

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 75/2021
[2021] NZSC 107

BETWEEN DEO DATT SHARMA
 Applicant

AND NIRMALA WATI
 Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: Applicant in person
 R O Parmenter for Respondent

Judgment: 30 August 2021

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay the respondent costs of \$2,500.**
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REASONS

Introduction

[1] The applicant seeks leave to appeal against a decision of the Court of Appeal declining to grant him an extension of time to file a case on appeal.¹

Background

[2] The current application arises against the background of litigation between the parties which has ensued since their separation in 2000. The applicant owes over \$39,900 in costs and interest to the respondent in relation to the litigation.

¹ *Sharma v Wati* [2021] NZCA 220 (Kós P, Gilbert and Courtney JJ) [CA judgment].

[3] In 2008, the respondent served bankruptcy notices on the applicant as a means of recovering these costs. The applicant unsuccessfully sought to have the notices set aside.² In the context of that application, the applicant paid \$21,000 into the High Court. The applicant refused to consent to those funds being paid out to the respondent. Based on what the applicant told the Associate Judge about the purpose of the payment into Court, the Associate Judge said the payment into Court was not security for costs but, rather, was “a step taken by [the applicant] to try and prove his solvency”.³ At that point in time, the respondent did not persevere in having the applicant made bankrupt as she did not want their home sold.

[4] Subsequently, the respondent changed her mind about selling the home and applied to have charging orders made against the applicant’s share of the family home in order to recover the costs. The Court’s leave to that course was required because of the age of the costs orders.⁴ Charging orders were made by the High Court.⁵

[5] The applicant filed an appeal to the Court of Appeal from the decision of the High Court making the charging orders, but did not file his case on appeal on time. Although he was only two days late in filing the case on appeal, the appeal was deemed abandoned under r 43(1) of the Court of Appeal (Civil) Rules 2005. The applicant then applied for an extension of time to file the case on appeal but, as we have noted, this was unsuccessful.

The proposed appeal

[6] In seeking leave to this Court, the applicant wishes to argue the Court of Appeal was wrong to decline an extension of time where the delay in filing was very short and was explained and where the proposed appeal has merit. In terms of the merits, he says the proposed appeal raises the following questions: whether the Limitation Act 1950 applies to enforcement proceedings; the correct approach to the exercise of the discretion to grant leave to file the charging orders in this case;⁶ whether the form

² *Wati v Sharma* HC Auckland CIV-2008-404-6367, 9 March 2011,

³ At [14].

⁴ High Court Rules 2016, r 17.9(2)(b).

⁵ *Wati v Sharma* [2020] NZHC 2010 (Downs J).

⁶ The applicant says that if bankruptcy had not been pursued earlier and instead charging orders sought, the house would have been sold and the costs paid some time ago.

of the application used in seeking leave under r 17.9 of the High Court Rules 2016 to file the charging orders was correct; and whether the Courts below were correct to reject the applicant's contention that the \$21,000 paid into Court was security for costs and available to meet the costs outstanding.

Our assessment

[7] The proposed appeal would have this Court reprise arguments made in the Court of Appeal. In declining to grant an extension of time, the Court of Appeal acknowledged the delay which brought r 43 into play was minimal and caused no prejudice to the respondent. In that context, the Court said that the prospective merits of the appeal were "clearly hopeless".⁷ First, the Court considered the High Court was correct that the Limitation Act did not apply to enforcement proceedings which were governed by the relevant court rules. Second, the Court did not see any basis for impugning the Judge's conclusion about the status of the \$21,000 paid into Court. The Court made the point that the applicant could uplift the money and pay the costs owed. Third, the Court said that the complaints about the bankruptcy proceedings did not affect an application to enforce costs orders made over six years ago. Finally, the Court took the view that the only way to obtain leave under r 17.9 was by interlocutory application, the process used in this case.

[8] There is no challenge to the principles applied by the Court of Appeal in terms of granting an extension under r 43(2).⁸ No question of general or public importance arises in that respect.⁹ As to the Court's assessment of the prospective merits of the proposed appeal, nothing raised by the applicant calls into question the Court's approach. In particular, the prospective question about the scope of the Limitation Act has insufficient prospects of success. Nor do we see any appearance of a miscarriage of justice in the Court of Appeal's assessment of the matters on which the applicant would rely.¹⁰

⁷ CA judgment, above n 1, at [7].

⁸ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

⁹ Senior Courts Act 2016, s 74(2)(a).

¹⁰ Section 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.

Result

[9] The application for leave to appeal is dismissed. The applicant must pay the respondent costs of \$2,500.

Solicitors:
Witten-Hannah Howard, Auckland for Respondent