

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA339/2019
[2020] NZCA 207**

BETWEEN	CAMERON JOHN SLATER Appellant
AND	JOHN DOUGLAS SELLMAN First Respondent
	BOYD ANTHONY SWINBURN Second Respondent
	SHANE KAWENATA FREDERICK BRADBROOK Third Respondent

Court: Kós P, Cooper and Clifford JJ

Counsel: Appellant in person
D M Salmon and J P Cundy for Respondents
P H Courtney and E G R Dowse for Official Assignee

Judgment: 2 June 2020 at 3 pm
(On the papers)

JUDGMENT OF THE COURT

- A The appeal is struck out.**
- B There is no order as to costs.**
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REASONS OF THE COURT

(Given by Clifford J)

[1] Mr Slater is being sued by the respondents in the High Court for defamation. Some time after that proceeding was filed, Mr Slater was adjudicated bankrupt. In

a judgment dated 17 July 2019, Palmer J rejected an argument made for Mr Slater that the proceeding continued only against his bankrupt estate (which was in the hands of the Official Assignee) and that he no longer needed to comply personally with previous orders for discovery and oral examination.¹

[2] Mr Slater filed an appeal against that judgment. He applied for security for costs to be dispensed with on the appeal. The Deputy Registrar declined that application, a decision upheld on review by Brown J, who ordered him to pay security no later than 17 January 2020.² Mr Slater did not do so.

[3] Without payment of security for costs, the Registrar could not allocate a hearing date.³ Nor was the appeal deemed abandoned under r 43 of the Court of Appeal (Civil) Rules 2005, because on 9 August 2019, the Registry accepted for filing a memorandum requesting the allocation of a hearing date, and on 19 August 2019 Mr Slater filed the case on appeal.

[4] In a minute dated 4 May 2020, Clifford J noted the appeal had stalled and warned that the Court intended to consider whether to strike out the appeal under r 44A(1)(a):⁴

44A Court’s power to strike out or stay appeal

- (1) In addition to any express power in these rules to strike out an appeal, the Court may, on an interlocutory application or on its own initiative, make an order striking out or staying an appeal in whole or in part if—
- (a) the appellant is in continuing default in complying with any of these rules or with any procedural direction or order made by a Judge; or
 - (b) the appellant has failed to prosecute the appeal with due diligence and dispatch; or
 - (c) the appeal is frivolous, vexatious, or otherwise an abuse of the process of the Court.
- (2) The Court must—

¹ *Sellman v Slater* [2019] NZHC 1666.

² *Slater v Sellman* [2019] NZCA 670.

³ Court of Appeal (Civil) Rules 2005, r 37(2).

⁴ The respondents suggested the appropriate course would be for the appeal to be struck out on the papers under r 37(1). Rule 37(1) does not expressly provide for a decision on the papers, and the practice in the past for strike-out applications in appeals under the Judicature Act 1908 (as is the case here) was for an oral hearing. Section 49 of the Senior Courts Act 2016 now provides a presumption that such matters are heard on the papers, and reliance on r 37(1) where the appellant is in default of security will usually be appropriate in future cases. However, as we consider it appropriate to determine this matter on the papers, we rely upon r 44A as it provides, on a retrospective basis, an express power to do so.

- (a) give the appellant 10 working days' prior notice of its intention to consider making an order under this rule; and
 - (b) give ancillary directions as to the filing and service of any written submissions.
- (3) The Court may make an order under this rule on the papers or after an oral hearing, as the Court thinks fit.

...

[5] Mr Slater did not respond to that minute. The respondents filed a memorandum submitting that the appeal should be struck out so the High Court proceedings, which have been suspended pending the conclusion of this appeal, may continue.

[6] We are satisfied that the appeal should be struck out. Mr Slater had a full opportunity to pay security but did not do so. Matters in the High Court should not be delayed any further.

[7] The respondents sought costs. We make no order as to costs, as this matter was raised on the Court's own motion rather than by interlocutory application.

Solicitors:
LeeSalmonLong, Auckland for Respondents
Crown Law Office, Wellington for Official Assignee