

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA406/2020
[2021] NZCA 357**

BETWEEN **DERMOT GREGORY NOTTINGHAM,
PHILLIP NOTTINGHAM AND
EARLE MCKINNEY**
Appellants

AND **THE REAL ESTATE AGENTS
AUTHORITY**
First Respondent

MARTIN RUSSELL HONEY
Second Respondent

Court: French and Cooper JJ

Counsel: Appellants in person
M J Hodge for First Respondent
D W Grove for Second Respondent

Judgment: 30 July 2021 at 2.30 pm
(On the papers)

JUDGMENT OF THE COURT

- A The application is dismissed.**
- B The cross-appeal has not been abandoned and remains on foot.**
- C The appellants must pay the second respondent costs calculated for a standard interlocutory application on a band A basis, and usual disbursements.**
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REASONS OF THE COURT

(Given by Cooper J)

[1] By a memorandum dated 1 April 2021 the appellants, Mr Dermot Nottingham, Mr Phillip Nottingham and Mr Earle McKinney, applied to have this Court “deem” a cross-appeal brought by the second respondent, Mr Martin Honey, abandoned or to strike it out for “procedural recalcitrance”. The appellants are self-represented.

[2] Mr Honey resists the appellants’ application. The first respondent, the Real Estate Agents Authority, abides the decision of the Court as to the status of the cross-appeal.

Procedural background

[3] The present application has been filed in the context of a long-running dispute between the parties, which has been afoot for some 10 years. In a judgment dated 3 July 2020, Wylie J allowed an appeal brought by the appellants against a decision of the Real Estate Agents Disciplinary Tribunal striking out their appeal proceedings before the Tribunal on the basis that they were vexatious and an abuse of process.¹ In a further judgment dated 23 July 2020, the Judge declined the appellants’ application for indemnity costs against the respondents.²

[4] The appellants appealed against both decisions on 24 July 2020. On 5 August 2020, Mr Honey filed a cross-appeal against the first decision of Wylie J.

[5] The appellants filed an application to dispense with security for costs under r 35(6) of the Court of Appeal (Civil) Rules 2005 (the Rules). That application was declined by the Deputy Registrar. The appellants applied for a review of that decision, which had the effect of deferring their obligation to pay security.

[6] On 4 November 2020, Mr Grove, counsel for Mr Honey, emailed the Deputy Registrar stating:

I await service of the application to review.

In the meantime I assume my client’s obligation to pay the security will also be on hold. That is because if the review fails and the appeal is therefore struck out my client will need to reconsider the cross appeal.

¹ *Nottingham v Real Estate Agents Authority* [2020] NZHC 1561.

² *Nottingham v Real Estate Agents Authority* [2020] NZHC 1793.

[7] On the same day, the Deputy Registrar replied, stating:

... unless an application for review of the decision on security for costs in the cross-appeal is made, that decision (including the payment date) remains. A cross-appeal is considered to be an independent appeal, which requires its own security for costs, and which can proceed even if the appeal is abandoned or struck out.

[8] Mr Grove filed submissions dated 9 December 2020 in opposition to the appellants' application for review. He acknowledged that security for costs had been ordered in relation to the cross-appeal, but noted that "[t]hose security for costs have not yet been paid given this outstanding challenge by the appellants". Mr Grove sought an extension of time to pay security of 10 working days following a decision being made on the appellants' review application.

[9] In a judgment dated 26 February 2021, Clifford J declined the application for review.³ He noted that the appellants were successful in the first decision of Wylie J, and an appeal can only be brought challenging the result of the Court below. Accordingly, there was no right of appeal on the points raised by the appellants, and a reasonable, solvent litigant would not pursue the appeal.⁴ As to the second decision, Clifford J held that Wylie J had correctly applied the law in relation to litigants in person. No reasonable, solvent litigant would pursue an appeal against the second decision.⁵ The application for review of the Deputy Registrar's decision was therefore declined.

