

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 114/2023  
[2024] NZSC 6**

BETWEEN                      LYNETTE JOY MILLS AND CARL  
   JAMES PETERSON  
   Applicants

AND                              KELLY DALZELL  
   First Respondent

   TRACY HOWARD LEVENBACH  
   Second Respondent

   ASB BANK LIMITED  
   Third Respondent

   GRAHAM HOWARD MILLS  
   Fourth Respondent

   JOHN LEVENBACH  
   Fifth Respondent

   CAROLE KRAMMER  
   Sixth Respondent

Court:                              Glazebrook, Ellen France and Kós JJ

Counsel:                              Applicants in person  
   S C D A Gollin and S L Michelsen for First and Third  
   Respondents  
   J R Sparrow and S T Hartley for Fourth Respondent  
   B R Webster and K B Perrett for Fifth and Sixth Respondents

Judgment:                              8 February 2024

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## JUDGMENT OF THE COURT

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- A The application for leave to appeal is dismissed.**
- B The applicants must pay the first and third, the fourth, and the fifth and sixth respondents three sets of costs of \$1,000.**
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### REASONS

[1] The applicants seek leave to appeal a decision of the Court of Appeal declining to extend time to apply for the allocation of a hearing date and file their case on appeal, and to pay security for costs.<sup>1</sup>

[2] This is the third set of proceedings brought by the applicants against certain of the respondents. The first two proceedings ended with a deed of settlement between the applicants and the third and fourth respondents.<sup>2</sup> The present proceedings, arising out of the same circumstances as the earlier proceedings but incorporating some additional defendants, were struck out in the High Court. Three grounds applied: they disclosed no arguable cause of action, they were an abuse of process having regard to the terms of the settlement deed (which were enforceable also by the first and second respondents as employees of the third respondent bank), and they were time-barred.<sup>3</sup>

[3] The applicants appealed to the Court of Appeal. They were unsuccessful in seeking an order dispensing with security for costs.<sup>4</sup> They thereafter sought and obtained certain extensions of time, but ultimately the appeal was deemed abandoned under r 43(1) of the Court of Appeal (Civil) Rules 2005. The present appeal arises from a further, formal application for extension of time. The Court of Appeal explained it in these terms:<sup>5</sup>

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<sup>1</sup> *Mills & Anor v Dalzell & Ors* [2023] NZCA 458 (Mallon and Wylie JJ) [CA judgment].

<sup>2</sup> The fourth respondent was Ms Mills's former business and domestic partner.

<sup>3</sup> *Mills v Dalzell* [2022] NZHC 2439 (Associate Judge Johnston). The second respondent is now deceased and did not participate in this application.

<sup>4</sup> *Mills v Dalzell* [2023] NZCA 68 (Courtney J).

<sup>5</sup> CA judgment, above n 1, at [1].

[1] The applicants, Lynette Mills and Carl Peterson, seek an extension of time, pursuant to r 43(2) of the Court of Appeal (Civil) Rules 2005 (the Rules), to apply for the allocation of a hearing date and file their case on appeal, and to pay security for costs. In short, they say that actions taken by the fourth respondent, Graham Mills, have prevented them from selling a property and generating funds to meet their obligations and that they should not be required to comply with r 43(1) or pay security for costs pending the High Court's final determination of an application they have made to stay a costs award made against them.

[4] The Court of Appeal declined that application. It reasoned the delays were not satisfactorily explained, the applicants being economically able to pay security but resisting doing so while an application for stay of a costs order remained outstanding in the High Court.<sup>6</sup> It agreed with the High Court that the applicants' case was "hopeless".<sup>7</sup>

### **Proposed appeal**

[5] The applicants wish essentially to contend that the High Court misapplied the provisions of the deed of settlement and provisions of the Limitation Act 1950, and failed to consider an alleged breach of s 240 of the Crimes Act 1961. They contend further that the Court of Appeal erred in its assessment of the merits; that their delay in filing the case on appeal, paying security for costs and applying for a hearing date was explicable; and (on the basis of new affidavit evidence) that they were not in fact in a position to pay security for costs in that Court.

### **Our assessment**

[6] The proposed appeal does not meet the statutory criteria for leave. It would turn on its own particular facts and does not appear to involve a question of public or general importance.<sup>8</sup> For the same reason, it does not raise an issue of general commercial significance.<sup>9</sup> Nothing raised by the applicants indicates evident error in the assessment of merits made in the High Court in light of the contents of the settlement deed, and endorsed by the Court of Appeal, or in the Court of Appeal's application of the principles stated by this Court in *Almond v Read*.<sup>10</sup> Accordingly,

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<sup>6</sup> At [23]–[24].

<sup>7</sup> At [26].

<sup>8</sup> Senior Courts Act 2016, s 74(2)(a).

<sup>9</sup> Section 74(2)(c).

<sup>10</sup> *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [36]–[40].

no error amounting to a substantial miscarriage of justice as that term is used in the civil context is apparent.<sup>11</sup> The affidavit here was tendered informally, without application under r 40 of the Supreme Court Rules 2004. In any event, it does not establish incapacity to pay security for costs set by the Court of Appeal. For all these reasons it is not necessary in the interests of justice for the Court to hear and determine the appeal.<sup>12</sup>

## **Result**

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

[8] The applicants must pay the first and third, the fourth, and the fifth and sixth respondents three sets of costs of \$1,000.

### Solicitors:

MinterEllisonRuddWatts, Auckland for First and Third Respondents

Holland Beckett Law, Tauranga for Fourth Respondent

Morgan Coakle, Auckland for Fifth and Sixth Respondents

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<sup>11</sup> Senior Courts Act, s 74(2)(b); and see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, [2006] 3 NZLR 522 at [5].

<sup>12</sup> Section 74(1).