

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 119/2021
[2021] NZSC 186**

BETWEEN DERMOT GREGORY NOTTINGHAM,
PHILLIP NOTTINGHAM AND EARLE
MCKINNEY
Applicants

AND THE REAL ESTATE AGENTS
AUTHORITY
First Respondent

MARTIN RUSSELL HONEY
Second Respondent

Court: William Young, O'Regan and Ellen France JJ

Counsel: Applicants in person
C P Paterson for First Respondent
D W Grove for Second Respondent

Judgment: 21 December 2021

JUDGMENT OF THE COURT

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

Introduction

[1] On 24 July 2020, the applicants filed an appeal in the Court of Appeal against two judgments of the High Court allowing their appeal against a decision of the Real

Estate Agents Disciplinary Tribunal¹ but declining to award them indemnity costs.² The second respondent, Mr Honey, filed a cross-appeal against the substantive decision of the High Court on 5 August 2020. Various issues then arose about the payment of security for costs and, relevantly, the applicants applied to the Court of Appeal seeking to have the cross-appeal deemed abandoned or struck out for procedural failings. The Court of Appeal dismissed the application and determined that the cross-appeal remained on foot.³ The applicants seek leave to appeal to this Court from that decision.

Background

[2] The question about the status of the cross-appeal arose in this way. The applicants sought dispensation from security for costs under the Court of Appeal (Civil) Rules 2005. The Deputy Registrar declined that application and the applicants sought a review of that decision thereby deferring their obligation to pay security.

[3] Counsel for Mr Honey emailed the Deputy Registrar noting his assumption that his client's obligation to pay security was also on hold. The Deputy Registrar replied stating that, absent an application for review of the decision on security for costs in the cross-appeal, security for costs on the cross-appeal had to be paid by the due date.

[4] Ultimately, after various other procedural steps, security for costs for the appeal was paid on 23 March 2021 and on the cross-appeal on 29 March 2021.

[5] The applicants then filed a memorandum dated 1 April 2021 seeking to have the Court deem the cross-appeal abandoned. A telephone conference was convened by Goddard J in the course of which counsel for Mr Honey submitted that the date for payment of security for costs on the cross-appeal was "superseded" by the applicants' application for review and that he had received no response to his request

¹ *Nottingham v Real Estate Agents Authority* [2020] NZHC 1561 (Wylie J) [substantive judgment].

² *Nottingham v Real Estate Agents Authority* [2020] NZHC 1793 (Wylie J).

³ *Nottingham v The Real Estate Agents Authority* [2021] NZCA 357 (French and Cooper JJ).

for an extension of time to pay security. Counsel said that, “by way of silence”, the extension of time had been given.

[6] Goddard J directed that the status of the cross-appeal should be decided following submissions from the parties. This was the issue before the Court of Appeal in the judgment from which leave to appeal is sought.

[7] The Court rejected the assertion by counsel for Mr Honey that an extension of time had effectively been granted by way of “silence”, but said that, where security had been paid and the delay had not occasioned any prejudice to the applicants, strike out would not be appropriate. The Court also emphasised that the applicants’ memorandum asking that the cross-appeal be treated as abandoned was filed after Mr Honey had paid security for costs.

[8] Turning then to the question of whether the cross-appeal remained on foot or was deemed to be abandoned, the Court of Appeal considered whether r 43 of the Court of Appeal (Civil) Rules applied to a cross-appeal. Rule 43 provides for an appeal to be treated as having been abandoned if the appellant has not applied for the allocation of a hearing date and filed the case on appeal within the three-month period. The Court said that r 43 did not apply to a cross-appeal. Rather, where security for costs was not paid on a cross-appeal, the consequences of non-compliance were those set out in r 37(1). Rule 37(1) is expressed to apply to cross-appeals⁴ and enables the Court to strike out if there is a default in any obligation to pay security for costs.

[9] In reaching this view, the Court contrasted the position under r 43 which said nothing about cross-appeals compared to other rules which were expressly applied to cross-appeals. The Court also considered it relevant that r 43 was triggered by not filing the case on appeal or seeking the allocation of a hearing date, neither of which requirements applied to cross-appeals.

⁴ Court of Appeal (Civil) Rules 2005, r 35(9).

The proposed appeal

[10] The applicants essentially say that non-compliance with the requirement to pay security for costs by the due date was fatal and the Court of Appeal has erred in not treating it as such. The applicants wish to argue that r 43 applies to cross-appeals. The applicants rely in that respect on *Lesa Systems Ltd v Canzac Ltd* in which the Court proceeded on the basis that r 43 was engaged.⁵ Moreover, the applicants consider the merits do not favour the cross-appellant. The argument is that counsel was not forthright with the Court and there should be consequences for such conduct. Finally, the applicants submit that the Court of Appeal has not applied the Rules in an even-handed manner.

[11] We do not consider that the proposed appeal meets the criteria for leave to appeal.⁶ The applicants seek to challenge a fairly routine application of the Court of Appeal (Civil) Rules to the particular facts. No question of general or public importance arises. Nor do we see any basis for interfering with the assessment of the Court of Appeal, particularly where the question of security has been resolved and there has been no prejudice to the applicants. There is no appearance of a miscarriage of justice.⁷ In addition, this is an interlocutory matter so the applicants must show that it is in the interests of justice for the appeal to be dealt with at this stage of the proceeding.⁸ We are not satisfied that criterion is met.

Result

[12] The application for leave to appeal is dismissed.

[13] The applicants must pay the respondents one set of costs of \$2,500.

⁵ *Lesa Systems Ltd v Canzac Ltd* [2007] NZCA 375.

⁶ Senior Courts Act 2016, s 74(2).

⁷ *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].

⁸ Section 74(4). Presumably if the cross-appeal had been deemed to have been abandoned, an extension of time could have been sought to file a new cross-appeal under r 29A of the Court of Appeal (Civil) Rules. See also r 29(2) and *Siemer v Stiassny* [2009] NZCA 624 at [22]–[26].

Solicitors:
Meredith Connell, Auckland for First Respondent
Foy & Halse, Auckland for Second Respondent