[10] On 24 March 2021, Mr Nottingham emailed the Deputy Registrar claiming that as the cross-appeal had been filed in early August 2020, but Mr Honey had not filed his case on appeal or applied for the allocation of a hearing date within three months, the cross-appeal should be deemed abandoned under r 43(1) of the Rules.⁶ That same day, the Deputy Registrar replied, stating:

We do not consider the cross-appeal has been abandoned under the Court of Appeal (Civil) Rules 2005. Rule 43 is not stated to apply to cross-appeals, unlike rules 35-37, pursuant to rule 35(9). If a proceeding involves both an appeal and cross-appeal, and the appeal is abandoned, our practice is to seek

³ *Nottingham v The Real Estate Agents Authority* [2021] NZCA 30.

⁴ At [4].

⁵ At [8].

⁶ Rule 43 of the Court of Appeal (Civil) Rules 2005 is set out at [16] below.

directions from a Judge as to how the cross-appeal will proceed, rather than to apply rule 43(1) to the cross-appeal.

[11] In any event, the Deputy Registrar noted that she had made various suspensions⁷ and an extension of time (granted to 25 March 2021) in respect of the automatic abandonment date in r 43(1). She considered that even if r 43(1) applied to the cross-appeal, it could not be interpreted in a way that meant that any suspensions under that rule would apply in respect of the appeal only (and not the cross-appeal), and result in the deemed abandonment of the cross-appeal.

[12] Security for costs for the appeal was paid on 23 March 2021. Security for costs for the cross-appeal was paid six days later, on 29 March 2021.

[13] It is in that context that by their memorandum dated 1 April 2021, the appellants sought to have the Court deem Mr Honey's cross-appeal abandoned, or to "strike it out for procedural recalcitrance". Mr Grove opposed that application on behalf of Mr Honey in a memorandum dated 12 April 2021.

[14] In a telephone conference convened by Goddard J, Mr Grove submitted that the date set for payment of security for costs was "superseded" by the appellants' application for review of the Deputy Registrar's decision. He said he sought an extension of time to pay security in his memorandum of 9 December 2020 but received no response. In his view there had been, "by way of silence", an acceptance of his request for an extension of time to pay security, which was paid on 29 March 2021.

[15] In a minute dated 22 April 2021, Goddard J directed that the status of the cross-appeal be determined following submissions from the parties.⁸ He considered the issue needed to be decided before a fixture for the appeal could be allocated. This judgment determines that question.

⁷ Five suspensions were made, on 19 October 2020, 25 November 2020, 15 December 2020, 13 January 2021 and 16 February 2021.

⁸ *Nottingham v The Real Estate Agents Authority* CA406/2020, 22 April 2021 (Minute of Goddard J).

Relevant rules

[16] The relevant provision is r 43 of the Rules, which relevantly provides:

43 Appeal abandoned if not pursued

- (1) An appeal is to be treated as having been abandoned if the appellant does not apply for the allocation of a hearing date and file the case on appeal within 3 months after the appeal is brought.
 - (1A) Subclause (1) is subject to any suspension granted under subclause (1B) or extension of time granted under subclause (2) or rule 5A(1)(c).
 - (1B) The Registrar may, on an informal application made before the end of the 3-month period referred to in subclause (1), suspend the application of this rule for periods of up to 1 month at a time if—
 - (a) the applicant has applied for legal aid and the application has yet to be finally determined; or
 - (b) an application under rule 35(6) in relation to security for costs or for a waiver of a fee has yet to be determined; or
 - (c) a review of a Registrar’s decision on an application under rule 35(6) has yet to be determined; or
 - (d) a party is seeking leave to appeal to the Supreme Court against a decision in relation to security for costs.
- (2) The Court, on an interlocutory application, may—
 - (a) grant an extension of the period referred to in subclause (1); and
 - (b) grant 1 or more further extensions of any extended period.

