

IN THE SUPREME COURT OF NEW ZEALAND

SC 65/2013
[2013] NZSC 75

BETWEEN

HARMON LYNN WILFRED
First Applicant

CAROLYN DARE WILFRED
Second Applicant

ANGELA MARIE SMALLEY
Third Applicant

LA FAMIA NO 1 LIMITED
Fourth Applicant

LA FAMIA NO 4 LIMITED
Fifth Applicant

AND

KAIWAN GAN AND YUZHEN YU
Respondents

Court: Elias CJ, McGrath and Glazebrook JJ

Counsel: H L Wilfred in person
S Caradus and B D A Collins for Respondents

Judgment: 26 July 2013

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
 - B The application for a stay is dismissed.**
 - C The applicants are to pay to the respondents costs of \$2,500 plus all reasonable disbursements to be fixed if necessary by the Registrar.**
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REASONS

Introduction

[1] The applicants apply for leave to appeal against a judgment of the Court of Appeal of 2 July 2013 (with reasons given on 4 July 2013),¹ which dismissed their application for a stay of execution pending an appeal against a decision of Chisholm J.²

[2] The applicants also apply for a stay of execution pending appeal to this Court. On 5 July, the applicants had applied to the Court of Appeal for a stay pending an appeal to this Court. That was refused on 9 July 2013.³

[3] By minute of 10 July 2013, a timetable was set for submissions to be made to this Court on both the leave and stay applications. Glazebrook J also ordered that no further steps (other than those already taken) were to be taken by the respondents, with regard to the property in question, until the applications were dealt with.

Background

[4] The underlying dispute relates to premises allegedly sub-leased by the fourth and fifth applicants from an associated company, La Famia No 2 Limited, which went into voluntary liquidation on 20 February 2013. The liquidators of La Famia No 2 disclaimed the head lease, but the respondents' attempts to re-enter the property were resisted by the third and fourth applicants.

[5] On application by the respondents, Chisholm J made an order granting possession of the premises to the respondents.⁴ The applicants appealed against that judgment and a stay was granted by the High Court on a number of conditions, including the payment of rental.⁵

¹ *Wilfred v Gan* [2013] NZCA 285.

² *Gan v Wilfred* [2013] NZHC 535.

³ *Wilfred v Gan* [2013] NZCA 295.

⁴ *Gan v Wilfred*, above n 2.

⁵ *Gan v Wilfred* HC Christchurch CIV-2013-409-442, 18 March 2013; 27 March 2013.

[6] The appeal against Chisholm J's decision has not yet been heard in the Court of Appeal but is scheduled for hearing on 25 July 2013. The appeal was first set down for hearing on 14 May 2013. The hearing had to be adjourned. On that day, the Court of Appeal continued the stay granted by Chisholm J.⁶

[7] In a minute of 19 June 2013, the Court of Appeal stated that the respondents should apply to the High Court to if they wished the stay to be lifted.⁷ The respondents duly applied to the High Court and, on 27 June 2013, Panckhurst J discharged the stay and declined the applicants' application for a rent abatement.⁸

[8] On 1 July 2013, Panckhurst J refused to order a further stay.⁹ The Court of Appeal granted an interim stay pending the hearing of an application for stay by that Court. At that stage, the respondents had effectively re-entered the premises.¹⁰

[9] As indicated above, the Court of Appeal refused the stay application on 2 July 2013, and it is in relation to that judgment that leave to appeal is sought.

The Court of Appeal's stay judgment

[10] The applicants' argument in the Court of Appeal on the stay application was that, because of the condition of the building, they should not have to pay rent. They also emphasised the impact on their business and employees if they were required to vacate the premises.

[11] The respondents' submission was that there was nothing to stay as they had already taken possession of the property, damages were an adequate remedy and the applicants should not be permitted to occupy the premises without payment of rent.

[12] The Court of Appeal, in its judgment of 4 July 2013, considered that there was nothing to suggest that damages would not be an adequate remedy, that there

⁶ *Wilfred v Gan* CA184/2013, 14 May 2013 (minute) at [4].

⁷ *Wilfred v Gan* CA 184/2013, 19 June 2013 (minute) at [3].

⁸ *Gan v Wilfred* [2013] NZHC 1508.

⁹ *Gan v Wilfred* HC Christchurch CIV-2013-409-442, 1 July 2013 (minute of Panckhurst J).

¹⁰ See *Wilfred v Gan*, above n 1, at [21].

should have been a proposal to pay rent in the meantime and that the balance of convenience strongly militated against any further stay.

The leave application

[13] It is submitted by the applicants in support of the leave application that Panckhurst J had no jurisdiction to remove the stay. This submission is made on the basis that when the Court of Appeal continued the stay pending appeal on 14 May 2013 it said that the respondents had to apply to the Court of Appeal for any discharge.¹¹ Then, on 19 June 2013, the Court of Appeal had ordered that the respondents should apply to the High Court to lift the stay (which then resulted in Panckhurst J's judgment).¹² The applicants' argument appears to be that the High Court usurped the jurisdiction of the Court of Appeal. It is also submitted that there should have been rent abatement.

Should leave be granted?

[14] It was Panckhurst J's decision of 27 June 2013 that discharged the stay and denied the rent abatement. No appeal against that decision has been filed with the Court of Appeal. Further, the grounds under s 14 of the Supreme Court Act 2003 for a direct appeal to this Court from Panckhurst J's decision are not met and, in the case of the stay, a direct appeal is precluded by s 8(c) of the Act.

[15] Even if the applicants can be taken also to repeat their arguments made to the Court of Appeal with regard to the stay,¹³ there is no matter of general or public importance or general commercial significance to warrant granting leave. The Court of Appeal applied established legal principles in a particular factual situation. Nor is there any miscarriage of justice.¹⁴ Further, as this is a hearing on an interlocutory matter, it is not necessary to hear it before the proceeding is concluded.¹⁵ Indeed, the substantive appeal against Chisholm J's decision was heard in the Court of Appeal

¹¹ *Wilfred v Gan*, above n 6, at [4].

¹² See at [7] above.

¹³ See at [10] above.

¹⁴ In the sense set out in *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, [2006] 3 NZLR 522 at [4] and [5].

¹⁵ Section 13(4) of the Supreme Court Act 2003.

on 25 July 2013 (which would render the proposed appeal nugatory). Judgment was reserved.

Result

[16] For the above reasons, the application for leave to appeal is declined. This means the application for a stay would necessarily also fail and it is dismissed. The temporary order made in the minute of 10 July 2013¹⁶ also lapses.

[17] The applicants are to pay to the respondents costs of \$2,500 plus all reasonable disbursements to be fixed if necessary by the Registrar.

Solicitors:
Duncan Cotterill for Respondents

¹⁶ See at [3] above.