

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2016-404-2267
[2017] NZHC 3056**

BETWEEN DERMOT GREGORY NOTTINGHAM
Plaintiff

AND THE AUCKLAND DISTRICT COURT
First Defendant

MARTIN RUSSELL HONEY,
STEPHANIE HONEY AND HEMI
TAKA
Second Defendants

Hearing: 30 November 2017

Appearances: D W Grove for first and second-named second defendants
D G Nottingham, Plaintiff in person and R E McKinney as
MacKenzie Friend

Judgment: 11 December 2017

JUDGMENT OF PALMER J

*This judgment is delivered by me on 11 December 2017 at 10.30 am
pursuant to r 11.5 of the High Court Rules.*

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Registrar / Deputy Registrar

Counsel:
P J Andrew, Barrister, Auckland
D W Grove, Barrister, Auckland

Party:
Plaintiff (and by courier)

Summary

[1] Mr Dermott Nottingham may be bankrupted if he fails in his application to stay enforcement of an award of costs against him. The successful defendants would only have to wait longer for their money, if they are still entitled to it. I grant the stay. I do not grant Mr Nottingham's application to recall the judgment.

What happened?

[2] Mr Dermott Nottingham's private prosecution of the second defendants in the District Court failed. He applied for judicial review of various District Court judgments, directions and orders. On 27 April 2017, in *Nottingham v Auckland District Court*, Gilbert J struck out the judicial review application and awarded costs against Mr Nottingham on a 2B basis.¹ Judgment was sealed on the basis the costs were \$15,770.

[3] Following failure to pay the costs the defendants served a bankruptcy notice on Mr Nottingham. They have now filed and served a bankruptcy petition which is listed at 10.00 am on 14 December 2017. Mr Nottingham has applied for leave to appeal Gilbert J's judgment to the Court of Appeal out of time. It is opposed.

[4] In this Court Mr Nottingham now applies:

- (a) to stay enforcement of the costs award pending determination of his application for leave to appeal; and
- (b) to recall Gilbert J's judgment on the basis the costs awarded are greater than the costs incurred by the first and second-named defendants.

[5] The second defendants oppose the applications, though they did not address the second application. The first defendant abides the Court's decision.

¹ *Nottingham v Auckland District Court* [2017] NZHC 777.

Application to stay enforcement

[6] Under r 20.10 of the High Court Rules 2016, an appeal does not operate as a stay of the proceedings appealed against. But under r 20.10(2)(b) the Court may, on application, order a stay of enforcement of any judgment or order appealed against. And, under r 17.29, a liable party may apply to the Court for a stay of enforcement “upon the ground that a substantial miscarriage of justice would be likely to result if the judgment were enforced”.

[7] The Court determines an application for a stay on the “balance of convenience”,² “in a manner which, on the balance of all the factors involved, best meets the overall justice of the present case”.³ If a stay is equivalent to hearing the appeal, that counts against it.⁴ So it comes down to the balance between the rights and interests of the successful party and the appellant’s position pending appeal.⁵ The Court takes into account, relevantly, whether no stay would render the appeal nugatory, the bona fides of the appellant, whether the successful party will be injuriously affected, and the overall balance of convenience.

[8] I consider the situation is clear. If the stay is granted, the second defendants will have to wait until determination of the application for leave to appeal, and the appeal itself, to get their costs if they are still entitled to them. If the stay is declined, Mr Nottingham will certainly have to face a bankruptcy petition and may be bankrupted. The balance of convenience favours Mr Nottingham. Not granting the stay would not render the appeal entirely nugatory but it may operate strongly to his disadvantage. Mr Nottingham suggests enforcement of the costs is being pursued in order to bankrupt him. If he is bankrupted, he may have to convince the Official Assignee to consent to pursuit of the appeal, though that is not entirely clear at law.⁶ And he may suffer the other disadvantages and indignities of bankruptcy. The defendants will be injuriously affected only by the time value of money for the period it takes for the application for leave to be considered and any appeal to be determined if leave is granted. The defendants submit Mr Nottingham has only

² *Philip Morris v Ligget & Myers* [1977] 2 NZLR 41 at 43 (per Cooke J).

³ At 42 (per Richmond P).

⁴ At 42 (per Woodhouse J).

⁵ *Duncan v Osborne Buildings Ltd* [1992] PRNZ 85 (CA) at 87.

⁶ See *Tamihere v Commissioner of Inland Revenue* [2017] NZHC 2949 at [15].

sought leave to appeal to avoid bankruptcy. But he is entitled to do that and certainly has sufficient incentives to pursue it.

[9] I grant the stay. Of course, this would not stop Mr Nottingham being made bankrupt on the basis of other debts.

Application to recall

[10] Mr Nottingham also applies to recall the judgment to argue the sealed judgment misrepresents the costs because the costs awarded are greater than the costs incurred by the first and second-named defendants. The defendants have provided evidence to the contrary.

[11] Rule 11.9 of the High Court Rules 2016 provides that a judge may recall a judgment “at any time before a formal record of it is drawn up and sealed”. Here, it has been sealed. The High Court does not have the power to recall a judgment once it has been sealed, except in a limited number of circumstances where there is a “real requirement” to do so and where the interests of justice require that.⁷ This is not one of those situations. And I would not recall the judgment. None of the three categories of reasons for recalling a judgment identified in *Horowhenua County v Nash* are present here.⁸ Mr Nottingham has to make his arguments on appeal of the judgment, if he gets leave.⁹

Result

[12] I grant the application for stay of enforcement of the costs awarded in Gilbert J’s judgment until determination of Mr Nottingham’s application for leave to appeal the judgment to the Court of Appeal and, if it is granted, of the appeal. I decline the application to recall the judgment.

.....
Palmer J

⁷ See *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (HC) at 633; *Payne v Payne* (2005) 17 PRNZ 518 (CA) at [12]; *Rabson v Gallagher* [2012] NZCA 237, [2014] NZAR 30 at [3].

⁸ *Horowhenua Country v Nash (No 2)*, above n 7.

⁹ *Thomson v Thomson* (1992) 6 PRNZ 591 (HC).