[17] Rules 35 and 37 are also relevant to the present application. Rule 35(2) provides that the appellant must pay the Registrar security for the respondent’s costs. Rule 35(9) provides that the rule also applies to cross-appeals. If security for costs is not paid within the required time, r 37(1) provides that this Court may, on an interlocutory application or its own initiative, make an order striking out an appeal. Rule 37(2) provides that the appellant may not apply for a hearing date under r 38(1) if in default of any obligation to pay security for costs or prescribed fees.

Submissions

[18] The appellants have filed lengthy submissions addressing aspects of the litigation between the parties to date and expressing various criticisms of the judgments of the District and High Courts.

[19] The appellants claim that Mr Grove misled Goddard J by saying that no reply was received from the Registrar to the request to pause the obligation to pay security for costs. In fact, as set out above, the Deputy Registrar replied to Mr Grove on 4 November 2020 explaining that a cross-appeal is a separate appeal, and that security for costs for the cross-appeal was required to be paid. The security was not paid by the due date. The appellants also assert the cross-appeal must be treated as having been abandoned for failure to apply for a hearing date, pay the hearing fees and file the case on appeal.

[20] If the cross-appeal is not deemed abandoned, the appellants submit it should be struck out. In addition to Mr Honey's failure to pay security for costs within the time required, apply for a fixture and file the case on appeal, they claim the cross-appeal lacks merit and should not proceed.

[21] Mr Grove submits the appellants' position that the cross-appeal is deemed abandoned as a result of the delay in paying security for costs is not correct. Rule 37(1) deals with the consequences of failing to comply with a requirement to pay security. That rule provides that the Court may, on an interlocutory application or on its own motion, make an order striking out an appeal if security is not paid on time. Mr Grove asserts there was not, and is not, an interlocutory application seeking a strike out. In any event, security for costs was paid for the cross-appeal on 29 March 2021.

[22] As to filing the case on appeal and applying for a fixture, Mr Grove submits the Deputy Registrar's position that r 43 does not apply to cross-appeals is correct. Further, Mr Grove says that r 43 was suspended in relation to both the appeal and the cross-appeal. He also claims that in any event there could not possibly be any prejudice to the appellants as any delay in prosecuting the appeal and cross-appeal have been caused solely by their own conduct. Finally, Mr Grove submits that if the

cross-appeal is deemed abandoned, this could be rectified by an application for leave to bring the cross-appeal out of time.

[23] Costs on the present application are sought, on the basis that the issues raised by the appellants are without merit and have caused further delays and costs for the respondents.

Decision

Security for costs

[24] Security for costs for the cross-appeal was paid late. There is no basis for Mr Grove's assertion that by way of "silence" an extension of time to pay security for costs had been granted. Security for costs should have been paid for the cross-appeal within time, as made clear by the Deputy Registrar in her email of 4 November 2020.

[25] However, Mr Grove is correct that a failure to pay security for costs does not result in an appeal being "deemed" abandoned under the Rules. The consequences of failure to pay security are set out in r 37. The only way that late payment would be relevant would be if the issue was raised in a formal application for strike out, or the Court decided on its own initiative to strike out the cross-appeal on that basis. That would not be an appropriate course of action, especially since security for costs has now been paid by Mr Honey. No prejudice to the appellants has been occasioned by the delay, since the appeal has not been able to proceed while the review of the Deputy Registrar's decision declining to dispense with security was underway.

[26] We emphasise that security for costs for the cross-appeal was paid on 29 March 2021, before the appellants filed their memorandum of 1 April 2021. Until that point there had not been any application for strike out under r 37(1). Assuming in favour of the appellants that the memorandum is sufficient to be treated as an interlocutory application for the purposes of r 37(1), it was filed when the security had been paid. It would be inappropriate and contrary to the interests of justice to strike out the cross-appeal at this point. The payment of the security means the objective of the rule has been met.

Is the cross-appeal deemed abandoned?

