IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 53/2025
[2025] NZSC 112

BETWEEN	MARY LOUISE SHORES Applicant
AND	CHARLES ALAN HOWDEN AND WITHERS & CO TRUSTEE COMPANY LIMITED AS TRUSTEES OF THE CHARLES ALAN HOWDEN FAMILY TRUST First Respondents
	CAROLYN ANN HOWDEN AND WITHERS & CO TRUSTEE COMPANY LIMITED AS TRUSTEES OF THE CAROLYN ANN HOWDEN FAMILY TRUST Second Respondents

Court: Williams, Kós and Miller JJ

Counsel: S E Russell and R K Potter for Applicant
J G H Hannan for Respondents

Judgment: 4 September 2025

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondents one set of costs of $2,500.

REASONS

Background

[1] Ms Shores and the Howdens are neighbours. The primary access to both properties is from Glengarry Ave, Whangaparāoa. The Howdens also enjoy a secondary right of way over Ms Shores' land, granted in 1966, which connects the other side of their property to an unformed extension to Layton Rd. When the Howdens purchased the property in late 2003, there was a broken concrete driveway over the right of way. They rebuilt it with reinforced concrete the following year.

[2] In 2019, Ms Shores decided to subdivide her property. Her partner, Mr Misiluti, met with the Howdens in October that year and told them he believed the right of way did not exist and that he and Ms Shores intended to remove the driveway. Despite a cease-and-desist letter from the Howdens' lawyer, Ms Shores proceeded in November to demolish the driveway and erect fence posts blocking vehicle access.

[3] The Howdens sought orders from the District Court requiring Ms Shores to remove the fence posts and reinstate the driveway.[1] Ms Shores made a cross-application seeking extinguishment of the right of way.[2] On 17 March 2023, Judge Allison Sinclair dismissed the cross-application and recognised the right of way, directing the parties to negotiate restoration of access.[3] When no agreement was reached, the Judge granted orders requiring Ms Shores to remove the posts and reinstate the driveway.[4] In the meantime, Ms Shores had appealed the first judgment to the High Court. On 16 August 2023, Ms Shores filed an amended notice of appeal claiming the Judge had erred in granting the orders in the second judgment.[5]

[4] In two interlocutory applications, dated 11 September 2023 and 14 March 2024, respectively, Ms Shores sought leave to adduce further evidence in

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1 Under s 313(1) of the Property Law Act 2007.
2 Under s 317(1).
3 *Howden v Shores* [2023] NZDC 4736.
4 *Howden v Shores* [2023] NZDC 12363.
5 Although Ms Shores has formally only appealed the first District Court judgment, in substance she challenges both judgments (putting the question of extension of time to one side): see *Shores v Howden* [2025] NZCA 140 (Courtney, Campbell and Cull JJ) [CA judgment] at [43], n 34.

the High Court.[6] The proposed evidence included, relevantly, two affidavits. The first was from Mr Martin, a civil engineering expert who had not given evidence at trial. It provided his expert opinion on the feasibility and cost of three different options for vehicle access to the two properties from Layton Rd. The second was from Mr Vaotogo, Ms Shores' original engineering expert at the District Court trial. Acknowledging that in that Court he had agreed with the evidence of the respondents' expert, Mr Perman, that constructing an alternative, direct accessway from the Howdens' property to Layton Rd would not be practical, Mr Vaotogo retracted that agreement, saying that part of his evidence was given "in error, without giving it due consideration".

[5] The affidavits were intended to support Ms Shores' argument on appeal that an alternative driveway not using the right of way would be a practical and more workable alternative to reinstatement of the former driveway, and that the right of way is therefore superfluous and can be extinguished under s 317(1)(d) of the Property Law Act 2007 without substantial injury to the Howdens.

[6] The High Court, in two separate judgments, declined leave to adduce the affidavits,[7] but granted leave to appeal those decisions to the Court of Appeal.[8] The Court of Appeal dismissed Ms Shores' appeals, finding the test for admission of new evidence on appeal had not been met in either case.[9]

[7] Ms Shores now seeks leave to appeal to this Court. She submits her proposed appeal raises a matter of general and public importance and that a substantial miscarriage of justice may occur if it is not heard.

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6 And, in respect of the second application, leave under r 7.52 of the High Court Rules 2016 to bring such an application.

7 *Shores v Howden* [2023] NZHC 3811 (Tahana J); and *Shores v Howden* [2024] NZHC 844 (Lang J).

8 *Shores v Howden* [2024] NZHC 1623 (Tahana J); and *Shores v Howden* [2024] NZHC 1631 (Lang J).

9 CA judgment, above n 5.

Our assessment

[8] We do not consider it is necessary in the interests of justice for this Court to hear and determine the proposed appeal at the interlocutory stage.[10] Decisions which are both discretionary and interlocutory will seldom be suited to challenge in this Court before the substantive proceeding is concluded.[11]

[9] While the circumstances of this appeal—an expert seeking to depart from his trial evidence at the appeal stage—may be uncommon, we do not accept the submission that they point to a lacuna in the law. Indeed, in *R M Turton and Co Ltd (in liq) v Southland Area Health Board*, the facts of which bear some similarity to the present application, Master Venning declined to admit further expert evidence on appeal as the expert could with reasonable diligence have given that evidence at trial.[12] We do not consider the relevant principles require reconsideration by this Court.

[10] Nor do we consider there is a real risk of a substantial miscarriage of justice, in the civil sense, if leave is not granted to bring a second appeal at the interlocutory stage.[13] As the Court of Appeal said in this case, Ms Shores was in a position to ask Mr Vaotogo to investigate and report on the matters now raised in the proposed evidence, but she did not.[14] Mr Vaotogo could himself have been expected to give "due consideration" to those matters—but, as he admits, he did not.[15] We therefore see no evident error in the concurrent conclusions of the Courts below that the proposed evidence could with reasonable diligence have been adduced at trial and is accordingly not fresh evidence. We add that the Howdens accepted in this Court that Mr Vaotogo's change of stance proceeds from the adoption of a different assumption to that adopted at trial. That opens the possibility that Ms Shores, on appeal, can point to the earlier assumption to discredit Mr Vaotogo's previous opinion.

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10 Senior Courts Act 2016, s 74(1) and (4).
11 *Body Corporate 207624 v Grimshaw & Co* [2024] NZSC 87 at [7].
12 *R M Turton and Co Ltd (in liq) v Southland Area Health Board* HC Invercargill AP7/97, 17 March 1999.
13 Senior Courts Act, s 74(2)(b); and see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].
14 CA judgment, above n 5, at [74].
15 See above at [4].

Result

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

[12] The applicant must pay the respondents one set of costs of $2,500.

Solicitors:
Russell | van Hout, Auckland for Applicant
Wynyard Wood, Auckland for Respondents