

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 71/2022
[2022] NZSC 109**

BETWEEN	DENNIS ARTHUR SMITH Applicant
AND	IAN JAMES PLOWMAN First Respondent
	NIKAU GROVE NURSERY LIMITED Second Respondent
	HELEN IRENE MITCHELL Third Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: Applicant in person

Judgment: 21 September 2022

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B There is no order as to costs.**
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REASONS

Introduction

[1] The genesis for Mr Smith's application for leave to appeal to this Court arises out of the requirement that Mr Smith pay a filing fee in the High Court on an appeal from the District Court. Mr Smith's application for waiver of the requirement to pay the fee was declined by the Deputy Registrar of the High Court on the basis he was not unable to pay the fee. His application for review of the Deputy Registrar's decision

was declined by Campbell J.¹ Campbell J subsequently declined to grant leave to appeal from that decision to the Court of Appeal.² Mr Smith unsuccessfully sought leave to appeal from the Court of Appeal.³ The Court of Appeal also declined Mr Smith’s application to recall the decision dismissing the application for leave.⁴ Mr Smith has applied for leave to appeal from the decision to decline recall.

Background

[2] The background is summarised in the decision of the Court of Appeal declining to grant leave in this way:⁵

In light of what Mr Smith told the Judge, we do not think there is an arguable error of fact; the Judge rightly concluded, based on what Mr Smith himself plainly said, that assets that can be converted to money are available to him for purposes of the litigation. If they are available to pay security, they are available to pay a filing fee. In any event, the issue is not of general or public importance warranting the attention of this Court. It is an issue peculiar to Mr Smith’s personal circumstances and manifestly does not justify leave. As Campbell J noted when declining leave, there is no reason to think that Mr Smith’s appeal from the District Court would be unable to proceed if he is required to pay the filing fee.

[3] In declining to recall the earlier judgment, the Court of Appeal saw the application for recall as “an attempt to relitigate the merits” of the Court’s decision to decline leave and, as such, “an abuse of the recall jurisdiction”.⁶

The proposed appeal

[4] Mr Smith’s submissions in support of the application for leave to this Court maintain that the proposed appeal would raise multiple issues for decision by the Court. It is said that the Courts below have erred in their approach to a number of these issues, for example, by treating him and the trust (which holds the assets referred to by the Court of Appeal) as the same entity. It is also said that there are other issues, such as the approach to the timeliness of his appeal to the High Court, which have

¹ *Smith v Plowman* [2021] NZHC 2618.

² *Smith v Plowman* [2021] NZHC 3223.

³ *Smith v Plowman* [2022] NZCA 170 (Miller and Dobson JJ) [CA leave judgment].

⁴ *Smith v Plowman* [2022] NZCA 247 (Miller and Dobson JJ) [CA recall judgment].

⁵ CA leave judgment, above n 3, at [3] (footnote omitted).

⁶ CA recall judgment, above n 4, at [2].

been ignored. Mr Smith says that the end result is a miscarriage of justice.⁷ Underlying these issues is his concern that he will be prevented by lack of means from pursuing his appeal to the High Court.

[5] We leave open for present purposes whether there is jurisdiction to appeal the refusal to recall.⁸ The recall decision involved the application of well-settled principles relating to recall. It does not give rise to any matters that would meet the criteria for leave to appeal to this Court.⁹

[6] There is plainly no jurisdiction to appeal from the underlying decision of the Court of Appeal to decline to grant leave to appeal. Section 68(b) of the Senior Courts Act 2016 specifically precludes this Court from hearing and determining an appeal against a decision of that kind.¹⁰ Nor is there any basis for the application to be treated as an application to bring a direct appeal against the decision of the High Court.¹¹ It is clear that such an application would not meet the criteria for leave to appeal. We note in this respect that the Courts below proceeded on the basis Mr Smith said that there were assets available to him in relation to the provision of security for costs.

Result

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

[8] As the respondents did not file submissions, there is no order as to costs.

⁷ Senior Courts Act 2016, s 74(2)(b).

⁸ See *Anderson v NZI International Acceptances Ltd* [2022] NZSC 85 at [9], citing *P (SC 46/2021) v Commissioner of Inland Revenue* [2021] NZSC 51. Compare *Ngahuia Reihana Whanau Trust v Flight* (2004) 17 PRNZ 357 (SC); and *Payne v Payne* [2005] NZSC 52.

⁹ Senior Courts Act, s 74(2)(a) and (b).

¹⁰ See, for example, *Tomar v Tomar* [2022] NZSC 84.

¹¹ Senior Courts Act, s 75.