[27] The question of whether the three-month rule in r 43(1) applies to cross-appeals has not been specifically addressed by this Court. However, we note that in *Lesa Systems Ltd v Canzac Ltd*,⁹ the respondent and cross-appellant, Canzac Ltd, applied under s 43(2) for leave to extend time to apply for the allocation of a hearing date and for filing a case on appeal. This Court did not expressly deal with the issue of whether r 43 applied to cross-appeals but apparently proceeded on the basis that it did. The Court declined the application, with the result that the cross-appeal was held to be abandoned.¹⁰ There was no appearance for the appellant in that case, and there is no indication in the judgment that the issue was considered.

[28] For the reasons now addressed we do not consider the rule applies to cross-appeals. First, as the Deputy Registrar noted in her email of 24 March 2021, r 35(9) specifically applies r 35 (with its requirement for payment of security for costs) to cross-appeals, together with rr 36 (security for costs where the appellant has applied for or been granted legal aid) and 37 (consequences of failure to comply with the requirement to pay security for costs). In this context it would be surprising if the application of r 43 to cross-appeals were left to be a matter of inference.

[29] Secondly, deemed abandonment under r 43(1) is triggered by failure to apply for the allocation of a hearing date and file the case on appeal within three months after the appeal is brought. A cross-appeal does not require a separate case on appeal. Rather, r 40, headed “Filing and form of case on appeal” contemplates that both the appeal and any cross-appeal will be contained in one case on appeal. This is plain from the drafting of r 40(5) which provides:

40 Filing and form of case on appeal

...

- (5) If there is more than 1 volume, there is to be a separate volume containing only—
- (a) the notice of appeal or the order or orders of the court giving leave; and

⁹ *Lesa Systems Ltd v Canzac Ltd* [2007] NZCA 375.

¹⁰ At [12].

- (b) *any notice of cross-appeal*; and
- (ba) any memorandum under rule 33; and
- (c) the pleadings; and
- (d) all relevant decisions that have been made in the proceeding;
and
- (e) any separate reasons for the decisions described in paragraph
(d); and
- (f) all relevant orders made in the proceeding.

(Emphasis added)

[30] In addition, r 39(1) contemplates that the appellant will prepare the case on appeal in consultation with the respondent. This process of consultation (a process which plainly requires cooperation in what ought to be a non-contentious endeavour) should result in documents relevant to the cross-appeal being included in the case on appeal. It appears in the present case that the notice of cross-appeal was in fact included in the case on appeal filed by the appellants.

[31] Thirdly, appeals and cross-appeals are almost invariably heard together. The appellant applies for the hearing date and an application by the respondent (cross-appellant) is not required. The Registry is concerned to ensure that the parties have conferred and endeavoured to provide the Court with a reliable estimate of the time that will be necessary for the hearing of the appeal. Where there is a cross-appeal the time necessary to deal with it must be taken into account. We consider there is no requirement in the rules that a cross-appellant apply for a fixture in addition to the appellant.

[32] There would be nothing to prevent a cross-appellant applying for a fixture where the appellant was being dilatory in fulfilling its obligations and the cross-appellant wanted its issues to be determined. But it is clear that deemed abandonment under r 43(1) will not occur unless or until the appellant has failed in its obligation to apply for the allocation of a hearing date or file the case on appeal. A cross-appellant can wait for the joint processes intended to precede these events to occur. There is a distinct difference between this position and that which applies if a cross-appellant does not pay security for costs. The difference is explained by r 35(9)

which makes it clear that the security for costs obligations apply to cross-appellants as if they were appellants.

[33] For these reasons we are satisfied that the cross-appeal should not be treated as having been abandoned.

[34] We are also satisfied that there is no proper basis on which the cross-appeal could be struck out as lacking in merit. The merits must await determination in the substantive hearing.

Result

[35] The application is dismissed.

[36] The cross-appeal has not been abandoned and remains on foot.

[37] The appellants must pay the second respondent costs calculated for a standard interlocutory application on a band A basis, and usual disbursements.

Solicitors:
Meredith Connell, Auckland for First Respondent
Foy & Halse, Auckland for Second Respondent