

The issue

[1] Courts are reluctant to dismiss appeals other than because they lack merit. But in certain situations, they must. Mr and Mrs Honey contend this appeal should be dismissed for lack of jurisdiction. Mr Nottingham submits jurisdiction exists. I see the issue a little differently: is the proposed appeal an abuse of process?

Background

[2] Mr Nottingham privately prosecuted Mr and Mrs Honey and Mr Taka. The case took a long time to hear: 17 sitting days. Judge Paul dismissed the charges.¹ His Honour concluded there was no case to answer. The defendants sought, and were awarded, a total of \$117,000 costs under the Costs in Criminal Cases Act 1967. Judge Paul made that award on 13 July 2016.²

[3] On 16 December 2016 Mr Nottingham filed an application for leave to appeal Judge Paul's decisions to dismiss the charges and award costs. The proposed appeal was framed as one involving a series of questions of law under s 296 of the Criminal Procedure Act 2011.

[4] Davison J heard the application over three days in May 2017. On 24 July 2017, the Judge declined leave in relation to all proposed questions.³ Mr Nottingham has since lodged either an appeal or an application for leave to appeal Davison J's decision to the Court of Appeal.

[5] On 8 November 2017 Mr Nottingham then filed an application for leave to appeal Judge Paul's costs decision. At callover on 24 November 2017, Mr Grove for Mr and Mrs Honey contended the appeal was without jurisdiction—or jurisdiction for an appeal was now spent, because of the sequence above.

[6] Mr Nottingham resists this contention, as s 271 of the Criminal Procedure Act provides a separate right of appeal in relation to costs. Mr Nottingham contends he

¹ *Nottingham v Honey* [2016] NZDC 9272.

² *Nottingham v Honey* DC Auckland CRI-2014-004-003937, 13 July 2016.

³ *Nottingham v District Court at Auckland* [2017] NZHC 1715.

has never exercised this jurisdiction. Mr Nottingham acknowledges leave is required for the appeal, as it is substantially out of time. But, he contends the appeal is otherwise available and should be progressed by a timetable.

Analysis

[7] I am satisfied the appeal must be dismissed as an abuse of process. My reasons can be brief.

[8] First, it is clear Mr Nottingham's application for leave to appeal of 16 December 2016 sought to reverse the costs award. Paragraph 15 of the application contended Judge Paul erred in fact and law to award indemnity costs. And, under the heading "relief sought", Mr Nottingham contended the costs order should be "voided".

[9] Second, Davison J dealt specifically with the costs award in his judgment. The Judge concluded the proposed ground raised no material question of law.

[10] Third, Davison J's decision is comprehensive. It extends to 137 paragraphs. The Judge concluded Mr Nottingham's private prosecution was fundamentally flawed. Implicit to this conclusion is the allied one costs were necessary. The second to last paragraph of the judgment captures the point:⁴

In my view the prosecution case brought against the defendants was misconceived from the outset. It was founded upon a series of speculative allegations and inferences for which there was never any sound and cogent basis. Once the appellant had formed his initial view that the presence and internet accessibility of the RE/MAX branded webpages was deliberate and intended to mislead the public by diverting internet based inquiries from RE/MAX to Ray White, he appears to have discounted any other possible explanation. Having heard all the evidence, the Judge dismissed all six charges laid against the defendants and in doing so found that there was no evidence of any conspiracy existing between the defendants or to support the charges brought under s 240 of the Crimes Act or alleging breaches of s 153 of the Real Estate Agents Act. The appellant has failed to show that in reaching his decision on the charges the Judge's factual findings were clearly untenable, and made in the absence of evidence to support them. Similarly, he has failed to identify any other error of law in respect of which leave to appeal should be granted. Accordingly, the appellant's application for leave to appeal is dismissed.

⁴ *Nottingham v District Court at Auckland*, above n 3, at [136].

[11] Fourth, while it is correct s 271 of the Criminal Procedure Act provides for a specific appellate pathway in relation to costs, it does not follow this pathway is now open to Mr Nottingham. Having sought to challenge costs—albeit, I accept by a somewhat elliptical route involving a question of law—and having been unsuccessful, it is now an abuse of process to seek to again use curial process to achieve a different outcome.

[12] Fifth, delay underscores the point. Mr Nottingham is seeking to re-litigate an issue first decided against him in July 2016. The proposed appeal is now substantially out of time. The nature of the case assumes relevance; this was a private prosecution. And, a misconceived one. The defendants are entitled to the presumption of finality.

[13] Sixth, Mr Nottingham’s proposed appeal to the Court of Appeal includes a ground specifically directed at Judge Paul’s costs award:

That the judgement for costs is repressive and undeserved, and is reflective of the Courts desire to punish those that make allegations against judges.

It follows Mr Nottingham is seeking to litigate *simultaneously*—in two courts of different jurisdictions—the very same issue.

[14] In summary, the application for leave to appeal is an obvious example of an abuse of process. And dismissed.

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Downs J