

IN THE SUPREME COURT OF NEW ZEALAND

SC 16/2016
[2017] NZSC 10

BETWEEN

JANINE DAVINA SAX
Applicant

AND

LUKE ANDREW SIMPSON
First Respondent

LUKE ANDREW SIMPSON AND
JANINE DAVINA SAX AS TRUSTEES
OF THE LUKE AND JANINE SIMPSON
FAMILY TRUST
Second Respondent

Court: Glazebrook, Arnold and O'Regan JJ

Counsel: G C McArthur for Applicant
E M Eggleston for First Respondent

Judgment: 17 February 2017

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B Costs of \$2,500 are to be paid by the applicant to the first respondent.**
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REASONS

[1] Ms Sax applies for leave to appeal against a decision of Miller J of 27 January 2016, dismissing her application to review the decision of the Registrar of the Court of Appeal refusing to dispense with security for costs.¹

¹ *Sax v Simpson* [2016] NZCA 3 [*Sax* (CA)]. The application for leave was filed on 23 February 2016. At the request of the parties the Court suspended its consideration of the application to allow settlement discussions between the parties. However, no settlement was reached.

Background

[2] Ms Sax's substantive appeal to the Court of Appeal is against a judgment of Brewer J of 26 June 2015,² concerning the use of a house purchased by the Luke and Janine Simpson Family Trust. The house was used (rent free) by Ms Sax and Mr Simpson as their matrimonial home before their separation. After separation Ms Sax continued to occupy the house for a period of 42 weeks. Mr Simpson then occupied the house for 97.7 weeks, before purchasing it from the trust.

[3] Relevantly for this application, Brewer J held that both Ms Sax and Mr Simpson succeeded in their occupation rent claims against each other, meaning that Ms Sax owed Mr Simpson \$9,450 in occupation rent and Mr Simpson owed Ms Sax \$21,982.50.³ Brewer J refused Ms Sax compensation for rental payments (\$8,366.00) she had made while Mr Simpson occupied the house on the basis that to do so would constitute double counting.⁴

[4] Brewer J also rejected Ms Sax's claim against Mr Simpson for loss of rental. She claimed Mr Simpson had intentionally induced tenants she had arranged to live in the house with her to breach their contract. Brewer J found Ms Sax failed to discharge her onus of proof on this ground. He relied on a Tenancy Tribunal decision which proceeded on the basis that Ms Sax was acting as landlord in her personal capacity and that she had, through her lawyer, terminated the tenancy.⁵

Miller J's decision

[5] Miller J rejected Ms Sax's contention that security for costs was not payable because she had filed an application for legal aid.⁶ Miller J agreed with the Registrar that Ms Sax did not file an application for legal aid and therefore did not comply with the relevant rule for dispensing with security for costs. He also agreed with the Registrar that the merits of Ms Sax's appeal are weak.⁷ The test for dispensing with

² *Simpson v Sax* [2015] NZHC 1466, [2015] NZAR 1210.

³ At [68]. The two sums for occupation rent were offset against each other, with the result that Mr Simpson was directed to pay Ms Sax \$12,532.50.

⁴ At [36].

⁵ At [43]–[45].

⁶ *Sax* (CA), above n 1, at [25] and [27].

⁷ At [22].

security for costs was therefore not met. Miller J noted that Ms Sax's claim of impecuniosity was not supported by evidence. In the circumstances, he considered that the Registrar had correctly determined that seeking further information about impecuniosity was not warranted.⁸

Grounds of application for leave

[6] Ms Sax's main contention is that Miller J erred in his assessment of the merits of her appeal. She says that the trustees had agreed to her living in the property rent free and that this agreement was not revoked on separation. Mr Simpson was also free to continue to live there. This means that she should not have been ordered to pay occupation rent. Mr Simpson, on the other hand, did owe the occupation rent ordered as he had taken exclusive possession of the house. In Ms Sax's submission, if she had been allowed to sue Mr Simpson by derivative action on behalf of the trust, the correct result would have been achieved. She maintains also that she should have been compensated for the rent she had to pay while excluded from the house.

[7] In addition, Ms Sax says that Brewer J was wrong to reject her claim that Mr Simpson had induced the tenants to break their tenancy. In her submission the Judge was wrong to rely on the determination of the Tenancy Tribunal. Section 50(1) of the Evidence Act 2006 should have been applied by analogy and the findings of the Tribunal disregarded. The determination of the Tribunal is in any event subject to review, although Ms Sax accepts that Brewer J had not been informed of this.

Our assessment

[8] Having considered Ms Sax's arguments carefully, there is nothing in them that leads us to the view that Miller J's decision was wrong or that any miscarriage of justice would arise if leave is not granted.⁹ Given the possibility that the

⁸ At [29].

⁹ As to the interpretation of "miscarriage of justice" in s 13(2)(b) of the Supreme Court Act 2003 in civil cases, see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60; (2006) 18 PRNZ 369.

substantive appeal may proceed to a hearing in the Court of Appeal, we do not consider it appropriate to comment any further.

Result

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

[10] Costs of \$2,500 are to be paid by the applicant to the first respondent.

Solicitors:

Gerald McArthur Barrister, Tauranga for Applicant

Holland Beckett, Tauranga for First Respondent