on to say, Mr Scott was not able to dictate to the respondents whether and on what basis the farms should be sold. He wished to become the sole owner of both farms. He claimed, at least in relation to the Scott

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[10] *Junior Farms Ltd v Hampton Securities Ltd* [2006] 3 NZLR 522 (SC).

Trust farm, that sale should be by public auction rather than tender as directed by the High Court. As the Court of Appeal concluded:

> [23] The issue presently before us is therefore a narrow one: what is the most appropriate process for sale of the trust farm? It is difficult to see how that determination by the Judge is open to any realistic challenge. It is not for this Court to say that the Judge got that process wrong, particularly when he had earlier given Mr Scott the opportunity he did. That decision was taken on the basis of appropriate professional advice, adduced in evidence. It cannot be that Mr Scott can simply substitute, as it were, his personal preference, or one that better suits his own ends.

[13] This conclusion of the Court was unsurprising, and clearly open to it. No substantial miscarriage of justice has resulted.

[14] Before this Court, Ms Davenport focussed her argument in support of a stay on the proposed sale of Tombstone Station and contended that Mr Scott should have the right to make a "pre-emptive offer" to purchase that property. It is much too late to give him that opportunity, even if it could have been justified at an earlier time. Whether the possibility of a stay is considered in the context of either or both farms the outcome is the same; no basis has been established for granting Mr Scott leave to appeal against the decision of the Court of Appeal refusing a stay.

Result

[15] For the reasons given, both applications were refused.

[16] As the total costs on the two applications, the applicant is ordered to pay to the respondents jointly $7,500 and reasonable disbursements, to be fixed if necessary by the Registrar.

Comment

[17] As Tipping J, the presiding Judge, said for the Court to Ms Davenport at the conclusion of the hearing:

> ... although your client has failed in his two applications, you have advanced his case with total competence and professionalism. No one could have done more than you have for your client.

Solicitors:
Holland Beckett, Tauranga for Applicant
O'Sullivan Clemens, Rotorua for Respondents