IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 87/2019
[2019] NZSC 114

BETWEEN	HARRY MEMELINK AND LYNX TRUSTEES LIMITED AS TRUSTEES OF LINK TRUST (NO 1) First Applicant
AND	HARRY MEMELINK Second Applicant
AND	COLLINS & MAY LAW Respondent

Court: Winkelmann CJ, Glazebrook and O'Regan JJ

Counsel: Second Applicant in person
E J Collins for Respondent

Judgment: 11 October 2019

JUDGMENT OF THE COURT

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

B The first applicant must pay the respondent costs of $2,500. Given the position at [2], we make no costs award against the second applicant.

REASONS

Introduction

[1] On 2 September 2019, the applicants applied for leave to appeal against a judgment of the Court of Appeal of 23 November 2017.[1] The application for leave to

[1] *Collins & May Law v Memelink and Renshaw as Trustees of the Link Trust (No 1)* [2017] NZCA 541 (Miller, Simon France and Toogood JJ) [CA judgment].

appeal is over one year out of time. The applicants therefore also apply for an extension of time to apply for leave to appeal.

[2] The second applicant, Mr Memelink, is bankrupt. The Official Assignee filed a memorandum on 8 October 2019 informing the Court that Mr Memelink has not sought the approval of the Official Assignee to bring the application and that Mr Memelink may not therefore advance the application. The Court had already considered the merits of the application before receiving that memorandum. Given the application is also made by the first applicant, it is necessary for the Court to address the merits. As we have decided the application for an extension of time is dismissed and the application for leave would also have been dismissed, we do not need to make a ruling on the matters raised by the Official Assignee. We therefore simply note the Official Assignee's position and proceed to deal with the application on its merits.

Background

[3] In late August 2006, the second applicant, Mr Memelink, instructed the respondent, Collins & May Law, to act for his family trust, the Link Trust (No 1) (the Trust), to settle the purchase of a property. The property at the time was owned by Mr Hoyte and his wife, Ms Matthews, as tenants in common in equal shares. The transaction had its origins in an agreement entered into in November 2003, settling a dispute between Mr Memelink and Mr Hoyte over the ownership of a company, John Hoyte and Associates Ltd, and related issues.

[4] Although the purchase price was agreed to be $570,000, Mr Memelink instructed Collins & May Law that the arrangements he had entered into for the transfer of the property to the Trust were such that the Trust would be required to pay only $232,569.34 to complete the settlement. Mr Memelink said the balance of the purchase price would be met by setting off amounts owed to Mr Memelink and related entities.

[5] On 5 September 2012, Ms Matthews successfully claimed her share of the equity in the agreed $570,000 purchase price ($155,715.33)[2] from the Trust on the basis that Ms Matthews had agreed to mortgage her share of the property and therefore her share could not be offset against the debt to the Trust.[3]

[6] The Trust and Mr Memelink then issued proceedings against Collins & May Law. They alleged that Andrews J decided against them because Collins & May Law acted negligently for the Trust on settlement, by not properly documenting that the payment of $232,569.34 fully discharged the Trust's obligation to pay the $570,000 sale price. They claimed damages of $155,715.33, the amount that Andrews J had ordered the Trust to pay to Ms Matthews.[4]

[7] Collins & May Law denied liability on the basis of the alleged limited scope of their instructions. They submitted that they were instructed to settle the transfer on the basis of the settlement statement. In particular, they asserted that they did not have a duty to the Trust or to Mr Memelink to review or document the underlying arrangements pursuant to which the Trust paid only $232,567.34 on settlement.

[8] The applicants succeeded in the High Court and Collins & May Law was ordered to pay damages of $155,715.33 plus reasonable disbursements to Mr Memelink.[5] Collins & May Law's appeal was allowed by the Court of Appeal and the orders made by the High Court were set aside.[6]

Application of extension of time to appeal

[9] Mr Memelink says that he had instructed his then lawyer to file an application for leave to appeal to this Court against the Court of Appeal decision. He says that he was assured by his lawyer that this had been done within the proper time limit. He could not, however, understand why he had received nothing from this Court about

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2 *Matthews v Memelink* [2012] NZHC 2284 at [84].
3 At [80].
4 *Memelink and Renshaw as Trustees of the Link Trust (No 1) v Collins & May Law* [2016] NZHC 442 (Clifford J) [HC judgment] at [4].
5 HC judgment, above n 4, at [62].
6 CA judgment, above n 1.

the application. Mr Memelink says that he eventually went to the Court to check and was told that there was nothing in the system.

[10] His then lawyer still insisted that the application had been filed and that he would locate a copy and follow through with the Court. Nothing transpired and Mr Memelink says that he went to the Court several more times and was told again that nothing had been filed.

[11] Mr Memelink says that most of the exchanges with his lawyer were by telephone but annexes an example of an email sent by him to his then lawyer on 25 June 2018 reading: "Urgent I need to see the supreme court application for appeal." Mr Memelink does not indicate what response he got to this email (if any). Nor does he give the dates he came to this Court to be told that no such application had been filed.

[12] What is clear, however, is that Mr Memelink was certainly put on inquiry before his email to his then lawyer in June 2018 and yet the application was only filed in September 2019, more than a year later. There is no reasonable excuse for the delay.

The application itself

[13] Mr Memelink has not identified any point of general or public importance arising from his proposed appeal.[7] Rather, he submits that the Court of Appeal erred on the facts and that the Court was deprived of certain documents which would have changed the result. He does not, however, identify with any precision those documents or explain why they would have led to a different result. Nothing raised by Mr Memelink suggests any risk of a miscarriage of justice.[8]

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7 Senior Courts Act 2016, s 74(2)(a).

8 For civil cases, the miscarriage of justice ground (s 74(2)(b) of the Senior Courts Act) allows this Court to review errors of fact, or errors of law not of general or public importance, in "the rare case of a sufficiently apparent error, made … by the Court of Appeal, of such a substantial character that it would be repugnant to justice to allow it to go uncorrected in the particular case": *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4].

Result

[14] There is no reasonable explanation for the delay in filing the application, which in any event does not meet the leave criteria.

[15] The application for an extension of time for leave to appeal is therefore dismissed.

[16] The first applicant must pay the respondent costs of $2,500.[9] Given the position in [2], we make no costs award against the second applicant.

Solicitors:
Collins & May Law, Lower Hutt for Respondent

[9] The respondent law firm has an employed lawyer acting for it in this application, but can nevertheless be awarded costs: *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [87].